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THE INFLUENCE OF CHANGE MANAGEMENT AND ORGANIZATIONAL CULTURE MEDIATED EMPLOYEE COMPETENCE ON THE IMPLEMENTATION OF GOVERNMENT REGULATION NUMBER 71 OF 2010 CONCERNING GOVERNMENT ACCOUNTING STANDARD

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Abstract: Financial reporting based on accrual should be implemented by all government entities by 2015 based on Government Regulation No. 71 of 2010. The strategy of change management, the development of organizational culture and employee competence is needed in improving the SAP (Standar Akuntansi Pemerintahan: Government Accounting Standards) implementation based on accrual on Government Regulation Number 71 of 2010. The purpose of this research is to analyze the effect of change management on employee competence, organizational culture influence to employee competence, influence of change management toward accrual-based SAP implementation, organizational culture influence to accrual-based SAP application and employee competence influence to accrual based SAP application. This research is an explanatory research by testing hypothesis and analysis technique used Structural Equation Modeling (SEM) method through AMOS program. The results show that the management of change and organizational culture has no effect on employee competence and the accrual-based SAP implementation. However, employee competence has a significant and positive effect on the accrual-based SAP implementation.

Keywords: organizational culture, employee competence, management of change, accrual based government accounting standards

INTRODUCTION

Government Regulation Number 71 of 2010 on Government Accounting Standards (SAP) requires the financial reporting of government entities using accrual basis no later than 2015 as set forth in the annex to the regulation. Accrual-based government accounting enables governments to identify opportunities in using future resources and realize good management of these resources (Asfiansyah, 2015).

Regional financial reports which are the end result of a qualified accounting process required human resources or personnel involved in the preparation of financial statements that understand and have competence in the field of government accounting (Roviyantie, 2011). Research conducted by Arif (2015) also indicates that competence of human resources has a positive and significant relationship so that competence is one of the factors that affect the readiness of Regulation implementation No. 71 of 2010. But some employees still do not understand accrual accounting system and procedures that can hamper the implementation of SAP based on the accrual optimally. This condition is caused by several things such as the placement of employees in positions not based on competence, especially in the field of regional financial management and accounting.

The resistance to changes from internal government agencies is a challenge that must be faced in the application of accrual-based SAP (Simanjuntak, 2010). Herlina's research (2013) find that no discussion of the steps to be taken in applying accrual accounting standards will increase the possibility of employee resistance to change is indicated by the reluctance of employees to adapt and competence in the new system. Therefore, change management will be needed in optimizing the implementation of accounting standards based on accrual government. In addition, Soedjono (2005: 24) also argues that organizational culture can be the main competitive advantage instrument that is when organizational culture supports organizational strategy and when organizational culture can answer or address environmental challenges quickly and accurately. Therefore, the management of change strategy, the development of organizational culture and the competence of employees is needed in improving the accrual-based SAP implementation based on Government Regulation No. 71 of 2010.

23 LITERATURE REVIEW

2.1 Accrual-Based Government Accounting Standards

Government Regulation No. 71 of 2010 on Government Accounting Standards (SAP) requires the use of accrual accounting basis in local financial reporting. Accrual basis is the basis of accounting that admits the effect of transactions and other events at the time the transactions/events occur regardless of when cash or equivalents are received or get paid. Some of the factors that influence the implementation of accrual-based government accounting are: a) The complexity of accounting systems and it based systems more complicated, b) Commitment from the leadership, c) Availability of competent human resources and d) Resistance to changes from the internal organization (Ibrahim and Abdurrahman, 2013).

The accrual-based SAP complexity can be seen from several important issues that arise in the change of accounting standards in accordance with Government Regulation Number 71 of 2010, Minister of Home Affair Regulation Number 64 of 2013 and Accrual-Based SAP Module are as follows.

- 23 The principal financial statements that have to be compiled become increasingly so that the whole financial statements include: a) Budget Realization Report, b) Report on Changes in the Existing Budget Balance, c) Operational Report, d) Statement of Changes in Equity, e) Balance Sheet, f) Statement of Cash Flows and g) Notes to the Financial Statements.
- 24 The accounting basis used is the accrual basis of accounting basis which acknowledges the effect of transactions and other events at the time the transactions and events occur regardless of when cash or cash equivalents are received or paid.

- 23 The existence of accounting policies that can be applied in the accounting process by accounting entities, namely: a) Depreciation and amortization of assets, b) Recording and valuation of inventories and c) Load recognition.

2.2 *Competence*

Competence is a skill and knowledge to perform activity/job/task. In addition, competence is an individual characteristic that underlies the performance or behavior within the organization. A person's performance will be influenced by knowledge, ability, attitude, work style, interests, trust and leadership style (Wibowo, 2011: 52).

Competence is not an ability that can not be influenced, Zwell (2000: 56) reveals that there are several factors that can affect a person's competence skills, namely a) Beliefs and values, b) Skills, c) Experience, d) Personal characteristics) Motivation, f) Emotional issues, g) Intellectual ability, and h) Organizational culture. In addition, Spencer and Spencer (1993) state the five characteristics that make up the competence of a) knowledge, b) skills, c) self-concept and values, d) personal characteristics, and e) motives.

2.3 *Management of change*

According to Potts and LaMarsh (2004: 16), Change Management is a systematic process of applying the knowledge, tools, and resources necessary to influence changes in people who will be affected by the process. Sunyoto and Burhanuddin (2011) changes in the organization that is changing attitudes and work skills, work roles, technology and strategy. Change of attitudinal involve values with persuasive appeal, training programs, team building and cultural change programs. Changes with the focus of work skills can be done with job training programs. Working role change is done by redesigning employee work with different activities and responsibilities, reorganizing workflow, changing criteria and so on. The approach in technology is done by introducing new equipment in completing the work. While the strategy approach in change demands consistent changes to individuals, work roles, and technology.

According to Winardi (2004) the most frequent and prominent problem is "rejection of change itself". The most popular term in management is resistance to change. The rejection of change is not always obvious. The rejection can be in a form that is clearly visible (explicit) and immediate, such as protesting, threatening strikes, demonstrations, and the others. While rejection is not visible (implicit), and running slowly, exemplified by loyalty to the organization diminishes, work motivation decreases, work errors increase, increased absent, and so on.

2.4 *Organizational culture*

Robbins (2002: 279) defines organizational culture as a system of shared meanings by members who differentiate organizations from other organizations. There are seven characteristics of organizational culture: a) Innovation and risk taking, b) attention to detail, c) Outcome orientation, d) People-oriented, e) Team-oriented, f) Aggressiveness, and g) Stability. In addition, Tan (2002) also revealed other organizational culture indicators that are a) Individual initiative, b) Risk tolerance, c) Control, Management support, and e) Communication pattern (communication pattern).

According to Cameron and Quinn (1999) mentions there are four types of organizational culture:

- 5888 Bureaucratic culture, an organizational culture that emphasizes formalities, rules, roles, policies, procedures, chain of command and centralized decision making.
- 5889 Clan culture, a characteristic described by familial situations, traditional emphasis, loyalty, ritual, teamwork and strong social influences within the team organization.
- 5890 Entrepreneurial culture, a characteristic described by innovation, creativity, risk-taking and aggressiveness in seeking opportunities.
- 5891 Market culture, which is characterized by a character of measurable achievement and depends on goals such as financial and market-based improvements.

2.5 Empirical Study

Research conducted by Sugiarto (2014), Laksono (2016), and Dewi (2017) concluded that the competence or quality of human resources has significant influence on the application of accrual-based SAP to government institutions. Organizational culture also has an effect on the adoption of accrual-based SAP as concluded in Najati (2016) and Sugiarto (2014) research. In addition, the existence of gaps or research gaps that provides different research results. Laksono (2016) and Astuti (2015) research gave results that organizational culture and competence did not significantly affect the application of accrual-based SAP. Bilondatu (2015) also concluded in his research that the level of understanding of the apparatus has no significant effect on the accrual-based SAP implementation.

METHOD

This research is an explanatory research that explains the causal relationship and test the correlation between several variables through hypothesis testing or explanatory research (Singarimbun and Effendi, 1995: 256). The location of the research was conducted in Lumajang Regency Government of East Java Province.

The population of research is Head of Sub Division of Finance and Accounting Officer from 54 Organization of Regional Officerat Government of Lumajang Regency so population is 108 people. The consideration of the population determination is based on the authority and responsibility held by the position in the administration of financial management and the preparation of financial statement of Regional Officer. Sampling research using census technique that is using all members of population as sample. Based on amount of population hence total of respondent in this research is counted 108 person.

Sources of data used are primary data and secondary data. Methods in this study using survey research methods using questionnaire. All obtained data will be counted using Likert scale with a range of 5 values categories or scores. Exogenous variables in this study are management of change and organizational culture and intervening variable is the competence of employees while endogenous variable is the application of accrual-based SAP. Hypothesis proposed in this research is as follows.

H1: Change management has a significant and positive impact on employee competence

H2: Organizational culture has a significant and positive impact on employee competence

H3: Change management has a significant and positive impact on the accrual-based SAP implementation

H4: Organizational culture has a significant and positive impact on the accrual-based SAP implementation

H5: Employee competence has a significant and positive impact on the accrual-based SAP implementation

Statistical analysis used in this study is an inferential statistical analysis used to test the research hypothesis that has been determined by using the sample data obtained. Inferential Statistics Method used is Structural Equation Modeling (SEM) using AMOS program.

IV. RESULT AND DISCUSSION

The research data collected based on the respondents' answers in the questionnaire amounted to 104 out of 108 questionnaires distributed. Summary description of respondent characteristics can be seen in Table 1 as follows.

Table 1. Description of respondent characteristics

Category	Characteristic	Number	Percentage
Sex	Men	41	39 %
	Women	63	61 %
	Total	104	100 %
Age	<25 Year	2	2 %
	25-35 Year	32	31 %
	>35 Year	70	67 %
	Total	104	100 %
Length of work	<10 Year	32	31 %
	10-20 Year	35	34 %
	>20 Year	37	35 %
	Total	104	100 %
Education	High School	29	28 %
	Diploma 1-3	8	8 %
	S1/ Diploma 4	63	60 %
	S2	4	4 %
	Total	104	100 %

4.1 Model Evaluation

SEM estimation results in full model using AMOS program shown in Figure 1 as follows.

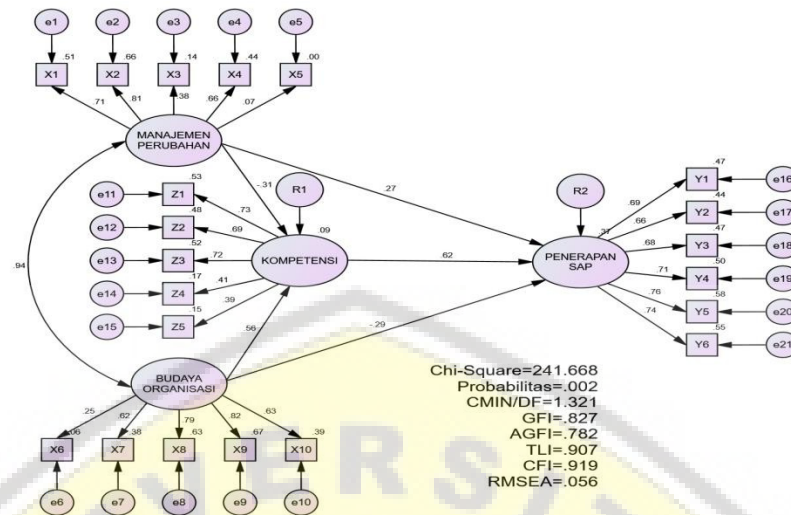


Figure 1. Result of full model estimation

The evaluation of the goodness of fit full model criteria in Figure 1 is summarized in Table 2 as follows.

Tabel 2. Result of goodness of fit criteria evaluation

No.	Goodness of fit index	Cut-of value	Value	Result	Info
1.	Chi-square	< 215,563	241,668	not fit	Number Chi-square 215,563 with df = 183
2.	Sidnificaned Probability	≥ 0.05	0,002	not fit	
3.	RMSEA	≤ 0.08	0,056	Fit	
4.	GFI	≥ 0.90	0,827	Marjinal fit	
5.	AGFI	≥ 0.90	0,782	Tidak fit	
6.	CMIN/DF	≤ 2.00	1,321	Fit	
7.	TLI	≥ 0.90	0,907	Fit	
8.	CFI	≥ 0.90	0,919	Fit	

Based on the evaluation results in Table 2 the model can be said not yet accepted as a good model because there are still some criteria of goodness of fit that have not been fulfilled. Then the model must also get a test of construct validity to determine the ability of indicator size in reflecting the latent theoretical construct. The result of construct validity test can be seen in Table 3 as follows.

Table 3. Test results of construct validity

Variable	Indicator	p	Validity Value			Information
			CV	AVE	CR	
Management of Change	X1		0,712	0,350	0,680	X3 and X5 not valid/convergent
	X2	***	0,814			
	X3	***	0,378			
	X4	***	0,660			
	X5	0,536	0,066			
Organizational Culture	X6	0,021	0,249	0,428	0,771	X6 not valid/convergent
	X7	***	0,620			
	X8	***	0,794			
	X9	***	0,817			
Employee Competence	X10		0,628	0,372	0,734	Z4 and Z5 not valid/convergent
	Z1	***	0,729			
	Z2	***	0,693			
	Z3	***	0,724			
	Z4	0,006	0,411			
Implementation of Accrual-Based SAP	Z5		0,391			
Implementation of Accrual-Based SAP	Y1		0,686	0,502	0,858	All indicator are valid/convergent

The data in Table 3 indicates there are some invalid indicators that require revision of the model by excluding invalid indicators into the model. The revision model can be seen in Figure 2 as follows after parameter estimation.

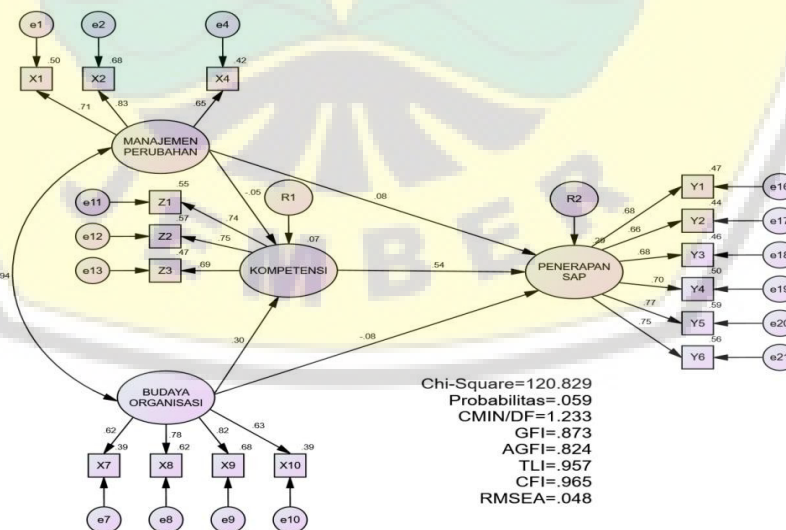


Figure 2. Result of re-estimation of SEM revision model

The results of the evaluation of goodness of fit and the validity test of the revised model construct shown in Figure 2 above are summarized in Table 4 and Table 5 as follows.

Table 4. Evaluation result of the criteria of goodness of fit revision model

No.	Goodness of fit index	Cut-of value	Number	Value	Info
1.	Chi-square	< 122,108	120,829	Fit	The value of Chi-square 122,108 with df = 98
2.	Sidnificaned Probability	≥ 0.05	0,059	Fit	
3.	RMSEA	≤ 0.08	0,048	Fit	
4.	GFI	≥ 0.90	0,873	Marginal fit	
5.	AGFI	≥ 0.90	0,824	Marginal fit	
6.	CMIN/DF	≤ 2.00	1,233	Fit	
7.	TLI	≥ 0.90	0,957	Fit	
8.	CFI	≥ 0.90	0,965	Fit	

Table 5. Result test of construct validity of model revision

Variable	Indicat or	p	Validity Value			Info
			CV	AVE	CR	
Management of Change	X1		0,709	0,535	0,774	All indicator are valid/convergent
	X2	***	0,825			
	X4	***	0,650			
	X7	***	0,622			
Organizational Culture	X8	***	0,785	0,519	0,809	All indicator are valid/convergent
	X9	***	0,823			
	X10		0,628			
Employee Competence	Z1		0,745	0,531	0,772	All indicator are valid/convergent
	Z2	***	0,753			
	Z3	***	0,687			
Implementation of Accrual-Based SAP	Y1		0,684	0,501	0,857	All indicator are valid/convergent

Table 4 shows the results of a better model so as to meet the requirements of goodness of fit, whereas Table 5 shows all the variable indicators have converged so as to reflect the latent theoretical construct. The next evaluation to be done before hypothesis testing is the assumption of SEM model that is evaluation of normality and outlier. The normality evaluation yields a value of 1.70 and the value is below the cut of value of 2.58 which means the data is normally distributed. Evaluation of the outlier assumption also shows that no observation results have extreme values.

Hypothesis testing can be done after evaluation of fit and assumption of SEM model has been fulfilled. The results of hypothesis testing are summarized in Table 6 as follows.

Table 6. Results of hypothesis testing

	Variable	Estimate	S.E.	C.R.	P	Info	Result
COMOETENC E	<--- MANAGEMENT OF CHANGE	-0,022	0,334	-0,065	0,948	Not Significant	Hypothesis rejected
COMPETENC E	<--- ORGANIZATI ONAL CULTURE	0,145	0,333	0,435	0,663	Not Significant	Hypothesis rejected
SAP IMPLEMENT ATION	<--- MANAGEMENT OF CHANGE	0,041	0,327	0,124	0,901	Not Significant	Hypothesis rejected
SAP IMPLEMENT ATION	<--- ORGANIZATI ONAL CULTURE	-0,045	0,328	-0,137	0,891	Not Significant	Hypothesis rejected
SAP IMPLEMENT ATION	<--- COMPETENC E	0,611	0,166	3,675	***	Significant	Hypothesis accepted

4.2 Discussion of Hypothesis Test Results

Hypothesis 1 explains that management of change has a significant and positive effect on employee competence is rejected. This can happen because of frequent mutation of employees both between positions and between agencies that make education and training as a management of change strategy to be in vain. Employees who replace the transferred officials often lack the knowledge and skills in completing the tasks to which they are assigned. Hypothesis 2 explains that organizational culture has a significant and positive effect on employee competency is rejected. Some employees consider their duties and responsibilities as routines that are annually done so that they lack awareness to improve their competence. Hypothesis 3 explains that management of change has a significant and positive effect on the accrual-based SAP application being rejected. The existence of a mutation of employees who do not pay attention to the competence of office also be the cause of hypothesis 3 rejected. In addition, information systems that still have many constraints are not an excuse for not implementing accrual-based SAP.

Hypothesis 4 explains that organizational culture has a significant and positive effect on the application of accrual-based SAP is rejected. The adoption of accrual-based SAP is only regarded as a routine administrative activity of local financial management making the objectives and benefits of such accounting standards to be not achieved. Some employees, even the heads of agencies, do not have much attention to changes in government accounting standards. Hypothesis 5 explains that employee competence has a significant and positive effect on the accrual-based SAP application accepted. This result is in line with the results of research conducted by Sugiarto (2014), Laksono (2016), and Dewi (2017) concludes that the competence or quality of human resources has a significant effect on the application of accrual-based SAP to government agencies. Ibrahim and Abdurrahman (2013) also revealed that competent human resources are the factors affecting the implementation of accrual-based government accounting.

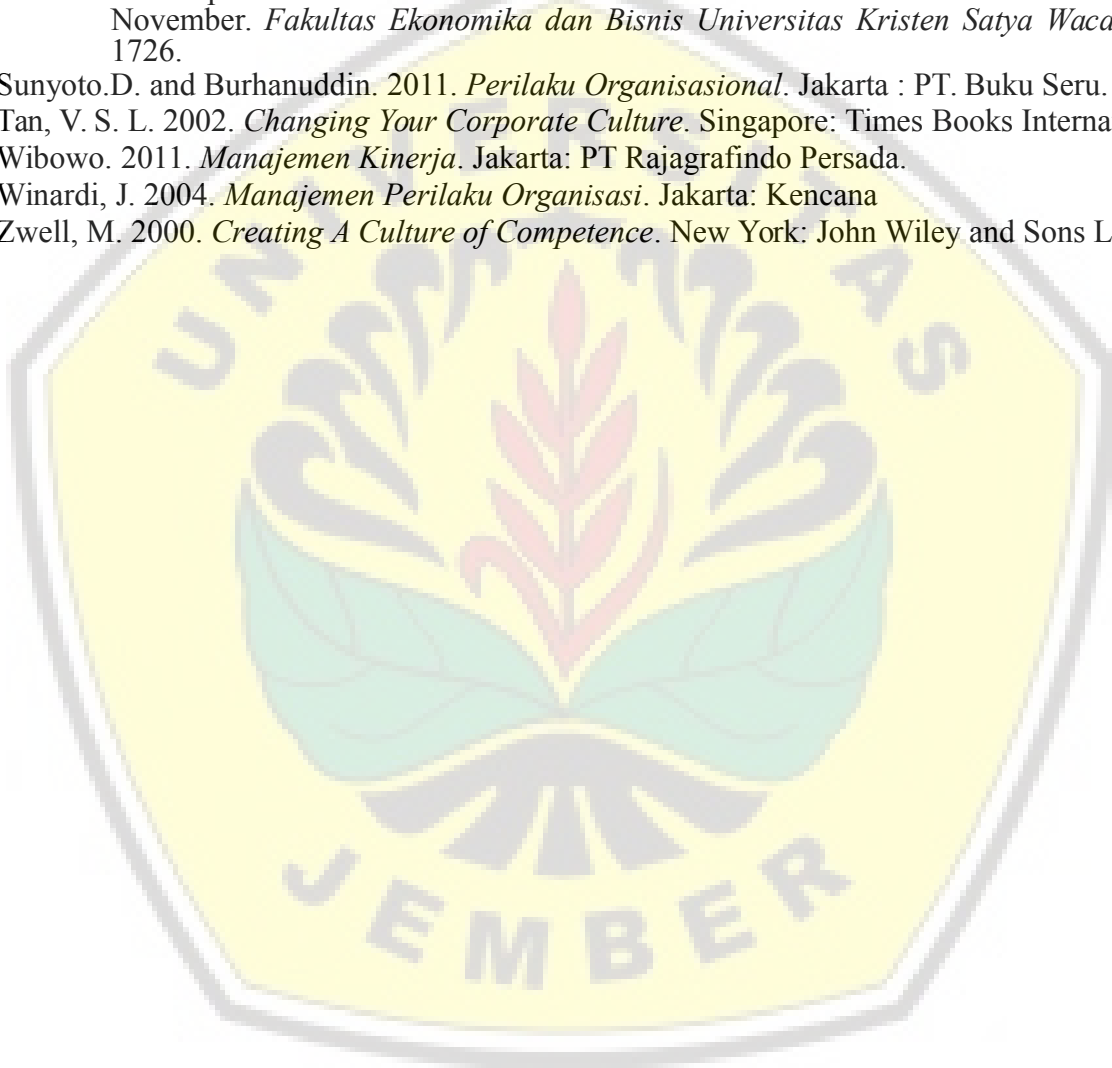
0 CONCLUSSION

Based on the result of hypothesis testing, management if change and organizational culture have no effect on employee competency and accrual-based SAP implementation in accordance with Government Regulation Number 71 of 2010. However, employee competence has a significant and positive influence on the accrual-based SAP implementation. These results indicate the need for a comprehensive strategy in improving employee competence as well as strengthening change management and organizational culture for the purpose and benefits of accrual-based SAP implementation can be achieved.

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JURIDICAL REVIEW AGAINST DEED OF AMENDMENT OF ARTICLES OF ASSOCIATION FOUNDATION BASED ON LAW NUMBER 28 YEAR 2004 ABOUT FOUNDATION

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Abstract: *The Foundation's arrangements have undergone a very dynamic development from time to time. In Indonesia, the foundation is a social activity body consisting of individuals, the general public as well as indigenous peoples, which is the accumulation of mutual care for each other. Basically the Foundation has different goals and interests, some are engaged in social, religious, cultural, educational and even in the field of humanity in accordance with the objectives of each Foundation. While the initial goal of each foundation is almost the same that involves the social field.*

With the issuance of Law Number 28 Year 2004 regarding Foundation, the government and the law makers intend to reopen the possibility of the old foundation that has not adjusted its articles of association with the Change of Foundation Act (Foundation which can no longer use the word "Foundation" in its name) adjustment of the articles of association to certain conditions. Thus, the foundation that was no longer able to make adjustments to the articles of association due to the lapse of the adjustment period is now again able to make adjustments.

Keywords: *act, foundation, deed*

0 INTRODUCTION

1.1 Background

The foundation is known as a non-profit corporation, which has separated a property from one's private property, which is then used for a social and religious purpose, and its management is left to a governing body to be properly managed and responsible. To be said as a legal entity a foundation must meet the elements, namely:¹ "Having own property derived from an act of separation, has its own purpose (certain), and has equipment."

A legal body that contains social elements in each activity, and is very synonymous with economic elements in accordance with the needs of society, making the foundation into a form

¹Gatot Supramono, 2008, Hukum Yayasan di Indonesia, Rineka Cipta, Jakarta, p. 2

of strategic business and rapidly growing in the community. Also triggered also because the establishment of an easy process because there is no rules governing. The government finally issued a law stipulating the foundation on 6 August 2001 after 56 years of independent Indonesia, namely Law Number 16 Year 2001 on foundations, State Gazette no. 112 Year 2001 Supplement to the State Gazette of 4132 (hereinafter referred to as the Foundation Law) which came into effect 1 (one) year after the date of promulgation on August 6, 2002. Then 4 (four) years later the Law revised in several chapters with the passing of Law No. 28/2004 on Amendment to Law No. 16 of 2001 concerning LN Foundation No. 115 TLN 4430 (hereinafter: Change of Foundation Act).

After the issuance of the Foundation Law, then automatically determining the status of legal entities foundations that have been established prior to the Foundation Law must follow the provisions contained in the Law on the Foundation. The Foundation Law states that the foundation obtains the status of a legal entity after the deed of establishment has been approved by the Minister (Article 11 paragraph (1)). The Foundation Law also determines that the foundation of the foundation is conducted by notarial deed and made in the Indonesian language (Article 9 paragraph (2)).

The old foundation with the status of a legal entity 'is stipulated in Article 71 Paragraph 23 and Paragraph (3) of the Law on Foundations. Article 71 paragraph (1) states: At the time when this Law comes into force, the Foundation has been registered in the District Court and announced in the Supplement of the State Gazette of the Republic of Indonesia; or registered in the District Court and have permission to engage in activities of the relevant authorities; shall remain recognized as a legal entity, provided that within a period of no later than 3 (three) years from the date when this Law comes into force, the Foundation shall adjust its Articles of Association to the provisions of this Law.

With the issuance of Law Number 28 Year 2004 regarding the Foundation which came into force since January 2, 2013, which is an amendment to Government Regulation Number 63 Year 2008 there is a fundamental change in relation to the position of Foundation which is no longer able to use the word Foundation in front its name. The foundation which was previously based on the Foundation Law and Government Regulation No. 63 of 2008 has been unable to be adjusted its articles of association with the Foundation Law, with the issuance of Law Number 28 Year 2004 on Foundation again possible to adjust its articles of association.

Furthermore, based on the provisions of Article 71 Paragraph (2) Amendment to the Foundation Law, foundations established before the Foundation Law and do not meet the requirements as referred to in Article 71 paragraph (1) Amendment to the Foundation Law shall be obliged to adjust the articles of association by the Foundation Law within 1) year to obtain status as a legal entity, and in Article 71 (4) The amendment of the Foundation Law provides that a foundation that does not adjust its articles of association within the period referred to in paragraph (1) and the Foundation as referred to in paragraph (2) the word "Foundation" in its name and may be dissolved by a court decision on the request of the Prosecutor or other interested parties.

The general objectives to be achieved by writing this thesis are:

5888 To be able to know the structure of the foundation long after the enactment of Law Number 28 Year 2004 regarding Foundation to the old foundation that is not incorporated under the provisions of the Foundation Law.

0 As one of the requirements for completing the Graduate Program in Master Program of Graduate Notary of Mataram University.

1.2 Theoretical Framework

1.2.1 Theory of the State of Law

Before stepping on the theories and other principles, the authors include the concept of the State of Law in this thesis as a foundation; where in the concept of this legal state "State" is the main object of discussion. "As Jimly Asshiddiqie puts it in his book, that the state is still the center of attention and object of study that coincides with the development of human knowledge."² Indonesia is a State that embraces the concept of the State of law in a material sense, with the other term the welfare state (welfare state). As Muchsan views that states that: Indonesia is a country that embraces the concept of a lawful State in a material sense, with the other term the welfare state.

As Muchsan views that states that the State of Indonesia is a welfare state. This can be seen from one of the precepts of Pancasila as the foundation of the state philosophy, the fifth precept which reads "Social Justice for all Indonesian people". From the sound of the fifth precept can be concluded that the purpose of the Indonesian state is to provide prosperity for its citizens. In addition, in the fourth of the opening of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) states that one of the objectives of the formation of the Republic of Indonesia is to promote the general welfare.³

Therefore, Moh.Kusnardi and Bintan R. Saragih stated that legality in the legal sense in all its forms as the characteristic of the state of the law is that any action either from the authorities or from the people should be justified by law.⁴

1.2.2 The Theory of Normal Law Level (Hierarchy)

In relation to the hierarchy of legal norms, Hans Kelsen, a philosopher of law, puts his theory on the level of the legal norm (Stufen theorie), in which he argues that: the legal norms are tiered and multilayered in a hierarchy of order lower norms are applicable, sourced, and based on higher norms, higher norms apply, are sourced and based on more sophisticated norms, and so on until a norm cannot be traced further and is hypothetical and fictitious i.e. , the basic norm (*Grundnorm*).⁵

Grundnorm is the basis of all power and is the legality of Positive Law. Hans Kelsen also argues: Of *Grundnorm* which is a norm that is still abstract, formed a more concrete arrangement of norms, then from this second arrangement made an arrangement concretized in the Constitution; more concretized again in the Law, from the Law to the government regulations,

256 Jimly Asshiddiqie, 2006, Pengantar Ilmu Hukum Tata Negara, Jilid 1, Konstitusi Press bekerjasama dengan PT. Cipta Media, Jakarta, p. 11.

257 Muchsan, 1982, Pengantar Hukum Administrasi Negara, Liberty, Yogyakarta, p. 70

258 Moh. Kusnardi dan Bintan R. Saragih, 1980, Susunan Pembagian Kekuasaan Menurut Sistem Undang-Undang Dasar 1945, PT. Gramedia, Jakarta, p. 29

259 Maria Farida Indarti Suprpto, 1998, Ilmu Perundang-undangan, dasardasar pembentukannya, Kanisius, Yogyakarta, p. 25

and so on. And finally in judgment the norms are individualized (used for a particular relationship and can be used).⁶

Jimly Asshiddiqie argues that: Stufen theorie Hans Kelsen and its development which states that norms are tiered and multilayered so that the norms under it should not conflict with the norms above it, applied in the 1945 Constitution. The application of Stufen theorie Hans Kelsen is State institutions that exercise judicial authority in Indonesia, in this case the Constitutional Court and the Supreme Court, are authorized by the 1945 Constitution to examine legislation. Testing the legislation is commonly referred to as the term "judicial review".

Objects tested in the judicial review are not only about legal products in the form of law, but also legislation.⁷

1.2.3 The Theory of Law

The consequences of a law are the consequences of an action taken to obtain an effect desired by the perpetrator and which is governed by law. The action he undertakes is a legal action that is the action taken to obtain something due to the desired law.⁸

More clearly that the legal consequences are⁹ all consequences resulting from any legal act perpetrated by a legal subject against a judicial object or other consequences caused by certain events by the law concerned have been determined or deemed to be the result of law. For that it is clear that the impact will affect the occurrence of conflicts of interest, especially on the internal foundation, in the sense that does not create doubts (multi-interpretation) and logical into a system of norms with other norms so feared occur Conflict the norms resulting from uncertainty rules may be in the form of norm contestation, norm reduction or norm distortion as set forth in Law Number 28 Year 2004 regarding Foundation with its implementation in the field.

0 RESEARCH METHODS

2.1 Types of research

The research of scientific paper in the form of this thesis, type of normative legal research (normative juridical),¹⁰ namely research that aims to examine the principles of law, legal systematic, legal synchronization, legal history and comparative law.

2.2 Type of Approach

Peter Mahmud Marzuki states that in legal research required an approach model. With this approach, the author will get information from various aspects of the issue (problematic problem) that is being sought the answer. Various approaches that can be used in writing are: 1) Approach Act (Statute AUUroach); 2) Conceptual Approach (Analitical Conceptual AUUroach).

0 RESULT AND DISCUSSION

⁰ C.S.T Kansil dan Christine S.T. Kansil, 2011, Pengantar Ilmu Hukum Indonesia, Rineka Cipta, Jakarta, p. 380

¹ Jimly Asshiddiqie, 2005, Model-model Pengujian Konstitusional diberbagai Negara, Konstitusi Pers, Jakarta, p. 4

² R. Soeroso, Pengantar Ilmu Hukum, Sinar Grafika, Jakarta, 2001., p. 21

³ Syarin, Pipin, S. H. 1999. *PIH Pengantar Ilmu Hukum*. Bandung: CV Pustaka Setia, p. 56

⁴ Peter Mahmud Marzuki, 2005, Penelitian Hukum, Prenada Media, Jakarta, p.183.

3.1 Adjustment Process of Amendment of Deed of Foundation Based on Law Number 28 Year 2004 regarding Foundation

3.1.1 Adjustment of Amendment of Deed of Foundation

People are always growing dynamically from time to time in various activities. The social interaction between community members has created a legal relationship. In this context the existence of law is very significant to regulate the legal relationships created in society, although sometimes the law tends to be left behind by the development of society. This phenomenon can be seen in the legal setting of the foundation.

In the long period of time after the independence of the Republic of Indonesia, the foundation of the foundation in Indonesia is based only on the customs in society and the jurisprudence of the Supreme Court, because there is no law governing it. The foundation has been better understood as a non-profit social organization or not seeking profit in its activities, if someone or some people will do activities full of idealism and social and humanitarian aims, usually the organization chosen is the foundation.

Selected social activities are primarily concerned with the areas of health, education and social institutions. Foundation is used by its founders to perform various social activities for the public interest.

Before the birth of Law No. 16 of 2001 on Foundation, the position of the Foundation as a Legal Body (*rechtspersoon*) has been recognized, and applied as a legal entity, but the status of the foundation as a Legal Entity is still considered weak, because it is subject to the rules derived from customs in society or jurisprudence.

At that time the community established a foundation with the intention to take refuge behind the Legal Entity status of the Foundation, which is not only used as a forum for developing social, religious, humanitarian activities, but also occasionally aimed at enriching the Founders, Managers and Supervisors. In terms of the role of foundations in the social, educational and religious sectors are very prominent, but there is no single law that specifically regulates the foundation.

With this legal uncertainty the foundation is often used to accommodate the wealth of the founders or other parties, even the foundation is a place to enrich the foundation's managers. The foundation is no longer a non-profit, but the foundation is used for business and commercial endeavours with all aspects of its manifestations.

In order to ensure legal certainty and order for the foundation to function in accordance with its aims and objectives based on the principle of transparency and accountability to the community, on August 6, 2001, Law No. 16 of 2001 on the Foundation which became effective on August 6, 2002. Then on October 6, 2004 through the State Gazette of the Republic of Indonesia Year 2004 the enactment of Law Number 28 Year 2004 amendment to Law Number 16 Year 2001 regarding Foundation.

The founding of foundations and everything related to the scope of motion of the foundation in Indonesia for a long time is based only on customary law or jurisprudence although there may be little additional or adjustments to the needs. In the absence of special rules governing the foundation in Indonesia, there is also no provision that regulates the founding requirements of the foundation, nor is there any provision explaining that the foundation should be established by notarial deed.

Based on customary law and legal assumptions generally accepted in the community, the characteristics of the foundation as a legal entity can be expressed as follows:¹¹

- 0 The existence of the foundation as a legal entity in Indonesia has not been based on the prevailing laws and regulations;
- 1 The recognition of the foundation as a legal entity has no clear juridical basis unlike PT, Cooperatives and other legal entities;
- 2 The foundation is formed by separating the founders' personal wealth for nonprofit purposes, for religious, social, religious and other ideological religious purposes;
- 3 The Foundation shall be established by notarial deed or by a decree of the official concerned with the founding of the foundation;
- 4 The foundation does not meet members and is not owned by anyone, but has an organizer or organ to realize the purpose of the foundation;
- 5 The foundation has an independent position, as a result of the separate property and personal wealth of its founder or management and has its own separate or separated objectives and personal goals of the founder or management;
- 6 The foundation is recognized as a legal entity just as a person, as an independent legal subject who can have independent rights and obligations, established by deed and registered with the local District Court Office; and
- 7 The Foundation may be dissolved by the Court if the purpose of the foundation is contrary to law, may be liquidated and may be declared bankrupt.

After the enactment of Law of the Republic of Indonesia Number 28 Year 2004 on the Amendment of Law of the Republic of Indonesia Number 16 Year 2001 about the foundation then all things and understanding of the new foundation is clear.

Foundation in Article 1 of Law Number 16 Year 2001 regarding Foundation, namely: "Foundation is a legal entity consisting of wealth separated and destined to achieve certain goals in the field of religious and humanity who have no members". Based on the Foundation's understanding, the Foundation is given clear boundaries and it is hoped that the community can understand the form and purpose of the founding of the Foundation. So there is no misperception about the Foundation and the purpose of the Foundation. The motion is limited in the social, religious and humanitarian fields so it is not used as a vehicle for profit.

Amendment to Law Number 16 Year 2001 regarding Foundation with Act Number. 28 of 2004 is intended to further ensure legal certainty and order, and provide a correct understanding to the community regarding the Foundation, so as to restore the function of the Foundation as a legal institution in order to achieve certain goals in the social, religious and humanitarian fields.

In addition, since the role of Foundation in society can create the welfare of the community, the revision of Law Number 16 Year 2001 on Foundation is also intended to enable the Foundation to function in an effort to achieve its goals and objectives in the social, religious and humanitarian fields based on the principles of openness and accountability.

The rapid amendment of the Law governing the Foundation shows that the foundation's problems are not simple and these legal entities are indeed needed by the community. Law

0 Budi Untung, *Reformasi Yayasan dalam Perpekpektif Manajemen*, Sinar Grafika, Jakarta, 2002, p. 4

Number 28 Year 2004 does not replace Law No. 16 of 2001. This change is only to change some of its articles only. This law is intended to provide people with a correct understanding of the foundation, ensure legal certainty and order and restore the function of the foundation as a legal institution in order to achieve certain goals in the social, religious and humanitarian fields based on the principle of openness and accountability.

This law affirms that the foundation is a legal entity having a social, religious and humanitarian purpose and objective, established by taking into account the formal requirements set forth in this law and is expected to be a strong legal basis for governing foundation life.

The foundation as a legal entity must necessarily have an independent nature, not dependent on other person or legal entity, but only as the sole self that is the foundation, so that when it has been established by a person or legal entity, then his wealth will be the foundation's wealth and irrevocable, or distributed to founders or foundation organs.

The existence of the foundation is a necessity for the community, who want a container or institution that is social and religious, and aims and aims social, religious, and humanitarian. With the foundation, then all social, religious, and humanitarian desires, it is manifested in an institution that is recognized and accepted existence.

In Article 9 paragraph (1) of Law Number 16 Year 2001 regarding the Foundation mentioned, the foundation can be established by one or more persons by separating the property of its founder, as initial wealth. The person referred to in this article is an individual and a legal entity. Means that the foundation can only be established by an individual only or may be a legal entity only. The meaning of separating the wealth of its founders shows that the founder is not the foundation owner because it has from the beginning originally separated some of the founders' founders into the foundation's foundation.¹²

In addition, the foundation may also be established based on a will, Article 9 paragraph (3). The recipient of the will is acting on behalf of the testator. Establishment of a foundation based on a will is mandatory, because if it is not exercised, then the interested party may hold accountable to, the heirs or receive the wills concerned. (Article 10 paragraph (3))

The founding of the foundation is conducted by notarial deed and made in Indonesian language, it is already determined firmly in Article 9 paragraph (2) of Law Number 16 Year 2001, so that the notarial deed is an absolute requirement which must be fulfilled by fulfilling all notary provisions in making deeds, both readings, time, territory of notary authority and signature.

3.1.2 Legal Status of Foundation

The formulation of Article 11 paragraph (1) of the Foundation Law reinforces that the foundation to obtain the status of legal entity must make a deed of establishment of a foundation approved by the Minister of Law and Human Rights made by a notary. The function of validation is intended for the validity of the existence of legal entity so that the legal entity has the feasibility of how far or not contrary to the provisions of existing legislation, especially foundations.

¹² Gatot Suparmono, *Hukum Yayasan di Indonesia*, Rineka Cipta, Jakarta, 2008, p. 110

This formulation of course brings the consequence that as a legal entity; the foundation has the characteristics and ability to act as a legal subject.¹³

The change in Article 11 paragraph 1 of the Law of the Foundation Number 28 Year 2004 which reads:

"The Foundation obtains the status of a legal entity after the founding foundation as referred to in Article 9 paragraph (2), obtains approval from the Minister."

The amendment of Article 11 Paragraph (1) of the Foundation Law has erased the authority of the Regional Office (Kanwil) in giving approval to a foundation legal entity and affirming that the authority to legalize a foundation as a legal entity is in the hands of the Minister of Law and Human Rights. In addition, it is stated that a Notary must submit an application to become a legal entity. This is probably due in the past many foundations are with

Deliberately did not apply to be a legal entity. This means that the ratification of this deed of establishment is the only document that determines when the status of the foundation becomes a legal entity.

3.1.3 Process of Amendment of Deed of Foundation Based on Law Number 28 Year 2004 About Foundation

Article 11 Paragraph (1) of the Foundation Law states that the Foundation obtains the status of a legal entity after the founding deed of the Foundation as referred to in Article 9 paragraph (2) obtains approval from the Minister. In relation to the sounding of Article 11 Paragraph (1), it means that since the foundation of the Foundation, the Foundation has automatically fulfilled the terms of the foundation's foundation which is filed in a deed. Thus, to know the amendment of the Deed of the Foundation, it is understood that the provisions of Article 14 Paragraph (1), it is mentioned that the founding deed of the Foundation contains the Articles of Association and other information as necessary. Accordingly, the meaning of Article 14 Paragraph (1) is the amendment of the founding deed of the Foundation, shall also change the provisions of the Foundation's Articles of Association. In the Foundation Law regulates the amendment of the founding deed of the Foundation prior to the life of the Foundation Law, where the deed of establishment must be in accordance with the provisions of the Foundation Law without exception.

In the provisions of Article 37 Paragraph (4) of the Foundation Law it is stated that the Notice of amendment to the Articles of Association of the Foundation shall be accompanied by:

- 0 Copy of the deed of amendment to the Foundation's Articles of Association;
- 1 Supplement to the State Gazette of the Republic of Indonesia containing the deed of establishment of the foundation or the proof of registration of the deed of establishment in the district court and the permission to conduct the activities of the relevant agencies;
- 2 Photocopy of Taxpayer Identification Number that has been legalized by a notary;
- 3 Statement of place of residence accompanied by complete address of Foundation which signed by the board of Foundation and known by lurah or head of local village;

0 Widjaja Gunawan, Suatu Panduan Komprehensif Yayasan di Indonesia, First edition. (Jakarta:PT. Elex Media Komputindo, 2002., p. 22

Based on the above provisions, several matters which must be attached to the amendment of the deed of the Foundation to create a public oversight mechanism for the Foundation suspected of committing acts contrary to the law, the Articles of Association or harm the public interest, the Foundation Law provides for the inspection of the Foundation is performed by an expert based on the court's determination of a written request of an interested third party or at the request of the prosecutor in terms of representing the public interest.

With the filing of the Foundation documents in accordance with the applicable provisions as mentioned in Article 37 Paragraph (4) above, it can facilitate the Court in conducting examination of the Foundation. More details of the provisions in Article 53 of the Foundation Law are:

- 0 Inspection of the Foundation to obtain data or information may be made in the event that there is a presumption that the Foundation's organs:
 - 0 Committing an act unlawfully or contrary to the Articles of Association;
 - 1 neglect in performing its duties;
 - 2 Conduct actions that harm the Foundation or any third party; or
 - 3 Conduct actions that harm the State.
- 1 The inspection as referred to in paragraphs (1) a, b, and c can only be done based on the Court's determination of an interested third party written request with a reason.
- 2 The examination as referred to in paragraph (1) letter d may be made based on the Court's determination at the request of the Public Prosecutor Office in terms of representing the public interest.

As explained earlier that the Foundation was originally guided by customary law has no legal basis, because with the existence of this Foundation Law, it is obligatory for every Foundation to submit and comply with all the provisions of the Foundation Law. One that needs to be emphasized is in the case of the change of the deed of the Foundation; it must be adjusted to the provisions of its Articles of Association. So that with the Foundation will be easier to be examined for all activities of the Foundation. Including if the Foundation is doing legal action, negligent, doing actions that harm the community (third party), and harm the state. In the examination of the Foundation must pass the decision of the Chairman of the Court at the request of the local Prosecutor's Office.

The Court may also grant and refuse upon request to the Foundation for review as provided for in Article 54 of the Foundation Law as follows:

- 0 The Court may reject or grant the request for inspection as referred to in Article 53 paragraph (2).
 - 1 In the event that the Court grants a request for examination of the Foundation, the Court issues the determination of the examination and appoints at least 3 (three) experts as examiners for examination.
 - 2 Trustees, Managers and Supervisors and executors of activities or employees of the Foundation can not be appointed as inspectors as referred to in paragraph (2).

Elucidation of Article 54 Paragraph (2) is meant by experts is those who have expertise in accordance with the issues to be examined. For example, if there is an unlawful act against the board of the Foundation, then the Prosecutor shall have the right to conduct such examination.

Then the result of the examination by the Public Prosecutor shall be submitted to the local Chief Justice of whether or not there has been an act against the law. Article 56 of the Foundation Law states that:

- 0 The Examiner must submit a report on the result of examination that has been made to the Chief Justice in the place of position of the Foundation no later than 30 (thirty) days from the date of inspection is done.
- 1 The President of the Court shall provide copies of the inspection report as referred to in paragraph (1) to the applicant or the attorney and the foundation concerned.

Based on several provisions concerning the inspection of the foundation mentioned above, it can be analyzed that the change of foundation deed of the Foundation which must be adjusted to the provisions of the Foundation Law brings legal consequences to the Foundation on all activities or activities of the Foundation so as to facilitate the relevant institutions such as the Court and the Attorney in doing the raiding to the Foundation.

In addition, in the process of amendment of the deed of the foundation referred to in Law Number 28 Year 2004 regarding the Foundation, among others:

0 Scope of Changes of Deed of Foundation

The scope of the change of deed of incorporation of foundation can be seen and understood what is stated in the Articles of Association. However, it should pay attention to the provisions in Article 17 that is not justified to change the intent and purpose. More is mentioned, "Articles of Association may be changed except the purposes and objectives of the Foundation".

Change name and place of residence. The name is very important for the Foundation by using the word "Foundation" in front of its name. Similar to humans, it cannot be separated from a name to know its identity, so by that name it will be easily known who that human being is. Once there is a Foundation if it does not have a name it will be difficult to tell the difference. In addition, civilians also recognize the legal subject of an agency or organization that is considered to act as a human being. In naming the Foundation is basically free with any name such as person's name, flower name, crop name, and others. Nonetheless, the freedom of naming the Foundation, by law, is limited to Article 15 Paragraph (1) of the Foundation Law, First, has been legally used by other Foundations; and Second, contrary to public order and / or decency.

Change of establishment period. If you want to change the time period until when the foundation of the Foundation, only provided by law two alternatives. It is stipulated in Article 16 Paragraph (1) of the Foundation Law i.e. for a certain period and for an indefinite period. If the time specified, it is clearly mentioned in the deed or in the change of deed of establishment of the Foundation for example 10 (ten) years. By mentioning that particular time, then after the time, the Foundation must disband. However, in Paragraph (2) there shall also be a time of renewal if the founder wishes. Regarding an unspecified period of time, the Foundation can stand all the time even though it has changed its organs. Changes should not be made when the Foundation will go bankrupt. The reasons are contrary to the purpose of the provisions of Article 1 Number 0 of Law Number 37 Year 2004 concerning Bankruptcy. The change of deed must be based on the meeting of the coach. This is because the council meeting has the authority mandated by Article 28 Paragraph (2) Sub-Paragraph a of the Foundation Law that the meeting is the highest organ position in the Foundation.

Changes that must be approved by the Minister. It is related to Article 21 Paragraph (1) that is concerning the name and activities of the Foundation must be approved by the Minister.

This is because the Foundation's name and activities are very administrative. Changes only sufficiently notified to the Minister. It is about Article 21 Paragraph (2), in which the changes other than those of Article 17 and Article 21 Paragraph (1) of the Foundation Law.

The aims and objectives of the Foundation should not be altered except those mentioned above which social, religious, and humanitarian are. Indeed there is mentioned as an exception that is in the provisions of Article 14 Paragraph (1) if necessary. However, it is constrained by the sound of Article 17 whereas in amending the deeds and the Articles of Association of the Foundation, it is prohibited by the Foundation Law to amend the Foundation's purposes and objectives. The objectives allowed by the Foundation Law are solely for social, religious, and humanitarian purposes.

0 *Terms of Amendment of Deed of Foundation*

Foundations are established by taking into account the formal requirements of the Foundation Law. If the application for legalization of the legal entity of the Foundation is filed by the Notary to the Minister of Justice and Human Rights of the Republic of Indonesia (Minister of Justice and Human Rights) by enclosing the terms:

- 23 A copy of the deed of establishment stamped foundation;
- 24 Photocopy of Taxpayer Identification Number (NPWP) on behalf of Yayasan that has been legalized by Notary;
- 25 Photocopy of certificate of domicile of the Foundation issued by the village chief or local village head and legalized by a notary;
- 26 Proof of payment of Non-Tax State Revenue;
- 27 Proof of payment;

As with the terms of the application for approval of the Foundation, so also the requirements that must be fulfilled if in case of change of deed of establishment of Foundation.

In Article 21 Paragraph (1) of the Foundation Law, a request for approval of the deed of amendment of the Foundation. The application for approval of the amendment of AD Foundation is filed by Notary to the Minister of Law and Human Rights by enclosing the following requirements:

- 0 A copy of the Notarial Deed which contains amendments to the stamp duty-affiliated AD;
- 1 Photocopy of NPWP on behalf of the Foundation which has been legalized by a notary;
- 2 Photocopy of certificate of domicile of the Foundation issued by the Head of Village or Village Head and legalized by a notary;
- 3 Proof of payment of PNBPN; and
- 4 Proof of payment of announcement in Supplement State Gazette (TBN).

In the case of notification of Article 21 Paragraph (2), the petition filed by Notary to the Minister of Law and Human Rights by enclosing the terms:

- 0 A copy of notarial deed which contains amendment of articles of association of stamp duty Foundation;
- 1 Photocopy of NPWP on behalf of Foundation that has been legalized by Notary;

- 0 Photocopy of certificate of domicile of the Foundation issued by the village chief or local village head and legalized by a notary;
- 1 Proof of payment of PNBPN;
- 2 Proof of payment announcement in TBN.

In the case of notification pursuant to Article 71 Paragraph (2) of the Foundation Law, a petition filed by a Notary to the Minister of Law of RI by enclosing the terms:

- 0 A copy of Notarial deed which contains amendments to the stamp duty-filled AD;
- 1 Evidence of the Foundation's registration to the District Court and the activity or operational permit from the relevant agency;
- 2 Proof of registration of the Foundation to the District Court and Supplement to State Gazette (TBN);
- 3 All documents relating to the Foundation;
- 4 Photocopy of NPWP on behalf of a legalized notary Foundation;
- 5 Photocopy of certificate of domicile of the Foundation issued by the village chief or local village head and legalized by a Notary;
- 6 Proof of PNBPN payment;
- 7 Proof of payment announcement in TBN.

As mentioned above, the AD may be subject to change except on the intent and purpose of the Foundation. Alteration of AD Foundation can be done through decision of meeting of coach that attended by 2/3 member of coach. The change is made by notarial deed and must be made in the Indonesian language.

The advisory meeting to decide on the amendment of the Army shall be made by consensus for consensus as mentioned in the provisions of Article 19 Paragraph (1). At the time of deliberation there are stages in making decisions. If the first meeting did not produce a decision, then a second meeting was held. This second meeting is done at least 3 (three) days since the first meeting. The second meeting is valid if it is attended by more than 50% of the members of the coach. Decisions are made by majority vote of the number of members present.

0 Procedure of Changing Deed of Foundation

The procedures for the amendment of the founding deed of the Foundation must take into account the formal provisions in the Foundation Law. That is Article 18 Paragraph (1), must be done first through the meeting of the supervisor. At the meeting should be at least attended 2/3 of the number of members of the builder. To amend the deed of establishment of the Foundation must be done by Notary and made in Indonesian language.

If the agreement in the meeting of the coach has been unanimous, then further to submit the change of deed to the Minister of Law and Human Rights is a Notary. Following the approval of the Minister of Law and Human Rights, in accordance with the provisions of Article 24 Paragraph (1), that on the deed of incorporation of the Foundation which has been ratified as a legal entity or amendment of the Articles of Association approved, shall be announced in the Republic's Additional State Gazette Indonesia.

0 shall be submitted by the Board of Directors or their proxies to the State Printing Office of the Republic of Indonesia within no later than 30 (thirty) days as of the date of the deed of incorporation of the approved Foundation or the amendment of the approved Agreement. Thus, the petition for the announcement in the Supplementary State Gazette (TBN) of the Republic of Indonesia may be submitted directly or sent by registered mail.

According to Mr. Marhumi¹⁴ as the board of the Foundation, said that the procedure for the amendment of the deed of the Foundation can be done through the following steps:

- 0 The founder or his proxy shall apply for amendment of AD to the Minister by sending a request for amendment of the Army;
- 1 The amendment of the Armed Forces is then approved by the Minister or appointed official. Approval of such amendment shall be done no later than 30 (thirty) days after receipt of the application. If the application for the amendment of AD is rejected, it must be notified in writing to the founder of the Foundation.

With the enactment of Law Number 16 of 2001 which has been amended by Law. 28 of 2004 on the Foundation brought significant changes to the existence of the Foundation as a legal entity in Indonesia. The affirmation of the foundation as a legal entity and procedure for establishing and obtaining legal entity status is clearly stipulated in the Law of the Foundation.

3.2 *Legal Result of Amendment of Deed of Foundation based on Law Number 28 Year 2004 regarding Foundation*

The Law of the Foundation Number 28 of 2004 affirms that the foundation is a legal entity having social, religious, and humanitarian purposes and objectives established by taking into account the formal requirements set forth in this law and is expected to become a strong legal basis for governing the life of the foundation.

The issuance of the Law on the Foundation is Law Number 28 Year 2004, foundations that have been established before the issuance of the Foundation Law and its Amendment, which then the foundation is considered 'dead' or its existence is not recognized because it is no longer legal entity and cannot use the word "Foundation" in front of its name because it does not perform the requirements as determined by Article 71 of the Foundation Law, can be re-enacted.

The foundations can make adjustments to the articles of association and apply for approval to the Minister of Law and Human Rights so that the foundation can acquire the status of a legal entity or 'live' again. The Foundation may request the Notary to be made a deed of amendment to the articles of association and then when the deed is completed, through the Notary the foundation may apply for approval to the Minister. With the deed, the foundation can re-engage its business activities. However, Law Number 28 Year 2004 regarding the Foundation adds the conditions that must be fulfilled to apply for ratification to the Minister, namely to attach the documents as mentioned in Article 15A of the Government Regulation.

Therefore, in the Law Number 28 Year 2004 regarding the Foundation clearly states that for the foundation in front of his name cannot use the word "foundation" anymore, can make changes to the articles of association to be able to re-use the word foundation with the condition

¹⁴ Wawancara dengan Bapak Marhumi selaku pengurus Yayasan Pondok Pesantren Darussalam Breml_Gerung; Kabupaten Lombok Barat, (Tanggal 5 Maret 2018)

for 5 (five) consecutive year still runs its foundation activities in accordance with the articles of association and has never been dissolved. It is therefore quite clear that Law Number 28 Year 2004 regarding the Foundation states that a foundation that has not been able to use the word "foundation" in its name in accordance with the Ordinance of the Foundation and its amendments, may re-use the word "foundation" under the terms set out in The Act.

In hierarchy, the Government Regulation cannot revise the existing laws and regulations. Based on the theory of the level of norms and the principle of preference, if there is a conflict between laws and regulations that are not equal, then the lower regulations are ruled out.

Based on Law Number 28 Year 2004 regarding the Foundation, the Notary, at the request of the parties, makes a deed of change of foundation that has been 'dead' or cannot use the word "foundation" in its name, which the foundation has actually been considered dead since 2008 by the Foundation Law, and the Act may be applied for cancellation to the District Court.

Law Number 28 of 2004 concerning the Foundation cannot revise what is stipulated in Article 71 of the Amendment of the Foundation Law. If the government wishes to provide convenience to the community whose foundation is 'dead' or can no longer use the word "foundation" because it runs out of time to make adjustments to the articles of association and requests the Minister's approval to obtain the status of legal entity, it is better that the Law of the Foundation be amended, in particular Article 71 which regulates the period of time to make adjustments and apply for approval.

The conflict between Law Number 28 Year 2004 regarding Foundation and the Foundation Law will have legal consequences to the deed of amendment of articles of association made before a Notary by a foundation who can no longer use the word "foundation" in its name. The legal consequences of creating a deed of foundation based on Law Number 28 Year 2004 regarding Foundation for foundations that have been 'dead' is that the foundation still cannot obtain the status of legal entity and the deed can be canceled.

In accordance with the theory of legal entities, especially in the theory of wealth and aims aimed at the theory of property owned by a person because of his position, a foundation must be incorporated because in accordance with its elements, a foundation is a body that has a stand-alone wealth, has a board, serve certain interests and their property is legitimate to be organized. Thus a foundation must be a legal entity. If a foundation loses its legal entity status by not adjusting the articles of association in accordance with the provisions of the Foundation Law, the foundation can no longer be referred to as a foundation.

Based on one part of the Good Governance General Principles, namely the Legal Certainty principle, a rule is created and enacted with the aim of arranging a matter to be clear and logical. Clearly in the sense that there is no doubt (multi interpretation) and logical in the sense of becoming a system of norms with other norms so as not to clash or cause conflict of norms.

The Principle of Legal Certainty requires respect for the rights one has acquired by a government decision. Thus, in order to achieve legal certainty, any decisions that have been issued by the government cannot be revoked unless it can be proven otherwise in court. In maintaining legal certainty, the government shall not issue rules of conduct that are not regulated by law or are contrary to law. In accordance with the principle of legal certainty, in the event of a conflict between the implementing rule and the law, the court must state that the rule is null and

void or otherwise never existed so that the consequences arising from such regulation shall be restored to normal.

A legal certainty is essential, in accordance with Article 28D Paragraphs (1) of the 1945 Constitution of the Third Amendment, namely: "Everyone is entitled to the recognition, guarantee of protection, and fair legal certainty, and equal treatment of law before the law. An amendment of the articles of association made before a Notary which is based on the new rules, namely Law Number 28 Year 2004 concerning the Foundation, which in fact the rule is contrary to the law above it, for the sake of the legal certainty of the court must cancel the deed. The amendment of the articles of association is invalid because it is based on a rule of legislation that should be abrogated because it is in conflict with higher-ranking rules.

Thus, with the conflict of norms between Law Number 28 Year 2004 regarding Foundation and the Foundation Law, besides causing the lack of legal certainty for the community regarding the period of adjustment of the foundation's articles of association, also resulted in a deed made under Law Number 28 of 2004 on the Foundation may be applied for cancellation to the District Court, which means that it has no legal force because the deed is legally flawed, and since the decision of cancellation of the deed by the judge, then the validity of the cancellation is valid since the legal action/agreement is canceled.

IV. CONCLUSION

Based on the result of the discussion on the problems in this thesis, the following conclusions can be put forward:

- 23 As regulated in Law Number 28 Year 2004 regarding the Foundation that the procedure for the amendment of the founding deed of the Foundation must take into account the formal provisions in the Foundation Law. That is Article 18 Paragraph (1), must be done first through the meeting of the supervisor. At the meeting should be at least attended 2/3 of the number of members of the builder. To amend the deed of establishment of the Foundation must be done by Notary and made in Indonesian language. Then if the agreement in the meeting of the coach has been unanimous, then further to convey the change of deed to the Minister of Law and Human Rights are a Notary. Following the approval of the Minister of Law and Human Rights, in accordance with the provisions of Article 24 Paragraph (1), that on the deed of incorporation of the Foundation which has been ratified as a legal entity or amendment of the Articles of Association approved, shall be announced in the Republic's Additional State Gazette Indonesia.
- 24 The legal consequences of the deed of amendment of the articles of association established under Law Number 28 of 2004 concerning the Foundation by an old foundation not incorporated in accordance with the provisions of the Foundation Law are deemed to be amended due to Law Number 28 Year 2004 regarding The Foundation has arranged so that all provisions stipulated in the old foundation law are deemed no longer valid.

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THE POWER OF BINDING AN ELECTRONIC DEED IN THE PROOF OF CIVIL PROCEDURE

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Abstract: *One of the many legal issues that arise in relation to e-commerce is whether an electronic deed or electronic document can be used as authentic proof of an authentic letter or deed which has the same binding power as the written document on paper stipulated in the Civil Code. This study aims to analyze the power of binding the electronic deed in the proof of civil case, Theory used is the theory of legal positivism. The type of this research is normative law research, approach method used is approach of Law and Conceptual Approach. The types and sources of legal materials used are Primary legal materials, secondary legal materials and tertiary legal materials. The technique of collecting legal materials in this research is done through documentation study and literature study, analyzed by interpretation. Based on the result of research that binding power of electronic deed has binding legal force with document written on paper and can be used as evidence in civil case.*

Keywords: *electronic deed and E-commerce*

5888 INTRODUCTION

The development of science and technology has brought change and convenience to human life. One of the most rapid technological developments today is the development of digital technology, which has brought many changes to the lifestyle of most people, including the Indonesian people who are part of the world community.¹

As more and more people use digital technology tools, including interacting with each other, the longer the stronger the pressure on the law, including the law of evidence, to face the realities of such a society's development.²

The law of evidence in litigation is a very complex part of the litigation process. The complexity will be more complicated because the proof is related to the ability to reconstruct the

²³ Dian Mega Erianti Renouw, *Perlindungan Hukum E-Commerce*, Pramuka Grafita, Jakarta, 2017, p. 4.

²⁴ *Ibid*

event or past event as a truth. Although the truth sought in the civil justice process is not ultimate truth, it is a relative or even probable truth, but to find such truth still faces difficulties.³

A social reality shows that Information technology is developing much more rapidly and has changed the pattern and behavior of society, for example in business transactions from conventional patterns by face-to-face or offline contracts, shifting to the age of electronic contracts through computers by way of online contracts.⁴

The development of the internet creates the formation of a new world called cyber space, where each individual one with another can relate without restriction and no need to meet face to face.⁵ With the technology of the Internet to change the lifestyle and behavior of the world community that usually information and communication is done by using paper (paper), turned into electronic.⁶

In cyberspace, communities carry out various activities in various fields, including transactions that carry certain legal consequences. The Transaction is an activity that creates rights and obligations for the parties involved in such activities in accordance with applicable legal rules. Activities in the field of law in cyberspace include all areas of law, such as, civil, criminal, and business.⁷

In the virtual world, there are many transactions in the field of business law. One of the most frequent activities is trading activities.⁸ With that background, a process of trade transactions made in cyberspace, namely electronic commerce transactions or electronic commerce transactions and hereinafter referred to as e-commerce. With that background, a process of trade transactions made in cyberspace, namely electronic commerce transactions or electronic commerce transactions and hereinafter referred to as e-commerce.⁹ According to Mariam Darus Badruzaman other terms used for e-commerce include electronic trading contracts, electronic trading transactions, and web contracts.¹⁰

Analysis of the rationale of electronic deed as evidence in the proof of civilization in commerce by using e-commerce shows a complex picture.¹¹ This is so because it is virtual nature of electronic transactions so that the network system does not recognize the boundaries of regions or countries and paperless and global. On the other hand, the law of credibility in Indonesia provides restrictions on the evidence.¹²

The Law of Proof (listed in the fourth book of the Civil Code (hereinafter referred to as the Civil Code), contains all the basic rules of evidence in civil.¹³ The evidence in the Civil Code is solely related to the case only. There are several definitions put forward by jurists that can be used as a reference. According to Pitlo, Proof is a way done by a party to the facts and rights

²³ Hari Sasangka, *Hukum Pembuktian Dalam Perkara Perdata*, Mandar Maju, Bandung, 2009, p. 11.

²⁴ Immawan Anshari, *Analisis Yuridis Model Pengaturan Jasa Kenotariatan Secara Elektronik (Cyber Notary)*, Tesis pada Program Studi Kenotariatan Program Pascasarjana Universitas Mataram, 2015, p. 11.

²⁵ Josua Sitompul, *Cyberspace, Cybercrime, Cyberlaw*, Tatanusa, Jakarta, 2012, p.22

²⁶ Didik M. Arief Mansur and Elisatris Gultom, *Cyber law Aspek Hukum Teknologi Informasi*, PT. Refika Aditama, Bandung, 2005, p. 4

²⁷ *Ibid*

²⁸ Munir fuady, *Pengantar Hukum Bisnis*, Citra Aditya Bakti, Bandung, 2012, p.407

²⁹ *Ibid*

³⁰ Mariam Darus Badruzaman, *Aneka Hukum Bisnis*, Alumni, Bandung, 2005, p.26

³¹ R.Eko Indrajit, *Manajemen Sistem Informasi dan Teknologi Informasi*, PT. Elex Media Komputindo, Jakarta, 2011, p. 259

³² Sarwono, *Hukum Acara Perdata Teori Dan Praktek*, Sinar Grafika, Jakarta, 2016, p.126

³³ *Ibid*

related to his interests. According to Subekti meant to 'prove' is to convince the judge of the truth of the proposition or the arguments presented in a dispute.¹⁴

A conventional proof is only done when there is a dispute. A dispute shall be settled in the Indonesian judiciary, if it has been agreed upon by both parties or has existed in a contract in which there is a clause stating that any disputes arising will be settled under Indonesian law and held in the Indonesian Courts.¹⁵

Contracts or agreements made in e-commerce transactions are not contracts or agreements made in writing on paper, but in the form of electronic documents.¹⁶ In general buying and selling transactions, in the event of a dispute the parties may use the contract or agreement written on paper to be used as evidence of the existence of a sale and purchase agreement between the parties. If the agreement in the form of electronic documents is difficult to serve as evidence in case of dispute.¹⁷

Based on Article 1866 Civil Code, the evidence consists of:

- 23 Proof of writing (letter);
- 24 Evidence with witnesses;
- 25 Suspects;
- 26 Recognition;
- 27 Oath;

When viewed from the understanding of any such evidence, the electronic deed shall not be included in the means of such evidence. When viewed from the five kinds of evidence, electronic documents can only be entered in the category of written evidence. This electronic document is written in an electronic mail and the purpose of this paper is to realize an event that has occurred and declare a legal act to be done by someone.¹⁸

The main evidence in the law of proof of civilization is written evidence that for commerce through e-commerce becomes a complicated problem because e-commerce uses electronic information.¹⁹ It appears that through the analysis of the articles of written evidence used to be the basis of the binding power of the electronic deed is not easy because there are multiple interpretations.

An electronic deed or electronic document signed with a digital signature may be categorized as written proof. However, there is a legal principle that causes the difficulty of developing the use of electronic deed or electronic documents, i.e. the requirement that the document be visible, transmitted and stored in paper.²⁰ Problems will arise when a person wants to make a transaction such as purchase of goods, then the parties have begun to face various legal issues such as the validity of documents made, digital signatures made when the person agreed to transact, the binding force of the contract and transaction cancellation and so on.²¹

⁵⁸⁸⁸ Subekti, *Hukum Pembuktian*, Pradaya Paramita, Jakarta, 2010, p. 87

⁵⁸⁸⁹ M. Yahya Harahap, *Hukum Acara Perdata Indonesia*, Sinar Grafika, Jakarta, 2012, p. 78

⁵⁸⁹⁰ Aloina Sembiring Meliala, *Analisis Yuridis Terhadap Legalitas Dokumen Elektronik Sebagai Alat Bukti Dalam Penyelesaian Sengketa*, Jurnal Wawasan Hukum, Vol. 32, No. 1, (Februari 2015): p. 4-5

⁵⁸⁹¹ Ramli, Ahmad M., *Menuju Kepastian Hukum Dibidang Informasi Dan Transaksi Elektronik*, Departemen Komunikasi Dan Informasi, Jakarta, 2013, p. 53

⁵⁸⁹² *Ibid*, p.56

⁵⁸⁹³ Edmon Makarim, *Notaris dan Transaksi Elektronik*, Rajawali Pers, Jakarta, 2013, p. 93

⁵⁸⁹⁴ *Ibid*, p. 100

⁵⁸⁹⁵ Ramli, Ahmad M., *Op.Cit*, p.46

In Indonesia's positive legal system, the provisions on electronic documents are regulated in Law Number 19 Year 2016 on Amendment to Law Number 11 Year 2008 on Information and Electronic Transactions (hereinafter referred to as the ITE Law). One of the sociological background of the formation of the Law of ITE because of information globalization or information revolution that has placed Indonesia as part of the world information society so that requires the establishment of arrangements on the management of information and electronic transactions at the national level so that the development of information technology can be done optimally, evenly and spread to the entire community in order to educate the nation's life.²²

Under the ITE Act Article 1 point 4 reads:

"Electronic documents are any electronic information created, forwarded, transmitted, received or stored in analog, digital, electromagnetic, optical or the like, which may be viewed, displayed and / or heard through a computer or electronic system, including but not limited to writings, sounds, drawings, maps, designs, photographs or the like, letters, signs, or numbers, access codes, symbols or perforations that have meaning or meaning or are understandable to those who are able to understand them.

One of the many legal issues that arise in relation to e-commerce is whether an electronic deed or electronic document can be used as authentic proof of an authentic letter or deed which has the same binding power as the written document on paper stipulated in the Civil Code.

Based on this background the author wants to raise the title of the Power of Electronic Binding Deed in the Proof of Civil Case.

23 METHOD

This type of research is normative legal research, namely legal research conducted by examining library materials or secondary data. The approach method used is: Statute Approach and Conceptual Approach. The types and sources of legal materials used are Primary legal materials, namely legal materials that bind and in accordance with the issues raised are the Law, Secondary law materials, namely the explanation of the primary legal material, and tertiary law material is a legal dictionary, the encyclopedia. Technique of collecting legal materials in this research is done through two ways, namely Collection of library materials through inventory procedures and identification of legislation. All legal materials are analyzed using interpretation.

5888 RESULT AND DISCUSSION

3.1 *The power of binding electronic deeds as evidence in the provision of civil cases*

The agreement as provided in article 1313 of the Civil Code (Civil Code) is an act by which one or more persons commit themselves to one or more persons. Unlike the standard agreement which is a written contract made only by one of the parties, often the contract has been printed in the form of certain forms, in which case when the contract is signed generally the parties only fill in certain data information with little or no change in its clauses, where the other party in the contract has no opportunity or little chance to negotiate or change the clauses already made by either party.

²² Adami Chazawi and Ardi ferdian, *Tindak Pidana Informasi dan Transaksi elektronik*, Media Nusa Creative, Malang, 2015, p. 4

Sjahdeni emphasized that what is standardized in this agreement is not the agreement form, but the clauses.²³ However, the inclusion of the standard clause has been regulated as stated in Article 18 of the Consumer Protection Law Number 8 Year 1999 (UUPK).

According to Law No. 11 of 2008 on Electronic Information and Transactions (ITU Law), electronic information and/or electronic documents, and / or prints are legitimately considered to be evidence, when generated from electronic systems. Agreement in electronic transaction in the form of standard contract, the condition is based on the "open system legal concept" as regulated in Article 1338 paragraph (1) of the Criminal Code or better known as the principle of freedom of contract, which in the article stated that "all agreements which is made legally valid as the law for those who make it ". The principle implies that people have the freedom to make arrangements according to their will or interest. Such freedoms include:²⁴

- 23 The freedom of each person to decide whether he will make an agreement or not make an appointment.
- 24 The freedom of each person to choose who will make an agreement.
- 25 Freedom of the parties to determine the form of the agreement.
- 26 Freedom of the parties to determine the contents of the agreement.
- 27 Freedom of the parties to determine how to make the agreement.

Furthermore, all e-commerce transactions that qualifies the validity of an agreement, namely Article 1320 Civil Code recognized as an agreement and binding for the parties. The Importance of Article 1320 of the Civil Code is caused in that Article is stipulated on the validity of a contract, namely: (1) an agreement; (2) the existence of a skill; (3) there are certain objects and (4) there is a halal cause. These conditions are of two kinds, the first of which concerns the subject (the one making the covenant) and the second which concerns the object, i.e. what is promised by each, which is the content of the agreement or what the parties intend by making the agreement.

In e-commerce transactions, transactions are done without paper and parties do not meet in person. In such transactions, documents are not stored in paper, but in electronic documents. With transactions based on electronic documents, there are changes to the various pre-existing instruments of evidence used to prove the existence of a legal act and in the law of evidence in Indonesia has not regulated the electronic documents as evidence.

The main requirement that electronic documents can be expressed as valid evidence is the use of electronic systems that have been certified electronic from the government as set forth in Article 15-16 UU ITE. Another requirement, must be an electronic signature, and put it in a standard electronic contract.

The written evidence is divided into authentic deeds and deeds under the hand. When viewed from the definition of an authentic deed pursuant to article 1868 the Civil Code explains an authentic deed is a deed created in a form prescribed by law or in the presence of an authorized public official for it in place of the deed is drawn up. From these explanations, electronic documents cannot be regarded as authentic deeds.

²³ Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia*, Institut Bankir Indonesia, Jakarta, 2002, p. 66.

²⁴ Sukarmi, "Tanggung Jawab Pelaku Usaha Atas Kerugian Konsumen Yang Disebabkan Oleh Perjanjian Baku (Standard Contract) Dalam Transaksi Elektronik", *Dissertation of Law Faculty of Padjadjaran University*, Bandung, 2005, p. 241.

Electronic documents can be categorized as legally written evidence of a deed under the hand. The contents of electronic documents explain the legal acts committed by the parties and the purpose of the manufacture of electronic documents itself are to be used as evidence by the parties who make the electronic documents. Regarding the requirement that the deed under the hand should be signed, the electronic document does not use a signature like a document on paper.

IV. CONCLUSION AND RECOMMENDATION

4.1 Conclusion

Based on what has been described about the discussion of the above issues, it can be concluded that the open legal system in Article 1338 paragraph (1) Criminal Code, hereinafter referred to as the principle of freedom of contract, has provided a legal basis for electronic transactions. In the electronic document used is a digital signature (digital signature). So as to have the same legal force with documents written on paper and can be used as evidence when there is a dispute between the parties in the case of the existence of an agreement.

4.2 Recommendation

The government in issuing a law should look at the other Laws that are interrelated, so that between one Act and another law can support one another.

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IMPLEMENTATION OF ARTICLE 21 AND ARTICLE 22 OF OJK REGULATION NUMBER 1/POJK.07/2013 IN THE STANDARD AGREEMENT ON BANK MANDIRI SYARIAH

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Abstract: Article 21 and Article 22 of POJK No. 1/POJK.07/2013 concerning Consumer Protection of Financial Services Sector regulating Bank Syariah Mandiri as PUJK in using standard agreement shall fulfill the principle of equilibrium, fairness and fairness in the deed of agreement with the consumer and prepared in accordance with the legislation.

The type of this research is normative law research with departure from the existence of conflict of norm where from the rules related to standard agreement in banking with financing agreement made by Bank Mandiri Syariah is not appropriate in pelaksanaannya, in the provisions contained in Article 21 and Article 22 OJK Regulation Number 1/POJK.07/2013 and OJK Circular Letter Number 13 / SEOJK.07 / 2014 still deviate from the financing agreement in Bank Mandiri Syariah.

The results of this study indicate that the application of standard agreements on financing contracts conducted by Bank Syariah Mandiri not fully comply with the provisions of Article 21 and Article 22 POJK Number 1/POJK.07/2013 on Consumer Protection of Financial Services Sector seen from the existence of several clauses that have not fulfilled the principle of equilibrium and justice and there are still exoneration clauses and / or transfer of responsibilities set forth in the sharia bank financing contract. The legal consequences for Bank Mandiri Syariah for violations of Article 21 and Article 22 of POJK Number 1/POJK.07/2013 in the standard agreement may be subject to sanctions in the form of administrative sanctions such as written warnings, fines namely the obligation to pay a certain amount of money, restrictions on business activities, business activities, including up to the revocation of business activity permits.

Keywords: article 21 and article 22, standard agreement, Bank Syariah Mandiri

5888 INTRODUCTION

Facing the rapidly developing, competitive, and integrated national economy along with increasingly complex challenges and an increasingly advanced financial system, policy

adjustments in the economy including banking are required.¹ Banking is a trust institution, as well as a trust institution, as well as a banking intermediary institution (financial intermediary institution) that plays an important role in the process of national development.²

Banking institutions, especially sharia banks as financial intermediary institutions that play an important role in the national development process. The main business activities of banks are collecting funds from the public in the form of savings (savings) and channeling back to the community in the form of financing in accordance with the principles of sharia. Bank as an institution related to service and fund management as well as trust from customers make this institution a requirement with regulation in the field of banking and other related legislation.

One of the sharia banking business that is well known in the community is the provision of loan funds to customers or often called financing. Financing is a mainstay of bank products because financing is able to provide benefits for banks. Provision of financing by banks to increase business profits in the framework of operational sustainability. Financing as the primary source of income for banks and to avoid risks should pay attention to sound funding principles.

Financing in banks, generally in the form of standard agreements, using standard agreements, the bank will obtain efficiency in expenses, personnel and time. A standard agreement is a written agreement set unilaterally by a Business Service Authority (or called PUJK) and contains a standard clause on the content, form, and manner of manufacture, and is used to offer products and / or services to consumers in bulk.³

The provisions on the standard clause have been regulated by Law Number 8 Year 1999 regarding Consumer Protection (hereinafter referred to as UUPK). In Article 1 point (10) mentioned the standard clause is any rules or provisions and conditions that have been prepared and determined first unilaterally by business actors as outlined in a binding document and / or agreement that must be fulfilled by the consumer. Prohibition of inclusion of exoneration clause in standard agreement can be found in Article 18 UUPK. Standard clauses contain standard conditions as well as a rule for the parties concerned in it and have been prepared in advance for use by either party without negotiation with the other party.

An independent institution named the Financial Services Authority established by the government based on Law Number 21 of 2011 on the Financial Services Authority (hereinafter referred to as OJK Law). OJK functions to organize an integrated regulatory and supervisory system for all activities within the financial services sector.

OJK issues the Financial Services Authority (or POJK) Regulation Number 1/POJK.07/2013 on Consumer Protection of the Financial Services Sector. In POJK Number 1/POJK.07/2013 on Article 21 it reads "Financial Services Actors must meet the balance, fairness and fairness in making agreements with consumers". And in Article 22 it reads:

- 0 In the event that the Financial Services Authority uses the standard agreement, the standard agreement shall be prepared in accordance with the laws and regulations.
- 1 The standard agreement as meant in paragraph (1) may be digital or electronic to be offered by the Financial Services Business Actors through electronic media.

Hermansyah, *Hukum Perbankan Nasional Indonesia*, Kencana Prenada Media Group, Jakarta, 2005, p. 40.

Ahmad Jahri, *Jurnal, Perlindungan Nasabah Debitur Terhadap Perjanjian Baku Yang Mengandung Klausula Eksonerasi Pada Bank Umum Di Bandar Lampung*, Jurnal Fiat Justitia FH Universitas Bandar Lampung, 2016.
General Provisions in Circular Letter of the Financial Services Authority Number 13 / SEOJK-07/2014 regarding the Standard Agreement

- 0 The standard agreement referred to in paragraph (2) used by the Financial Service Actors is prohibited:
 - 0 Declare the transfer of responsibility or liability of the Financial Service Actors to the consumer;
 - 1 Stating that the Financial Services Businesses shall be entitled to refuse refunds paid by Consumer on purchased products and / or services,
 - 2 Declare the granting of power from the Customer to the Financial Services Agent, either directly or indirectly, to undertake any unilateral action on the goods pledged by the Customer, unless such unilateral action is exercised in accordance with the laws and regulations;
 - 3 Regulates the Consumer's evidentiary obligation, if the Financial Services Business actor declares that the loss of the use of the products and / or services purchased by the Customer is not the responsibility of the Financial Services Business Actor;
 - 4 Grant the right of the Financial Services Businesses to reduce the usefulness of the products and / or services or to reduce the property of the Consumer as the object of the product and service agreement;
 - 5 Declare that the Customer is subject to new regulations, additions, continuations and / or changes made unilaterally by the Business Service Actors in the Consumer's period of utilizing the products and / or services purchased; and / or
 - 6 Declare that the Customer authorizes the Financial Services Businesses for the imposition of mortgages, liens or guaranteed rights to products and / or services purchased by Consumers in installments.

To implement the POJK, in 2014 OJK has issued Circular Letter Number 13 / SEOJK.07 2014 regarding the Standard Agreement (hereinafter referred to as SEOJK on the Standard Agreement) to regulate provisions concerning implementation instructions to adjust the clauses in the standard agreement as stipulated in Article 21 and Article 22 POJK Number 1/POJK.07/2013 concerning Consumer Protection of Financial Services Sector.

The standard agreement is a forced agreement, the customer to obtain the required financing only has two options, namely accept or reject the standard agreement (take it or leave it). Although UUPK has arranged a ban on the inclusion of a standard clause on each document and / or agreement containing the transfer of responsibility of the business actor, as well as the POJK reinforced by SEOJK on the Standard Agreement also prohibits, but in reality it is still often found the inclusion of a standard clause that contains the exoneration clause in the sharia bank financing agreement.

In the Standard Agreement clause set forth in SEOJK, states that PUJK shall meet the balance, fairness and fairness in making agreements with consumers. There is also a banned standard agreement clause that is:

- 0 The inclusion of an exoneration / eksemsi clause is that it adds the rights and / or reduces the PUJK obligation or reduces the rights and / or ads to the consumer's obligation.
- 1 2. Misuse of circumstances is a condition in the Standard Agreement that has an indication of misuse of the circumstances. Examples of these conditions are for example to take advantage of urgent consumer conditions due to certain conditions or in emergencies and intentionally or unintentionally PUJK does not explain the benefits, costs and risks of the products and / or services offered.

Bank Mandiri Syariah is one of the syariah banks that perform the contract by using standard agreement. The standard agreement in the financing of Bank Mandiri Syariah between the Bank and the Customer under its standard agreement includes an exoneration clause and a misuse of the customer's circumstances, such as in the contractual agreement of Al Mudharabah financing, contained in article 11 regarding the Promise Injury, in this article it says " Article 3 of this Agreement, the Bank shall be entitled to claim or collect financing from the Customer or any person who obtains rights thereof for any or all of the Customer's total debt to the Bank under this Agreement, to be paid instantly and simultaneously without the need for notices, warning letters or other letters ". This article indicates that the bank does not provide an opportunity for customers to defend themselves and also the absence of a clause on the waivers the customer deserves to be obtained if he or she is injured by an unintended appointment.

The application of standard contract agreement made by Bank Syariah Mandiri above indicates that the Bank Mandiri Syariah has not complied with Article 21 and Article 22 POJK Number 1/POJK.07/2013 because there are still clause of eksenorasi and the transfer of responsibility or obligation PUJK to customers and also in the financing contract of sharia independent bank has not fulfilled the balance, justice and fairness in making the agreement with the customer.

Based on the above description, this research is important to do, because of the conflict of norms which regulate the standard agreement in the financing agreement in Mandiri Syariah Bank with Article 21 and Article 22 POJK Number 1/POJK.07/2013 and SEOJK on Standard Agreement so that in this thesis will examine how the implementation of Article 21 and Article 22 of POJK Number 1/POJK.07/2013 in the Standard Agreement on Bank Mandiri Syariah and the applicable legal consequences for Bank Mandiri Syariah for violation of Article 21 and Article 22 of the Standard Agreement.

5888 RESULT AND DISCUSSION

2.1 *Implementation of Article 21 and Article 22 of POJK Number 1/POJK.07/2013 in the standard agreement on Bank Mandiri Syariah*

The terms of the standard agreement is a translation of the standard contract; the standard means a benchmark and reference. Salim HS reveals that the standard Agreement derived from the English translation, namely the standard contract, the predetermined agreement and has been poured in the form of a form that has been determined unilaterally by one party, especially the strong economy against the weak economy.⁴

Sutan Remi Sjahdeni explained the standard agreement is an agreement that almost all of its clauses have been standardized by the user and the other party basically has no chance to negotiate or request change. What have not been standardized is only a few things, such as concerning the type, price, quantity, color, place, time and some other specific things of the object being contracted.⁵

²³ Salim HS, *Perkembangan Hukum Kontrak Diluar KUH Perdata*, Buku Satu, Rajawali Pers, 2006, p. 145.

²⁴ Sutan Remi Sjahdeni, *Kebebasan Bebasan Berkontrak Dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank Indonesia*, PT. Pustaka Utama Grafiti, Jakarta, 2009, p. 74.

Munir Fuady also explained what is meant by a standard contract is a written contract made only by one party in the contract. Often, the contract has been printed in the form of certain forms by one of the parties, in which case when the contract is signed generally the parties' only fill in certain informative data with little or no change in the clauses. The other party in the contract has no opportunity or little chance to negotiate or amend the clauses already made by either party, so usually the standard contract is very biased.⁶

According to Mariam Darus Badruzaman standard agreement can be divided into five characteristics, namely:⁷

- 23 The contents are set unilaterally by parties whose position (economy) is strong.
- 24 The community (the debtor) does not come together to determine the contents of the agreement.
- 25 Prompted by its needs the debtor is forced to accept the contents of the agreement.
- 26 Specific form (written)
- 27 Prepared in bulk and collective.

Bank Mandiri Syariah is one of the syariah banks that perform the contract by using standard agreement. Form of standard agreement on financing in Bank Mandiri Syariah between the Bank and the Customer is contained in every contract made by Bank Syariah Mandiri with the Customer.

The financing contract that is made by default indirectly contains the element of coercion (Ikrah) because the condition created is the debtor's customers are forced to accept every clause of the loan default agreement they are proposing because the debtor's customer position is in a weak position so that the borrower will inevitably accept and agree to any terms mentioned in the agreement clause.

Referring to Article 21 of POJK Number: 1/POJK.07/2013 concerning Consumer Protection of Financial Services Sector which reads: "Business Service Actors shall fulfill equilibrium, fairness and fairness in making agreements with Consumers". This can be seen from several agreements applied by Bank Syariah Mandiri in the Financing Agreement.

In the *Mudharabah* financing agreement, contains the contents of the standard agreement that has been determined by the Bank Syariah Mandiri, a clause of financing and the use of which has been determined by the bank whose amount is adjusted to customer demand. Timeframe clause, where the bank has determined the period of time which is then adjusted to the customer's ability to make repayment. Clauses of profit sharing agreements, cost clauses, deductions and taxes, customer liability clauses, customer recognition clause clauses, appointment injuries, breaches and insurance.

According to the authors that this Agreement, when viewed from Article 21 POJK No. 1/POJK.07/2013, has not met the balance, fairness and fairness in some clauses such as fees, deductions and taxes stating that: "The Customer promises and hereby binds to cover all necessary costs in respect of the implementation of this Agreement, including the services of Notary and other services, insofar as it is notified by the Bank to the Customer prior to the signing of this Agreement, and the Client expresses its consent ". This clause indicates that the burden of any costs incurred in connection with the implementation of the contract is borne by

5888 Salim HS,
Loc. Cit' Ibid. p.
146.

the Customer indicating that there is no balance and fairness in bear the burden of the costs incurred. This burden should be a joint responsibility between the customer and the bank.

The subsequent clause which, according to the authors, has not reflected the balance and fairness is the determination of the profit sharing set by Bank Syariah Mandiri in the profit sharing clause stating that: "The Customer and the Bank agree and bind themselves to one another, that the Ratio of income / the benefit to each party shall be as set forth in Annex A attached to it and thereby become an integral entity of this contract. This shows that the profit sharing paid by the Customer to Bank Syariah Mandiri has been determined first. Although dibahasakan have agreed.

Clauses which also contain things that are contradictory to Article 21 are at Risk Clauses on Financing Channels of Fund Investment Funds Distribution based on Mudharabah Principle Muqayyadah On Balance Sheet which states:

- 23 If, for any reason that is not an error of BANK, a loss arises on the business activities of the Project, the risk of loss of such investment shall be fully borne by the CUSTOMER'S CUSTOMER; and with this CUSTOMER INVESTORS indemnifies BANK from the loss / risk of such investment.
- 24 INVESTOR CUSTOMER shall accept and acknowledge the risks of investment loss as referred to in Article 7 Paragraph (1), if the INVESTOR CUSTOMER has received, reassessed and approved all calculations and explanations made and submitted by BANK to INVESTOR CUSTOMERS and CUSTOMERS INVESTOR has submitted its assessment result in writing to BANK.

The Mudharabah Principle Muqayyadah On Balance is a transaction based on Sharia Principles in which the investor (the owner of the capital) agrees to invest his capital through the bank for a particular business run by a Financing Customer already known; the income earned by the bank from the proceeds of the Financing Customer shall be divided between the investor and the bank in accordance with the agreed profit sharing ratio.

The risk clause also illustrates that all responsibilities should be borne by investors' clients as a second party. Meanwhile, the bank as the first party is not willing to accept any risk. These clauses are deliberately listed by the bank as a creditor which, in the bank's view, is an act of protection for the bank if the debtor performs an act of default that could harm the bank. Customer as investor of investor or debtor's client sometimes does not pay attention to the contents of the clause that is not good or even harmful and only in favor of bank's interest. The parties are forced to accept every clause of agreement that has been made by default by the bank.

In addition, the author may refer to the Clause of Promises Injury to Al Mudharabah Financing Agreement is contradictory to Article 22 and SEOJK of the Standard Agreement, namely the clause of exoneration and abuse of the customer's circumstances, contained in Article 11, in this article is said "Notwithstanding the provisions of Article 3 of this Agreement, The Bank shall be entitled to claim or collect financing from the Customer or any person who obtains his or her right to partly or wholly the amount of the Customer's debt to the Bank under this Agreement, to be paid instantly and simultaneously without the need for notices, warning letters or other letters ". This article indicates that the bank does not provide an opportunity for customers to defend themselves and also the absence of a clause on the waivers the customer deserves to be obtained if he or she is injured by an unintended appointment.

Article 1320 of the Civil Code has regulated the legitimate requirements of an agreement which reads "in order for a valid agreement to be made, it is necessary to fulfill four conditions:

- 23 Their binding agreements;
- 24 The ability to make an engagement;
- 25 A certain subject matter (object);
- 26 An unlawful cause (for the lawful) "

According to Herlian Budiono, said that:

"As one of the conditions of validity of the agreement, the agreement plays an important role in the process of formation of a consensus, we can easily recognize the agreement if there is conformity of supply and acceptance, but there will be a problem if there is no match between the bid and acceptance, write down the order amount ".⁸

However, it should always be understood that the standard agreement is a bank protection effort, making the financing agreement in sharia banking to be spared from the existence of a balance between rights and obligations for the parties. The Bank does not wish to obtain any loss in the financing agreement it makes with the customer so that by all means the bank includes a favorable and favorable clause to it. The Customer as a party in need of funds, in the standard agreement is only given the opportunity to read and sign or not sign the agreement. This is what then makes the standard agreement known as take it or leave it contract.⁹

From the above description of the application of standard contract agreement made by Bank Syariah Mandiri is still contradictory or not fully comply with the provisions of Article 21 and Article 22 POJK Number 1/POJK.07/2013 on Consumer Protection of Financial Services Sector seen from the existence of several clauses that have not met the principle balance, fairness and fairness, and there are still extenuating clauses and abuse of customer / customer circumstances.

2.2 *The legal consequences for Bank Mandiri Syariah for violation of Article 21 and Article 22 POJK Number 1/POJK.07/2013 in the standard agreement*

Standard agreements include agreements containing coercive elements. The intention of coercion in that opinion is that the customer does not have the opportunity to refuse or revise the agreement clause and as the party requiring the funds, the customer can only accept all clauses by forced means. However, it is very difficult to require this, because legally the agreement is made legally which is evidenced by the signature of the customer and the bank.

The standard agreement is included in a valid agreement, but the standard agreement does not contain principles, namely the principle of balance, fairness and fairness.

There are several factors that often cause the contract to be very one-sided contract is as follows:¹⁰

²³ Herlian Budiono, *Ajaran Umum Hukum Perjanjian dan Penerapannya dibidang Kenotariatan*, Citra Aditya, Bandung, 2010. p. 76.

²⁴ Dwi Firdhayantii, *Jurnal, Perjanjian Baku Menurut Prinsip Syariah (Tinjauan Yuridis Praktik Pembiayaan di Perbankan Syariah)*

²⁵ Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*, Second print. PT. Citra Aditya Bakti, Bandung, 2003, p. 78

- 23 The lack of or even no opportunity for either party to bargain, so the party to which the contract is offered is not much opportunity to know the contents of the contract, especially there is a contract written in very small letters.
- 24 Due to the unilateral contracting, the document provider usually has enough time to think about the clauses in the document, perhaps even in consultation with the experts or the document has been made by experts. While the party to whom the document presented is not much opportunity and often unfamiliar with the clauses.
- 25 The party to whom the standard contract is placed occupies a very depressed position, so it can only be "take it or leave it".

Legally, the standard contract itself is not so much a problem, considering that the standard contract is a daily habit. The problem is if the standard contract contains unfair (one-sided) elements for either party. Therefore, the standard agreement must comply with the provisions of Article 21 POJK Number 1/POJK.07/2013 on Consumer Protection of Financial Services Sector, where Bank Syariah Mandiri is required to meet the balance, fairness and fairness in making agreements with Consumers. While Article 22, states that:

- 23 In the event that a Business Service Provider uses a standard agreement, the said standard agreement shall be prepared in accordance with the laws and regulations.
- 24 The standard agreement referred to in paragraph (1) may be digital or electronic to be offered by the Financial Services Business Actors through electronic media.
- 25 The standard agreement as referred to in paragraph (2) used by the Financial Services Business Act is prohibited:
 - 23 Declare the transfer of responsibility or obligations of Business Service Provider to Consumer;
 - 24 Declare that the Financial Services Businesses shall be entitled to refuse refunds paid by Consumer on purchased products and / or services;
 - 25 Declare the granting of power from the Customer to the Financial Services Agent, either directly or indirectly, to undertake any unilateral action on the goods pledged by the Customer, unless such unilateral action is exercised in accordance with the laws and regulations;
 - 26 Regulates the Consumer's evidentiary obligation, if the Financial Services Business actor declares that the loss of the use of the products and / or services purchased by the Customer is not the responsibility of the Financial Services Business Actor;
 - 27 Grant the right of the Financial Services Businesses to reduce the usefulness of the products and / or services or to reduce the property of the Consumer as the object of the product and service agreement;
 - 28 Declare that the Customer is subject to new regulations, additions, continuations and / or changes made unilaterally by the Business Service Actors in the Consumer's period of utilizing the products and / or services purchased; and / or
 - 29 Declare that the Customer authorizes the Financial Services Businesses for the imposition of mortgages, liens or guaranteed rights to products and / or services purchased by Consumers in installments.

If Bank Syariah Mandiri violates the prohibition as regulated in Article 21 and 22 POJK Number: 1/POJK.07/2013 on Consumer Protection of Financial Services Sector, then the legal

effect to be applied to Bank Syariah Mandiri as Business Service Business actor shall be given a sanction as set forth in Article 53 of POJK Number: 1/POJK.07/2013 on Consumer Protection of the Financial Services Sector, which reads:

- 23 The business actor of Financial Services and / or parties violating the provisions of this Financial Services Authority Regulation shall be liable to administrative sanctions in the form of:
 - 23 Written warning;
 - 24 The penalty is the obligation to pay a certain amount of money;
 - 25 Restrictions on business activities;
 - 26 Suspension of business; and
 - 27 Revocation of business activity permit.
- 24 The sanction as referred to in paragraph (1) letter b, letter c, letter d, or letter e may be imposed with or without preceding the imposition of a written warning sanction as referred to in paragraph (1) letter a.
- 25 The penalty as referred to in paragraph (1) letter b may be imposed separately or jointly with the imposition of sanctions as referred to in paragraph (1) letter c, letter d, or letter e.
- 26 The amount of fines sanction as referred to in paragraph (1) letter b shall be stipulated by the Financial Services Authority based on the provisions concerning administrative sanctions in the form of fines applicable to any financial services sector.
- 27 The Financial Services Authority may announce the imposition of administrative sanctions as referred to in paragraph (1) to the public.

The regulation is already written in such a complete and clear, but in the implementation both from the bank and the customer is still less understanding of the importance of making agreements in accordance with existing regulations namely Article 21 and Article 22 POJK Number 1/POJK.07/2013 reinforced again with SEOJK on the Standard Agreement .. While in terms of legal culture, bank employees and customers never read carefully the clause of the agreement that affects the validity of the agreement so that it can apply binding, and also the client is less responsive to things like this by just assuming the standard agreement after being signed is considered valid, but when a default or act against the law of the bank, then in the lawsuit touched on the validity of the standard agreement itself.

Thus, it is expected that standard agreements made by sharia banks pay close attention to the rules relating to the agreements set forth in each financing contract both in terms of sharia principles and also supporting law. The objective is that the agreement will not cause any harm to both parties, so as to achieve a balance, fairness and fairness.

5888 CONCLUSION

The application of standard contract agreement made by Bank Syariah Mandiri has not fully complied with the provisions of Article 21 and Article 22 of POJK Number 1/POJK.07/2013 concerning Consumer Protection of Financial Services Sector as seen from the existence of several clauses that have not fulfilled the principle of balance, justice and fairness, and in the financing agreement in Bank Mandiri Syariah there is still clause eksenorasi and abuse of state of customer / consumer.

The legal consequences for Bank Mandiri Syariah for violations of Article 21 and Article 22 of POJK Number 1/POJK.07/2013 in the standard agreement may be subject to sanctions in the form of administrative sanctions such as written warnings, fines namely the obligation to pay

a certain amount of money, restrictions on business activities, business activities, including up to the revocation of business activity permits.

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THE POSITION OF THE INTERNAL AUDITOR ASSOCIATION OF INDONESIAN GOVERNMENT (AAIPI) IN THE INTERNAL SUPERVISION SYSTEM FOR THE GOVERNMENT INTERNAL SUPERVISORY APPARATUS (APIP) IN THE REGION (A STUDY OF PROVINCIAL INSPECTORATE OF NTB)

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Abstract: *The organization of profession of auditor as mentioned in Article 52 section 3 and Article 53 section 3 was established on November 30, 2012 under the name of the Indonesian Government Internal Auditors Association (AAIPI), which has the statutes and bylaws, continuing from the contributions of each member. When performing audit, all auditors is guided by the rules issued by AAIPI both the code of ethics and audit standards, but the auditor's definition issued by AAIPI is inconsistent with the definition contained in Government Regulation no. 60/2008. AAIPI as a professional organization for the auditor, also accommodate the position of government supervisor in it. AAIPI itself stands for the Indonesian Government Internal Auditors Association, not the supervisory association, although the duties and functions of the auditor also conduct supervision.*

Keywords: *auditor association, AAIPI position in APIP*

0 INTRODUCTION

Government Internal Supervisory Apparatus has standard of inspection in conducting supervision which is stated in Government Regulation of Republic of Indonesia Number 60/2008 about Intern Controlling System of Government which stated in article number 52 section 1 that to control executive behavior as explained in article number 51 section (1) code of ethics is arranged for intern controlling of Government. while in article number 52 section (3) explained that code of ethics as explained on section (1) arranged by profession auditor organization refers to government instruction. Moreover, in article number 53 section 1 stated that to keep the quality of an inspection which conducted by government intern controller, audit standard is arranged. While in article number 53 section 3 explain that audit standard as explained in

section 1 arranged by organization of profession auditor according to guidelines set by government.

Before the organization of profession of auditor developed, to conduct good quality audit and reach high quality outcome audit, the government through Ministry of Empowerment of State Apparatus and Bureaucracy Reform issued the Law of Ministry of Empowerment of State Apparatus and Bureaucracy Reform number 4/ 2008 about APIP code of ethics and Law of Ministry of Empowerment of State Apparatus and Bureaucracy Reform Number 5 /2008 about Audit Standard of APIP.

Organization of auditor profession as stated in Article number 52 section 3 and article number 53 section 3 established on 30th of November 2012 as Internal Auditor Association of Indonesian Government (AAIPI) , which has article of association statutes and bylaws from members contribution. In conducting audit, all auditors must be based on AAIPI rules both code of ethics and audit, so other law of constitutions which regulate the code of ethics and standard of audit is no longer applicable. AAIPI membership is also a resolved issue until this day. Definition of auditor which is issued by AAIPI is not compatible with definition of auditor which is stated in Law of Government number 60/2008. AAIPI as professional organization for auditor also accommodate the government supervisory occupation in it. AAIPI stands for Association of Internal Auditor of Indonesian Government, not a supervisory association, although supervising is a part of functions and tasks of auditor.

According to background above, writer interested in conducting research on position of the Internal Auditor Association of Indonesian Government (AAIPI) in internal supervision system for the position of association of internal auditor of the Indonesian government in the region (research on provincial Inspectorate of West Nusa Tenggara).

Based on background above, there are some problems that will be discussed:

- 0 What is AAIPI position in internal supervision system for APIP in regional stage?
- 1 How the implementation of audit standard by APIP is after AAIPI has established?
- 2 What is juridical consequences of auditor definition in AD-ART (articles of association and bylaws) AAIPI (P2UPD and Auditor)?

From the problem above, theoretical framework is needed in order to provide useful sources as basis of problem analysis. This research uses three theories to analyze the problem, Theory of Authority, theory of Legislation Hierarchy and Theory of Supervision. Attribution Authority is giving a new authority to a position under constitutional rule or law. Delegation Authority is transference of current authority under constitutional and rule of law. Mandate is not transference of authority, but as a result of inability for the competent to attend.

Philipus M. Hadjon said that a scope of official action legitimacy or government institutions (including general officer) involve the: authority, procedure and substance. First, authority, every executive action must base on legal authority. The sources of legal authority are attribution, delegation, and mandate. Attribution authority generally arranged by the division of state power by the Constitution, while delegation authority and mandate are authority which

comes from authority delegation. Every authority which belongs to government institutions must be restricted by material, area, and time. Aspect will cause invalid authority (*onbevoegdheid*) which related to: (a) invalidity of material (*onbevoegdheid ratione materiae*); (b) invalidity of area (*onbevoegdheid ratione loci*); dan (c) and invalidity of time (*onbevoegdheid ratione temporis*).

Matter of law-abiding or obedience of pandect generally become a major factor in measuring whether it is effective or not, in this case, law. Besides that in Hierarchy Theory of Constitutional Law, one of Hans Kelsen theory which got lot of consideration is norm of law hierarchy and validity chains which create pyramid of law (*stufentheorie*). Hans Nawiasky is one of Hans Kelsen student which develop the theory. But Hans Nawiasky works, *Allgemeine Rechtslehreals System der rechtlichen Grundbegriffe*, is not much discussed in english literature. Nawiasky theory called with *ntheorie von stufenufbau der rechtsordnung*. Based on the theory, arrangement of norm is:

- 0 The fundamental norms of the state (*Staatsfundamentalnorm*);
- 1 Basic Rules of State (*staatsgrundgesetz*);
- 2 Formal constitution (*formellgesetz*); and
- 3 Regulation of implementation and autonomy regulation (*verordnungenautonomesatzung*).

II. RESEARCH METHOD

This research is normative law research which put law as construction of norm system. Norm system is principles, norms, rules, principles of law and regulation, agreement, and doctrine. Approach used in this research is Statute Approach, Conceptual Approach, sources of law used Prime source of Law, which contain binding materials such as constitutional regulation for example regulation number 17/2003 about State Finance, Constitutional Regulation number 31/1999 about Corruption, Constitutional Regulation number 30/2014 about Government Administration, Government Regulation number 41/2007 about Regional organization, Government Regulation number 60/2008 about Government Internal Controlling system, Regulation of Ministry of Empowerment of State Apparatus and Bureaucracy Reform number 220/2008 about Functional Position of Auditor and Credit Numbers, Regulation of Ministry of Empowerment of State Apparatus and Bureaucracy Reform number 15/2009 about Functional Position of Supervisor of Organizer of Regional Government Affairs, etc. Secondary source of law is source from books or journals of law containing basic principles, the views of law expertise, law encyclopedia and the material is research material consisting of text book which not related to political book, economic book, census data, and annual report of company, dictionary and general encyclopedia.

Law materials research that is used in this research is Library Research, collected by documentation technique which involves law materials contained literature data of prime law material, secondary material, non – law material. Instrument of material collecting is document research.

0 DISCUSSION

3.1 Position of AAIPI in the internal supervision system for APIP in the Region

The purpose of establishing AAIPI is congesting the potential of government internal auditors to be the driving force of national development in realizing a just and prosperous society according to Principle of Pancasila and the 1945 Constitution, with the aim of developing and utilizing the potential of government internal auditors to create a copyrighted work of the Indonesian government internal auditors to be dedicated for the benefit of the nation and state. In running the organization, AAIPI performs the following tasks and functions:

- 23 Formulate, establish, and develop the code of ethics of the APIP auditor;
- 24 Formulate, establish, and develop standard of audit;
- 25 Formulate, establish, and develop peer review guidance in the APIP environment;
- 26 Provide advice in the development of methodologies, techniques and approaches of internal supervising and appropriate internal surveillance practices within APIP circle, referring to international practice;
- 27 Provide input in realizing the integrity, professionalism, and welfare of the auditor in order to realize the role of APIP; and
- 28 Cooperate with other professional organizations in national and international scope.

3.2 Implementation of auditing standards by APIP in the regions (Provincial Inspectorate of NTB) after the establishment of AAIPI

Before establishing AAIPI, which is a place of functional position of Auditor and P2UPD by far before P2UPD was formed in 2009, the functional position of Auditor performs occupational tasks and functions based on the Ministerial regulation number 4 and 5 which are obviously established as a guidance in running occupational tasks and functions of auditor in the governmental internal monitoring environment without the existence of functional position of P2UPD, besides, standard audit regulated in PERMENPAN number 5/2008 about the audit standard of government internal supervisory apparatus which is only addressed to the auditor. In the APIP standard audit, internal surveillance is defined as “the whole activity process of audit, review, monitoring, evaluation, and other surveillance activities in form of assistance, dissemination and consultation toward conducting organizational tasks and functions in order to put sufficient trust that the activities have been held as according to the benchmarks that have been effectively and efficiently determined for the headship interest in creating a proper governance”. Moreover, a governmental institution, which is called Government Internal Supervisory Apparatus (APIP), is pointed to perform the internal supervision tasks which consist of:

- 23 State Development Audit Agency (BPKP) which is responsible to the President;
- 24 Inspectorate General (Itjen) / Chief Inspectorate (Ittama) / Inspectorate who is responsible to the Minister / Head of Non-Department Government Institution (LPND);
- 25 Provincial Government Inspectorate which is responsible to the Governor, and;

23 The Inspectorate of the Regency / City Government which responsible to the Regent / Mayor.

In accordance with article 53 of PP 60/2008, the mandate given to the professional organization of auditors is to arrange audit standards. In the explanation of article 53 sections (1) of PP 60/2008 expressly stated that what is meant by “audit standard” is criteria or quality measure to conduct audit activities that must be guided by government internal supervisory apparatus.

3.3 *The juridical consequences of the audit result from the functional position of Supervisor of Administration of Regional Government Affairs (P2UPD and Auditor)*

In the Articles of Association of the Internal Auditors of the Government of Indonesia stated that:

“The auditor is a position with the scope, duty, responsibility, and authority to conduct internal supervision on government institutions, institutions and / or other parties in which there are state interests in accordance with the laws and regulations, which are occupied by Civil Servants with the right and the obligations granted in full by the competent authorities.”

In addition, in Article 1 section (3) of the Articles of Association states that

“The definition of the Auditor as referred to in section 1 includes the Auditor Functional Position and the Supervisor of the Implementation of Governmental Affairs in the Region (P2UPD) domiciled as the functional technical supervisor in the field of the Government Internal Supervisory Apparatus”

Equation of the auditor's understanding by AAIPI is the polemic in the implementation of APIP duties and functions in the region, especially the West Nusa Tenggara Provincial Inspectorate. As discussed in the previous discussion, the Government itself has distinguished between functional positions of auditors and functional positions of government oversight. The definitions, duties, authorities, and clumps of office are different. The author has reviewed the definition of the AAIPI. Indeed between the Supervisory Government and Auditors have the similar task of conducting internal control over government agency. Regulation of the Minister of Home Affairs Number 23 Year 2007 concerning Guidelines for Procedure of Supervision over Local Government Implementation and Regulation of the Minister of Home Affairs Number 28 Year 2007 regarding Monitoring Norms and Code of Ethics Government Supervisory Officials do not limit the scope of internal control that can be done by Internal Supervisor only on technical government only, but the Regulation of the Minister of Administrative Reform of the State Number 15/2009 strictly limits its scope to technical government affairs in areas outside of financial supervision.

However, neither the Minister of Home Affairs nor the Minister of PAN made a definition of “technique of governance matter in the region”. On the other hand, Ministerial Regulation of PAN No. 220/2008 does not limit the scope of supervision by auditors only on accounting and finance issues, but also includes governmental techniques. One of the main duties of the auditor is to conduct a performance audit, which according to Article 50 of Government Regulation Number 60/2008 is defined as an audit of state financial management and execution of tasks and functions of Government Institutions consisting of aspects of efficiency, efficiency and effectiveness. However, it does not necessarily make the definition of auditors the same as the definition of government supervisor. The establishment of the Internal Auditors Association of the Government of Indonesia is mandated by Government Regulation Number 60/2008. The author again quotes Article 51 Section (1) of Government Regulation Number 60/2008 stating that “Implementation of internal audit in the Government Agency is carried out by officials who have the task of perform supervision and who has fulfilled the criteria of competence as an auditor. “Article 52 section (1) states that” To maintain the behavior of officials as referred to in Article 51 section (1) compiled the code of ethics apparatus internal government control. “Then Article 52 section (3) “The code of ethics as referred to in section (1) shall be prepared by the professional organization of the auditor with reference to the guidelines established by the government.”

Based on the mandate in the clause of Article 52 section (3), a professional audit organization is established with the name of the Indonesian Government Internal Auditors Association (AAIPI).

By including the auditor's understanding that involves the position of government supervisor, and then this has an impact on the implementation of the tasks of both functional positions. As mentioned in the previous discussion that the two functional positions have different tasks as set out in the Ministerial Regulation of the PAN. APIP in the region particularly, in this case the West Nusa Tenggara Provincial Inspectorate gives tasks for auditors and P2UPD in 1 (one) Task Order (SPT) to perform performance audits, operational audits, reviews, and others. Therefore, the product produced as a result of the issuance of the Task Order is the Audit Result Report. This becomes very confusing, when the resulting Audit Result Report contains financial oversight. Regulation of the Minister of State Apparatus Empowerment number 15/2009 clearly states that the government supervisor should not be in contact with financial supervision.

Afterwards, a matter which is being the impact of the auditor's definition by AAIPI in the regions, especially the Provincial Inspectorate of NTB is the appointment of roles in the assignment of personnel. In 1 (one) Task Order containing auditor and P2UPD, there is a government supervisory officer acting as technical controller. This is contrary to Regulation of the Minister of State Apparatus Empowerment Number 15/2009. In the independent assignment, the first government supervisor is portrayed as a member, the young government supervisor is acted as the team leader and the municipal supervisor is acted as the supervisor. Supposedly, the supervisor of the middle government in the Provincial Inspectorate should not act as a technical control. The role of technical handler is not known in Regulation of the Minister of State Apparatus Empowerment No. 15/2009. Technical control is the role specified in the independent

assignment of the auditor as specified in Regulation of the Minister of State Apparatus Empowerment Number 220/ 2008. Supposedly, there is a separation in the execution of duties at the Inspectorate of NTB Province between the auditor and P2UPD so that both can perform the duties as regulated in the Regulation of the Minister of State Apparatus Empowerment.

Furthermore, the juridical consequence with the definition of auditor which also includes government supervisory officers in the AAIPI statutes is internal supervision by regional APIP must be performed by the auditor and P2UPD. Although normatively it is not regulated, but it affects the implementation of supervisory duties and the implementation of audit standards and codes of ethics issued by AAIPI. Internal supervision can no longer be done by an ASN who is not an auditor and not a government supervision official. In Ministerial Regulation Of The Empowerment Of State Apparatus

Number 15/2009, there is no clear regulation regarding to the competence / expertise of government supervisors. In contrast to the auditor expressly stipulated in the Article 51 section 5888 and section (2) of Government Regulation Number 60/2008 that “The implementation of internal audit within Government Institution is conducted by the official having the duty to carry out supervision and who has fulfilled the qualification of expertise as an auditor. The requirement of competency of expertise as the auditor as referred to in section (1) is fulfilled through the participation and graduation of the certification program. This has become a dilemma for APIP in the region, especially the Provincial Inspectorate of NTB which has the title of APIP level 3.

At this level, APIP must thoroughly maintain the grade and quality of the audit. The definition of auditor made by AAIPI leads to inhibition of quality improvement and the effort to maintain the quality of audit as required. This condition is caused by government supervisors who also participate in conducting audit, which we already know that they do not have the requirements of competence. As a result, in auditing, the grade and quality of the audit will be questioned by the agency being audited. Government supervisors are only required to attend education and training without any certification / exam program. While the auditor, besides joining the education and training of the formation of auditors, is required to follow the certification program through certification examination of auditor functional position. It becomes an interesting thing for the writer that a job can be categorized as a profession, one of which is the work based on skill education, and usually has to be eligible to pass in order to know its theoretical and practical knowledge. Certification is intended to provide a written guarantee of competency mastery in the field of internal government supervision as a sign of an individual's ability to perform the task.

In view of these conditions, with the auditor's definition by AAIPI that AAIPI indirectly requires the application of certification of expertise for the government supervisors. It is expected to improve the quality of skills and quality of APIP audit results. However, until this time, there is no single organization/institution that provide certification for government supervisors. Within this condition, the Inspectorate of the Province of West Nusa Tenggara through the Inspector issues a Decree on the Procedures for Proposal of Functional Officials of Auditors and P2UPD at the Provincial Inspectorate of NTB.

IV. CONCLUSION

The position of Association of Internal Auditors of the Indonesian Government (AAIPI) in the internal government oversight system is as a forum for the Government Internal Supervisory Apparatus which consists of the functional position of the auditor and the supervisory official of the local government affairs (P2UPD) to accommodate aspirations, the guiding organization for APIP to APIP level capability 3 and the drafting organization guidelines for APIP in implementing internal control.

Implementation of Audit Standards by APIP in the region after the establishment of AAIPI is that the Audit Standards regulate the internal audit activities that can be performed by auditors and APIP leaders in accordance with their mandate and position, duties and functions so that if AAIPI uses the Internal Audit Standards title, the standard made by AAIPI applies to all APIP assignments, not specific audit activities and these conditions are different from the APIP Audit Standards established through the State Minister for Administrative Reform of the State Apparatus Number PER / 05 / M.PAN / 03/2008 which expressly states in its scope that the audit standard applies to audit activities only.

The juridical consequence of the definition of auditor accommodating the position of government supervisor of regional government affairs (P2UPD) is the execution of internal control must be done by auditors and government supervisors. The Leader of APIP shall no longer issue a supervisory mandate to ASN which is not an auditor and P2UPD, and the Government Supervisory Officer must follow the education and training and auditor certification in order to measure the competence and expertise.

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LEGAL PROTECTION AGAINST INTERIM REPLACEMENT (PAW) OF DPRD LEADERSHIP BASED ON GOVERNMENT REGULATION NO. 16 OF 2010

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Abstract: *The Interim Replacement (PAW) has the function of being the mechanism control of a political party which has its representative who sits as a member of parliament. Authority of Interim Replacement (PAW) is regulated in article 213 of Law Number 27 Year 2009 jo. Law Number 17 Year 2014 concerning the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representatives Council and the Regional People's Legislative Assembly. This time-lapse phenomenon often creates legal disputes later on, especially by one of the parties (generally those charged and / or reimbursed) who feel the injustice of what is happening with their positions. Parties, who feel aggrieved in fighting for the injustice they experienced, generally take legal action through the State Administrative Court (Administrative Court).*

Keywords: *interim replacement, political parties, the concept of people's representatives*

0 INTRODUCTION

Interim Replacement (PAW) is often used as a tool to frighten the legislators who sit in DPRD districts / municipalities, provinces or DPR RI by political parties, usually by leaders of political parties at the regional as well as national level, due to certain subjective factors, under the pretext disloyal to a political party as a political vehicle of a particular legislative member. The PAW process is not as simple and easy as it is based on subjective elements, because its legal basis based on the law is very clear as stipulated in Law Number 27 Year 2009 regarding MPR, DPR, DPD and DPRD, has now been amended by Law invite Number 17 of 2014.¹

The interim replacement of members of the People's Legislative Assembly, the Regional House of Representatives and the Regional People's Legislative Assembly shall be elected directly to occupy or hold office of legislature in a period (five years). But in reality it still seizes and keeps many legal issues against the legislative officials who occupy their

Miriam Budiardjo, *Dasar-dasar ilmu politik*, Jakarta: Gramedia Pustaka Utama, 1992

positions after being elected through an electoral mechanism. The legal issue is the existence of Repeat Recalling for legislators. With the existence of Interim Replacement (PAW) is obviously causing harm to officials who still occupy his position. A member of the DPRD has not yet finished his time to take office in one period at any time with his dismissal, by his political party.

Interim Replacement of DPRD members is not unconstitutional. The law provides the provisions (legality principle) for the legitimacy of Time Delivery Substitution. Starting from Law Number 22 Year 2003 regarding the Composition and Status of MPR, DPR, DPD and DPRD, as amended by Law Number 27 Year 2009, Now amended by Law Number 17 Year 2014, Law Number 31 Year 2002 on Political Parties, as amended by Law Number 2 Year 2008, has now been amended by Law Number 2 Year 2011, Law Number 32 Year 2004 regarding Regional Government, as amended by Act Number 23 until 2014, until the Government Regulation No. 16/2010 on Guidelines for Formulation of the Regional People's Legislative Regulations on the Standing Orders of the Regional People's Legislative Assembly shall be affirmed on the terms of the Inter-Time Dismissal. Spread the regulation regarding the Interim Replacement of Members of DPRD.²

Members of Regency / Municipal DPRD, Provinces and DPR RI quit over time due to death, resigned, dismissed. members of the provincial / Provincial DPRD and DPR RI shall be dismissed from time to time if they are unable to carry out their duties continuously or remain permanent as members of the district / municipality, Provincial and DPR DPRD for three consecutive months without any explanation, violating the oath / pledge of office and the code of ethics of the Regency / Municipal DPRD, provincial, is found guilty on the basis of a court decision that has had permanent legal force (*in kracht van gewijsde*), for committing a criminal offense under penalty of five years in prison or more, not attending a plenary meeting and / or meeting of DPRD districts / municipalities, Provinces, whose duties and responsibilities are six times consecutively without any valid reason.

Mechanism of dismissal among recipients of Regency / Municipal DPRD members, provinces as regulated in Law Number 27 Year 2009, as amended by Law Number 17 Year 2014 on the Composition and Position of MPR, DPR, DPD and DPRD, through two the door, which is proposed by the leadership of his political party (Article 384) or by the Honorary Council of the Regency / City DPRD, provincial (Article 385). From the provisions of Law Number 2 Year 2008 jo. Law Number 2 Year 2011 as well as Law Number 27 Year 2009 jo. Law Number 17 Year 2014 hegemony of political parties in the right of recall is still very large. Recall criteria set forth in Article 383 paragraph (2) letter e jo. Article 384 paragraph 0 of Law Number 27 Year 2009 jo. Law No. 17 of 2014 with the clause „proposed by its political parties in accordance with legislation“ is a criterion that may be unmeasurable, because of its subjective nature and the potential for arbitrariness perpetrated by party oligarchy to protect party members from the arbitrariness of party leaders, every political party should provide the forum and formulate its own internal mechanisms in the ART to accommodate those needs in a balanced, fair and non-arbitrary way. On the other hand, political parties must also be protected from the pragmatic behavior of party cadres who only use political parties merely as vehicles or stepping stones to become parliamentarians, thus undermining the party's policy line.

The polemic that occurred in connection with the validity of recall rights by political parties is due to the fact that the current members of the Regional House of Representatives

0Mulyana Kusumah and Baut, Paul S, *Hukum Politik dan Perubahan Sosial*, YLBHI, Jakarta, 1988

(DPRD) are sitting as members of parliament because of the legitimacy of the popular vote in the sense of being directly elected by the people, and not from the votes of political parties. So the legitimacy of political parties in terms of me recall members who have sat in the seat of the DPRD should be questioned. Moreover, several cases of recall by political parties against DPRD members occurred solely for political reasons of the party. Moreover, in the provisions of Article 5 paragraph (1) Law No. 2 of 2011 on Political Parties confirms that “AD / ART may be amended in accordance with the dynamics and needs of Political Parties”, which means it does not meet the legal certainty principle and adds unclear recall arrangement by political parties.

Based on the thoughts that have been described in the background mentioned above, it can be raised the problem of how Legal Protection against the leadership of the DPRD conducted Interchange Time. This research is an empirical normative legal research using the Statute Approach by examining all laws and regulations relating to the issues discussed and the conceptual approach, by examining the views/concepts of experts pertaining to the problem discussed. Analysis of data and legal materials using qualitative descriptive analysis using the induction analysis framework is to draw conclusions from a special thing to the general. In this case the practice of replacing the time between the leadership of the DPRD NTB as a fact that took place today, compared with the legislation on the interim replacement of the Chairman of the Parliament that applies nationally.

0 RESULT AND DISCUSSION

2.1 *Legal Protection through the Administrative Court of Justice (PTUN)*

According Prajudi,³ the presence of the Administrative Court of Justice (PTUN) within the scope of the judiciary in Indonesia, in principle also carries out the general functions of government, namely providing protection both to the public and to the government. In addition, the State Administrative Court aims to maintain the development of the State Administration Law itself, namely to develop and maintain state administration, appropriate by law (*rechtmatic*), or appropriate by law (*wetmatig*), or appropriately functional (effective) and functioning efficient.

The special function of the Administrative Court of Justice as a judicial institution is to become a tool of public control over the conduct of government administration. According Soegiyatno Tjakranegara,⁴ control functions carried out by this State Administrative Court, in accordance with the speech of the Minister of Justice of the Republic of Indonesia in welcoming the DPR’s approval of the Bill on PTUN dated December 20, 1986 as follows:

“While we acknowledge the importance of the State Administrative Court and welcome the birth, we must place the presence of the State Administrative Court proportionally in the perspective of a clean and authoritative government apparatus. In such contexts the State Administrative Court is a judicative repressive control, following the occurrence of administrative irregularities or abuse “.

The existence of judicative repressive controls carried out by the Administrative Court, in dealing with irregularities perpetrated by administrators, can be an effort to realize a clean and authoritative government. The modern government is orderly, clear and fluent.

⁰ Prajudi Atmosudirdjo S, *Administrasi dan Manajemen Umum*, 1982.

¹ Soegijanto Tjakranegara, *Hukum Acara Peradilan Tata Usaha Negara*, Penerbit Sinar Grafika, Jakarta, 2005.

According to Ismail Saleh,⁵ the lack of clarity of the rules, which form the basis for the settlement of the affairs, the amount of fees to be paid and the term of the settlement, result in inefficient legal services, burdening the public and causing uncertainty. So that condition leads to high cost economy.

Concerns raised by the critics are not without reason, because if the understanding of the PTUN as a tool of repressive control, really strictly executed, it is not impossible that such pressure is strong, it leads to counterproductive. The highly repressive use of administrative justice will cause the government, or in this case state officials and administrative bodies, to be very careful and in the end they will not do anything.

The above concerns, apparently did not occur in the implementation of PTUN today, not exactly the case the opposite, the Administrative Court is considered less able to serve the needs of the community will access administrative justice. The concern itself, apparently a manifestation of attitudes and views of the science of State Administration Law that developed at the time, which tends to provide excessive protection to officials and state administrative bodies.

There is a need for a new understanding and perspective on the existence of the State Administrative Court as a judicial institution. This means that the presence of the State Administrative Court as the access to justice of the people, is not negotiable, but on the other hand the existence of the State Administrative Court is not an obstacle to existing government mechanisms. The State Administrative Court should be understood, as a balancing tool, between the interests of the state and the interests of the people.

2.2 *Factors Underlying the Dispute*

The growing political dynamics in political institutions in Indonesia is a natural process that always emerges in the reform era. Similarly, PAW, especially in the legislature is something that is natural to happen in democracy.

However, the question of interim turnover (PAW) of a member of parliament absolutely becomes the affairs of each political party. The process still begins with the relevant political party as a legislative candidate, it can not be denied even if the PAW there is an insistence from the community and not necessarily directly be replaced without going through established processes and rules.

Interim Replacement (PAW) of a member is not carried out as originally dislodged, but is made in accordance with established rules and legal mechanisms, in this case Law number 22 year 2003 jo Law number 17 year 2014 on the composition and position of MPR, DPR, DPD, and DPRD. While the operational implementation is elaborated in detail with Government Regulation No. 25 of 2004 on Guidelines for the Preparation of the Rules of Procedure of DPRD as amended by Government Regulation number 53 of 2005 on Amendment to Government Regulation number 25 year 2004. In addition to the Laws Regulation, PAW mechanism also shall be regulated in Decree of the Minister of Home Affairs as stipulated in Decree No.161.74-55 / 2008 dated 8 February 2008 on Inauguration of Termination and PAW.

Interim Replacement (PAW) of the DPRD Leadership becomes interesting to be studied from the perspective of constitutional law. This is related to the provision of PAW for

Ismail Saleh, *Ketertiban Dan Pengawasan*, Penerbit Haji Mas Agung, Jakarta, 1988

members of the recalling board. Recalling backgrounds are different between board members, ranging from political party stewardship, council members' criminal acts, and differences of views related to the political party's interest orientation based on the party's articles of association and budget. However, the interest factor of the party's political party is very dominant in determining the recalling. Recalling members of the local parliament who also always raises internal conflicts between the political party officials and the replaced members of the council.

At the beginning of the actual reform recalling was abolished in accordance with the provisions of Law No. 4 of 1999 jo Law number 17 of 2014 on the Composition and Position of the MPR, DPR and DPRD. But then in 2003 recalling reappeared with regulation in Law number 31 year 2002 jo Act number 2 year 2008 as already amended by Act number 2 year 2011 about political party.

The recalling arrangement is influenced by the problems faced by the DPR / DPRD to discipline its irresponsible members and not to function as members of the council. But recalling another livelihood here is also very vulnerable to deadly critical attitudes among council members against the policies of his party. Although admittedly, the recalling article is quite a dilemma. If no, members of the people's legislature can work as they please. The only sanction that can be dropped is simply not re-elected in the next election. However, if enacted, the chances of political parties to abuse it as happened in the past are open again.

Interim Replacement (PAW) for members of the council is regulated in Law number 22 of 2003 jo Law number 17 of 2014 on the Composition and Position of the People's Consultative Assembly, DPR, DPD and DPRD. PAW for MPR, DPR, DPD and DPRD members shall be stipulated in Article 84 through Article 97 of Law Number 22 Year 2003 in conjunction with Law No. 17 of 2014. According to the law, the decision of the PAW of the People's Representative Body is due to: death, resigns as a member upon his/her own request in writing, and proposed by the political party concerned.

The proposal for dismissal of members of the People's Legislative Assembly by a political party shall be based on the reasons referred to in Article 12 of Law Number 31 Year 2002 in conjunction with Law No. 2 Year 2011 on Political Parties. The article affirms that members of a political party who are members of a representative body of the people may be dismissed from the representative body of the people if; declare to withdraw from the membership of the political party concerned or declare to be a member of another political party; dismissed from the membership of the political party concerned for violating the articles of association and bylaws; or violate the laws and regulations that cause the person to be dismissed.

For the stages of submission of PAW, the legislative members of the People's Legislative Assembly according to Law No. 22 of 2003 jo Law No. 17 of 2014 are as follows: First, the PAW members of the House of Representatives stages the submission as follows: Political Party proposes to House Leadership, DPR Leadership asks for verification to the Election Commission KPU), House Leadership conveyed to the President to inaugurate PAW with recommendation from KPU, President to make Decision Letter (SK) concerning PAW, Second, PAW Provincial DPRD stage of submission as follows; Political Party proposes to the Chairman of the Provincial DPRD, the Chairman of the Provincial DPRD asks for verification to the Provincial KPU, the Head of the Provincial DPRD submits to the Minister of Home Affairs through the Governor to inaugurate the PAW with the

recommendation of the Provincial KPU, the Minister of Home Affairs makes a Decree on PAW, Third; PAW member of Regency / City DPRD stage of submission is as follows; Political Parties propose to the Chairman of the Regency / City DPRD, the Head of the Regency / City DPRD asks for verification to the Regency / City KPUD, the Head of the Regency / City DPRD submits to the Governor through the Regent / Mayor to inaugurate the PAW with the recommendation of the Provincial KPUD, the Governor makes a Decree (SK) about PAW.

The mechanism above shows that the decision of PAW involves four parties, namely Political Party, Board Leader, General Election Commission, and President. But the key lies in the political party because it becomes the party that determines the size of PAW members of the board while the other three parties are only administrative.

The problem is the size of recalling is not very assertive and tends to be easily engineered by the political parties concerned. One measure of recalling is based on statutes and households of political parties. Whereas the interpretation of violations of the articles of association and the household budget must be very different in accordance with the interests concerned.

In order for the implementation of recalling not causing anti-democratic actions, the implementation of the recalling provisions needs to be evaluated. For example, to discipline DPR / DPRD members in order to perform well. On the contrary, in the implementing regulations, it should be clearly stated that the members of the People's Legislative Assembly who have different views from the leaders of the political party or the government or the owners of capital supporters of political parties and the government cannot be subject to recalling. Recalling decisions should be based on a violation of a criminal offense or a code of ethics. For violation of the code of ethics it also must pay attention to the aspirations of its voters that can be done through a motion of not believing that the mechanism can be searched as effective and as cheap as possible.

After the DPR and the Government have agreed on the new Susduk Law, a number of political parties are planning to propose the dismissal of a number of DPR / DPRD members who are no longer members of the party. Two issues need to be addressed from the new law, when this law is enacted. Are the requirements and procedures for the replacement of members of DPR / DPRD clear enough so that they do not contain and invite multiple interpretations.

The two provisions of the Transitional Provisions in this law give a message; at least the impression is inconsistent with each other. Article 109 states that the composition, position, membership and leadership of the People's Consultative Assembly, DPR, Provincial DPRD and Regency / Municipal DPRD resulting from the 1999 general election shall be valid until the deliberations and the people's representatives of the 2004 election results are formed. However article 111 states the declaration of interim turnover (PAW) of members of the MPR, DPR, Provincial DPRD and Regency / Municipal DPRD is declared valid since the law is passed. These two articles can be read differently, first, does not PAW members of the DPR / DPRD change the membership of DPR / DPRD?

Second, interim turnover is not included in the provisions of Article 109 because PAW is a requirement of every organization. Therefore, PAW must remain possible with or without new law. The new Act of Structure and Procurement only affirms that the provisions of the PAW used are not the old provisions based on Law No. 4 of 1999 but under the new law of Susduk. Which reading should be followed?

Arrangement of PAW of DPR and DPRD members according to Law Number 22 Year 2003 Jo of Law Number 17 Year 2014 on Structure and Status (Susduk) of People's Consultative Assembly, DPR, DPD, and DPRD, both replacement mechanism and change mechanism, much clearer and more certain than PAW in Law Number 4 Year 1999 on the MPR, DPR and DPRD Susduk. The replacement of members of the DPR / DPRD is divided into two categories, stopped for one of three reasons (died, resigned and proposed by a political party), and dismissed for one of five reasons.

Decision-making on the replacement of DPR / DPRD members is also divided into two ways: as decided by the House / DPRD Leadership because they do not require investigation and consideration, as well as those decided by the Honorary Board of the DPR / DPRD as they require careful investigation and consideration.

The new Structure and Counsel Law provides three answers. Firstly, members of the DPR / DPRD who are stopped or dismissed between elected time in the general election due to meeting the number of electoral divisor (BPP) or voting more than half the BPP will be replaced by the candidate who gets the most votes in the next list of votes in the electoral district same. This answer is clear without the need for interpretation.

Second, members of the DPR/DPRD who are stopped or dismissed between elected times in elections outside the two categories of elected means will be replaced by the next sequential number candidate from the list of candidates in the same electoral district.

This answer is not very clear what is meant by "in addition to the two categories" of the chosen way. Whether in addition to the two categories is still within the framework of the number of votes obtained, ie the number of votes obtained did not reach BPP and did not get more than 50 BPP. Or, also include other elected ways that are not based on the number of votes the candidate earns, such as based on the serial number in the permanent candidate list?

Third, if the first and second category replacements resign or die, the successor is based on the order in which the votes are ranked or the sequence of the next list of candidates. The replacement mechanism of DPR / DPRD members based on the number of votes obtained by candidates, of course, refers to the procedure for determining the elected candidates for DPR / DPRD members based on Law Number 12 Year 2003 regarding General Election of DPR, DPD and DPRD members. According to this last law, after the contested seats in each electoral district are divided up to the political parties participating in the election then the political party allocates the seats it earns to those whose names are on the candidate list. Candidates earning a vote reaching the BPP will be declared elected even though the person is the last serial number in the candidate list. In the absence or absence of a candidate receiving the number of votes reaching the BPP, the seats obtained by the political party shall be allocated to the candidates according to the candidate number.

Thus, the mechanism for determining the replacement of DPRD members who are stopped or dismissed from time to time is not entirely the same as the procedure for determining the elected candidate stipulated by Law Number 12 Year 2003. This difference does not matter because the two laws regulate different things. Election Laws, among others, regulate the determination of elected candidates, the Law of Suspects, among others, regulates the replacement of members of DPR / DPRD between times.

2.3 *Substitution Between Leadership of DPRD According to Principles of Pancasila Democracy*

The principle of freedom in the 1945 Constitution has been reflected in the provisions of Article 28, Article 28E, Article 28G Paragraphs (2), and Article 28I Paragraph (2). Article 28 of the 1945 Constitution states that “freedom of association and assembly, issue of thought with oral and written and so on is stipulated by law”. When viewed from the duties and obligations of members of parliament as representatives of the people who sit in parliament as regulated in the law, then the existence of recall rights by political parties may limit what it wants to realize from the provisions of Article 28 which entitles each individuals to express their thoughts both in writing and orally. If viewed from its position, a member of the elected political party and subsequently inaugurated as a member of the DPRD then the position of the member of the political party is no longer a party official but has become a public official. Consequently, members of the People’s Legislative Assembly shall be subject to public law regulating the rights, and duties and duties of members of the DPRD, including implementing the code of ethics of the members of the DPRD itself.

Recall rights become steep roads for DPRD members. Then, if seen again in the provisions of article 28E paragraph (3) of the 1945 Constitution clearly reaffirmed by the constitution, that individuals in this case citizens of Indonesia are given full right to express opinions. So if it is associated with the right of recall then it can be said recall right again become a challenge for DPRD members in carrying out their duties.

Furthermore, if judged by Article 28G Paragraph (2) of the 1945 Constitution which states that “Everyone has the right to be free from torture or degrading treatment of human dignity and entitled to obtain political asylum from other countries”. So it can be said that when the right of recall is implemented against members of the DPRD for reasons of violation of the AD / ART or indeed only because of political interests only it can be said that the right of recall can degrade the dignity of the members of the DPRD recall, this is because members DPRD which is already directly elected by the constituent based on the most votes and not to mention the expenses incurred during the campaign will be seen to degrade the dignity of the members of the relevant DPRD if it is recalled during his tenure. However, the recall is understandable if the reason for recall consideration is caused by a violation of the law or a violation of the code of ethics by the members of the respective DPRD.

If the reasons for recalling are caused by the reasons set forth in the letters e, h, and l in Article 213 paragraph (2) of Law number 27 of 2009 or listed in d, g, and h in Article 239 paragraph (2) Of Law No. 17 of 2014, it can lead to legal uncertainty. In this case, the DPRD member already has the position of the State official not as the officer of the political party anymore, hence for that reason, the right of recall is not in accordance with the expectation to be realized in the provision of Article 28D paragraph (1) of the 1945 Constitution.

When viewed from the provisions of article 28H paragraph (2) stating that “Every person shall have the right and privilege to have equal opportunities and benefits to achieve equality and justice”. In the case of carrying out its duties and obligations, members of the DPRD should get the ease, in which case the political party no longer puts pressure on its members who are in parliament to adapt or implement what has become the party’s policy line. From the articles reflecting the principle of freedom in the 1945 Constitution, the recall right by political parties is not in accordance with the principle of freedom in the 1945 Constitution.

The principle of majority vote can be shown in the provisions of Article 2 paragraph (3), Article 6A paragraph (3) and paragraph (4), Article 7B paragraph (3) and paragraph (7), and Article 37 paragraph (4) of the 1945 Constitution. Has shown that the results to be realized in the article are the application of the most votes in decision-making. Decision of MPR determined by majority vote. Then, in the case of determination of the president and / or vice president also based on votes of more than 50%. In this regard, concerning the MPR's decision on the proposal for dismissal of the President and Vice President also requires a majority vote in this matter requiring a plenary session of the People's Consultative Assembly, to be attended by at least 3/4 of the number of members and approved by at least 2/3 of the number of DPR members present.

In the determination of dismissed DPRD members due to suggestions from political parties as well as the results of decisions of the Honorary Board DPRD, there is no provision in this regulation to require the approval of the majority of other DPRD members in plenary sessions. In fact, when viewed from the provisions concerning the dismissal of the president and / or vice president as set forth in Article 7B paragraph (3) and paragraph (7) of the 1945 Constitution, this becomes the gap between the mechanisms of dismissal of the president and / or vice president with the dismissal of DPRD members. So from the correlation of these provisions within the scope of principle of majority vote, the right of recall is not in accordance with the principle of majority vote.

In the case of involvement of constituents concerning recall rights proposal by political party also not yet accommodated in Law Number 27 Year 2009, Law Number 17 Year 2014 and Law Number 2 Year 2011 about political party. Whereas the electoral system used in selecting legislative members in this case members of the DPRD one of them, namely using an open proportional system based on the majority vote. So constituents are also entitled to the opportunity to propose a recall of members of parliament who he thinks is problematic based on the reasons set forth in the provisions contained in the law regarding the dismissal of members of parliament.

However, the reason for dismissal of DPRD members is not only due to violations of law but also performance reasons that are not in accordance with the direction of party policy or poor performance can be proposed recall by political parties. It can be said that the recall right mechanism is not in accordance with the principle of accountability. Though the task as a public official in this case as a member of the DPRD is responsible for the duties and obligations to the people. So it is not accountability to political parties anymore, but accountability to the people. Yet based on the theory of popular sovereignty that the sovereignty of the people in a democratic system is reflected also from the expression that democracy is a system of government from the people, by the people and for the people (government of the people, by the people, for the people). Then the elected DPRD members are now the result of the legitimacy of the people through the general election, so the responsibility is automatically to the people who have given legitimacy.

The right of recall by political parties is a means provided by law to replace the interim time of members of political parties that sit as members of parliament. Though it is the duty of parliament to voice the aspirations of the people as originally said parliament, namely *le parole* which when translated into English means to speak, or voiced.

In terms of its impact, the right of recall by political parties has a negative impact on the political life of the country. Negative values that can arise include: First, it can curb and bind the logic of a critical member of the DPRD and want to voice its constituents. Second, to

form the mentality of DPRD members to fear their parent organization (Political Party), which can cause DPRD members to prioritize and prioritize the interests of their political parties, rather than voice their constituent aspirations.

Based on several other reasons, it is clear that the recall of political parties will shift the sovereignty of the people into the sovereignty of political parties. Whereas the sovereignty of the people in a democratic system is a system of government from the people by the people and to the people. In addition to contradicting the principles of popular sovereignty governed by the 1945 Constitution, the right of recall against members of parliament by political parties is not in accordance with one of the principles of popular sovereignty which has been expressed by Hatta the fourth is culture, which contained the values of freedom of religion, freedom express opinions, and freedom to study. In this case about freedom of expression. The right of recall can be said to be a barrier for DPRD members to be able to fight for what is in the interests of the people of parliament. Recall right becomes a frightening specter for DPRD members.

The right recall should be abolished because members cannot be objective to the people for fear of the faction. The existence of a recall system caused many people's representatives to become uncritical, even afraid to voice the people's aspirations. Article 16 Paragraph (3) of Law Number 2 Year 2011 on Political Parties determines in the event that members of a dismissed political Party are members of a representative body of the people, the dismissal of membership of a Political Party shall be followed by the dismissal of membership in a representative body in accordance with the law; invitation. Such an attachment basically confirms that DPRD members are delegates of political parties that win the seats of the DPRD in the election process.

As representatives of political parties, DPRD members cannot express thoughts or opinions, and or actions that differ or deviate from the establishment or policy established by political parties, even if the thoughts, opinions or actions of DPRD members conform to or reflect the aspirations and or interests of the community from the electoral district of the DPRD member concerned.

When a political party assesses that its member of parliament has been different or deviates from the party's policy line, the party may at any time replace it with another messenger. The implementation of state power is determined by political parties either directly or indirectly. Moh. Hatta also once said:

“Recall rights conflict with democracy let alone Pancasila democracy. Leaders of political parties have no right to cancel their members as a result of the election. Apparently in reality the party leadership feels more powerful than the voters. If so, he suggests that the election be abolished. Basically the right recall is only in communist and fascist countries that are totalitarian “.

This means that as long as the majority still have not decided, then the discussion of a problem continues. However, if it has been agreed and the decision is announced then everyone is silent, and the supporters and opponents of such action unite in approving the accuracy of the majority decision.

Based on the above matters, it can be said that the right of recall of political parties based on violation of AD/ART to DPRD membership is not in accordance with the principles of people's sovereignty under the 1945 Constitution of the State of the Republic of Indonesia.

0 CONCLUSION

Legal protection of the DPRD Leaders who are in the Inter-Time Substitution in the event of internal conflict of a party, in accordance with the applicable political party law in Indonesia this is done through the court of the political party first, if not achieved can be resolved through the District Court (PN) and the Supreme Court (MA). Can also through the State Administrative Court (PTUN) against the Decree (SK) issued by the authorized, in this case the Minister of Home Affairs (Home Affairs). The State Administrative Court is a more competent court. The State Administrative Court may adjudicate the dispute between PAW DPRD as seen from the elements of the decision of the inauguration of PAW members of the DPRD, in accordance with the elements of the Decision of State Administration.

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THE EXISTENCE OF COMMUNITY FOREST AFTER THE ENACTMENT OF LAW NUMBER 23 YEAR 2014 ON REGIONAL GOVERNMENT

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Abstract: *This study aims to analyze the existence of community forest after the implementation of Law Number 23 Year 2014 on Regional Government. This research is normative law research, Community Forest which hereinafter called HKm is; State forest utilization is primarily aimed at empowering local communities. The empowerment of local communities is an effort to enhance the capability and independence of local communities to benefit optimally and equitably from forest resources through capacity building and access provision in the context of improving the welfare of local communities. Community empowerment is also to overcome the problem of poverty, the community get the assurance of access to manage forest area, HKm able to change the paradigm of centralized forest management, which has caused deforestation, marginalization of community rights, marginalization of culture and poverty, and HKm expected to solve conflicts forestry, by providing access and management rights related to community claims in the forest area, the context of the sustainability of economic transformation, the culture of the community in forest areas that require recognition and certainty. Community Forestry Arrangement and Implementation which is one of the policies of granting forest rights to groups is not actually community-based, Community Forest is a unit of patterns compiled from groups based on modern management, and management models these groups are not recognized by the community in the history of forest management, and the existence of Community Forest after the enactment of Law No. 23 of 2014 is still very far when compared with the Government target that has targeted the achievement of social forest at least 12.7 million hectares until 2019 .*

Keywords: *community forest, operation, management of HKm*

5888 INTRODUCTION

Forests have a position and a very important role in encouraging national development, the foundation of forestry development is Article 33 Paragraph 3 of the 1945 Constitution of the State of the Republic of Indonesia namely; Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.¹

11776 The 1945 Constitution of the State of the Republic of Indonesia which has been amended by his explanation, Apollo, Surabaya, 2009, p. 23.

Understanding is not master owned, but an understanding that contains obligations and authority in public law. namely the right of the state to; Implement and manage the planning, designation, provision and use of the forest in accordance with its function in providing benefits to the people and the state, regulating forest management in a broad sense, and defining and regulating legal relationships between persons or legal entities with forests, legal acts concerning forests.²

Forest management systems in Indonesia are more profitable for the country than timber sales. This, in turn, makes the government have enormous powers in regulating and controlling the use of forests, only those licensed by the government may use forest products, and those parties are limited to private companies or state enterprises. However, on the other hand, the community considers forest to be the common property of this nation, thus the community should be able to take direct advantage of the forest.

Communities in forest areas are generally classified as a class of disadvantaged people, the socioeconomic conditions of this class of people are generally poor. Forest utilization by holders of Forest Management Rights (HPH) often ignores the community's interest in forest areas over forest resources, which makes the population's access to forest benefits very limited. So the economic status gap between the local indigenous population and the outsiders is getting higher. The enactment of Law Number 41 Year 1999 on Forestry is one of the efforts to improve the old system of forest management in Indonesia. Where communities are said to have the right, even greater obligation, to engage in forest management. Therefore, through the Community Forest or abbreviated HKm as one of the policy frameworks issued by the Ministry of Forestry to reduce deforestation rate in Indonesia by involving the community, many people view this policy as a state recognition of forest management by the people who have been neglected.

Community Forest or HKm is a state forest whose utilization is primarily aimed at empowering local communities, while the empowerment of local communities is an effort to improve the ability and independence of local communities to benefit optimally and equitably from the forest resources through capacity building and access provision in order to improve the welfare of the community local.³

HKm in addition to aiming for community empowerment also to overcome the problem of poverty by opening access and space forest area for the community. Through HKm, communities gain assurance of access to participate in managing forest areas, becoming a source of livelihood, the availability of water utilized for households and agriculture. for the government, HKm can contribute indirectly by the community through self-help/self-directed rehabilitation and forest protection, while for the forest itself the function of habitat restoration, crop diversity, the maintenance of ecological and hydrological functions, and preserve the natural wealth of flora, fauna that has been there before, in addition, HKm is expected to change the paradigm of centralized forest management, which has led to deforestation, marginalization of community rights, marginalization of culture and poverty, and also HKm, is expected to resolve forest conflicts by granting access and the right to manage related to community claims in the control of forest area.

In that context, HKm is expected to ensure the sustainability and transformation of the economy and culture of the community in forest areas that require recognition and certainty.

⁵¹² Salim, HS. *Dasar - Dasar Hukum Kehutanan*, Edisi Revisi, The fifth edition 2013, Sinar Grafika, Jakarta 2013, p.

0 Regulation of the Minister of Forestry of the Republic of Indonesia Number: P.88 / Menhut-II / 2014 About Community Forest.

Related to that, in the implementation of HKm, there are still many problems and challenges that occur in the practice of implementation, such as the process of determining the working area of HKm and IUPHKM longer than the time specified according to the rules and the absence of strict sanctions on the delay of the process, centralization to obtain IUPHKM, HKm recognition and licensing process, Regulations on HKM that are not synchronized, high requirements that must be fulfilled in preparing the general plan (RU) and operational plan (RO), Forest area administration policy until now there is no clarity of rights of society to manage forest areas, and land legality conflicts have not been resolved. Of the many problems that arise in the implementation of HKm so far and that has not been resolved, then faced with shifting transfer of authority of the central government, provincial and district / city, with the withdrawal of Law Number 32 Year 2004 with all its changes, replaced by the Act Number 23 Year 2014 About Local Government. The matter of government affairs consists of absolute, concurrent and general government affairs, in the division of the affairs provides a distinction with the previous law especially in the administration of government affairs in the field of forestry, there is a drastic change related to the authority of the Regency / City Government in the affairs of the forestry field. District / municipal governments have only one authority or affairs, namely the Implementation of Forest Park Management (Tahura), and become part of the sub-affairs of conservation of biological natural resources and their ecosystem. This indicates that forestry affairs again become centralized, although there are provincial governments that still have considerable authority. But the provincial government is actually an extension of the central government through the concept of DE concentration. This is inversely proportional to the forest management orientation set forth in Law No. 41 of 1999 on Forestry, which expressly states that the government handed over some authority to the local government.

Based on the complex problems occurring in the field of forestry, particularly in the management of community access rights through Community Forest after the enactment of Law Number 23 Year 2014 on Regional Government, there is a tendency to recall or centralize the authority of district / municipal governments by the central government through intermediaries provincial government that became an extension of central government. This indicates some overlapping of regulation between Sector Act i.e.; (Law No. 41 of 1999 on Forestry with Law No. 23 of 2014 on Regional Government).

From the description above, the writer wants to see the existence of Community Forest after the enactment of Law Number 23 Year 2014 About Local Government. This research is normative law research Problem approach used is Statutory Approach, Conceptual Approach, Historical Approach and Case Approach.

0 DISCUSSION

Indonesia is known as a country. Which has the last tropical rainforest (tropical rain forest) forest area in Indonesia is experiencing serious degradation. This is in addition to the fact that the number of people who rely on forests as a source of livelihood continues to increase, as well as the government has consciously exploited forest resources as the most dependable source of income and state revenues after natural resources of oil and gas in terms of economic development. The exploitation of forest resources by the government has contributed to economic growth in Indonesia. Through the policy of granting Forest Concession Right (HPH) of Forest Product Harvesting Rights (HPHH) or Industrial Timber Estate (HTI), the government is able to boost national economic growth, increase revenues and foreign exchange, absorb labor, drive the economy and increase local revenue. But on the other hand the destruction of forest

resources due to uncontrolled and uncontrolled exploitation consistently, causing ecological costs also caused social and cultural damage, including restrictions on access and displacement of community rights and the emergence of conflicts over the utilization of forest resources in the region.

Government's forest resources exploitation policy proves that degradation of forest resources in Indonesia is not solely due to population density, low level of economic prosperity of the community, which tends to be associated with community life around forest areas that have shifting cultivation traditions. However, the damage to forest resources is precisely because of the choice of state-based development paradigm, the use of centralized development management and solely economic growth oriented, supported by repressive law and policy instruments.

Starting from the New Order government through the development of national economy oriented to pursue economic growth (Economic Growth Development). to realize the rapid rate of economic growth, the government issued a policy to open economic opportunities and business opportunities by inviting investors to invest in Indonesia and the government consciously exploit forest resources and other natural resources, especially oil and gas, as a source of income and foreign exchange state (state revenue) to finance national development. To support the implementation of capital-oriented development policies (oriented capita) and oriented to pursue economic growth alone by prioritizing the achievement of certain growth targets, the government created a legal instrument (legal instrument) which begins with the ratification of Law No. 1 of 1967 on Planting Foreign Capital (PMA), then followed by Law Number: 6 of 1968 on Domestic Investment (PMDN), Immediately after the PMA Law is invited by the Government, To support the increase of foreign investment and domestic capital in the exploitation sector forestry, the government establishes a legal instrument beginning with the establishment of Law Number 5 Year 1967 on Basic Forestry Provisions.

To implement the provisions concerning forestry concessions underlying the policy of granting forest resource exploitation concessions, the Government Regulation No. 18/1975 on the Rights of Forest Exploitation and Forest Product Harvesting Rights (HPH and HPHH) is issued. After this Government Regulation is issued, massive forest resource exploitation activities are initiated by the government through the granting of HPH concessions and HPHH to foreign and domestic capital owners in the form of BUMS, BUMN. From the economic point of view of giving HPH and HPHH concessions to BUMS, SOEs actually contributed positively to the improvement of Indonesia's economic growth. However, from another aspect of the policy of granting non-open and non-selective forest concessions, it contains elements of KKN so that concessions are controlled by certain people or foundations that have strong access to the ruling elite, coupled with weak controls, and law enforcement, there is an uncontrolled and untouchable exploitation of forest resources by logging concessionaires and HPHH concessionaires. Ecological consequences occur in the degradation of quantity and quality of tropical forests in various regions in Indonesia, from the economic side there are limitations and the loss of local community life sources, from the socio-cultural point of view, local community groups, especially the people who are hereditary live and live around the forest. Victims of development, displaced and neglected and freezing access and their rights to forest resources, there have been prolonged conflicts over the management and utilization of forest resources between local communities and governments and concessionaire's forestry.

Reform era can be observed that the phenomenon of the law of management of forest resources that are produced ideologically has not changed, legal products in the form of

Government Regulation Number 6 Year 1999 About Forest Exploitation and Production Forest Production contains the content of soul, spirit and substance which in principle is not different with Government Regulation Number 21 Year 1970 regarding HPH and HPHH. The legal products of the legislative and executive institutions in the reform era in the form of Law Number 41 Year 1999 on Forestry, ideologically and substantially are not much different from Law Number 5 Year 1967 as the product of forestry law of the New Order era. Centralized, and merely oriented to economic growth.

The Community Forestry Policy was issued in 1995 through Decree of the Minister of Forestry Issuance No. 622 / Kpts-II / 1995 of its follow-up, the Director General of Forest Utilization, supported by NGOs, Universities and International Institutions, trials in various places in forest concession management involving local community. Until 1997 HKM recognition form is still very small, then the Minister of Forestry issued a Decision Number. 677 0Kpts-II / 1997 by amending Decision Number. 622 / Kpts-II / 1995. This regulation provides a space for the granting of forest utilization rights to communities known as Community Forestry Rights (HPHKm) which are limited to non-timber forest utilization. The promotion of HKM forms is an approach that can minimize forest degradation and improve the level of the community's economy. The Minister of Forestry is amended by issuing the Minister of Forestry Decree No. 31 / KPTS-II / 2001 with the existence of this decision; the community is given greater flexibility as the main actors in forest management. The policy was further refined through Minister of Forestry Regulation No. P.37 / Menhut-II / 2007 on Community Forests and subsequently followed by its amendments (Minister of Forestry Regulation No. P.18 / Menhut-II / 2009 Permenhut Nomor: P.13 / Menhut-2010 to Permenhut Number: P.52 / Menhut-II / 2011) and subsequently refined by the Minister of Forestry Number. P.88 / Menhut-II / 2014 about Community Forest. In the regulation, the government explains the technical guidance regarding the procedures for obtaining HKM's rights, including details of the licensing process and the granting of Permit for Utilization of Community Forest Management (IUPHKm).

There are three main issues that must be considered in the management and utilization of forests that involve the community in order to build forests, namely:⁴

- 0 This effort should be directed (targeted) means that what is done is directed directly to those who need and according to their needs designed to solve the problem.
- 1 Must directly engage or engage the community in the management and utilization of the targeted forest, with the objectives in accordance with their will, capabilities, and needs, to continuously improve empowering communities with experience and designing, implementing, managing, and sustainable.
- 2 Using a group approach, because if individually the community is difficult to solve the problems it faces.

Expectations through the pattern of land management in the forest area of forest sustainability are maintained and the improvement of forest functions can be improved, and the benefits of multipurpose plant system (multi-purpose trees species can improve the welfare of the community).⁵

⁰ Otto Soemarwoto, *Atur diri sendiri, Paradigma Baru Pengelolaan Lingkungan Hidup*, Gajah Mada University Press, Yogyakarta, 2001. p.27.

¹ Dodik Ridho Nurrochmat, *Strategi Pengelolaan Hutan, Upaya Menyelamatkan yang Tersisa*, PustakaPelajar. Yogyakarta, 2010, p.1

The existences of Community Forest there are several benefits that can be obtained for the community, the government and the forest functions, namely:⁶

0 For HKm community can

Provide certainty of access to participate in managing forest area.

Be a source of livelihood.

The availability of water that can be utilized for households and farms is maintained. and

Good relationship between government and other related parties.

1 For HKm government can:

Indirect contributions by communities through self-help and self-directed rehabilitation.

HKm activities have an impact on forest observation.

2 For forest functions and habitat restoration

Establishment of plant diversity.

The maintenance of ecological and hydrological functions, through mixed cropping patterns and technical conservation of applied lands.

Maintain natural wealth of pre-existing flora and fauna.

In the implementation of HKm the existence of Tenurial Conflict, this emerged as a result of specific policy conflicts namely forestry law No. 41 of 1999 and UUPA Number: 5 Year 1960. On the other hand forest tenure conflict is also caused by sectorial policies, gap between ownership and control, fragmentation of customary forests, or the difficulty of recognizing customary forest based on the rules of Forestry Law Number 41 Year 1999. Differences of stakeholders' perceptions, regulatory conflicts between formal and informal, and horizontal conflicts between communities.⁷

Community Forest is part of the application of the concept of Social Forestry; the goal of this social Forestry is divided into long-term, short-term goals.

0 Long-term goals, social forestry are improving critical land conditions, active participation of local communities in forestry development, improving the welfare of local communities, providing the needs of local communities, from within forests and conservation of natural resources.

1 The short-term goal, social forestry is for the establishment of forest farmer groups (KTH) for improved crops (forestry and agriculture) and increased income for members of forest farmer groups.⁸

The legal certainty that the government gives to the people in the management of Community Forest is a concrete form of government concern for the welfare of the people around the forest. Community Forest management efforts in principle can prosper the community, the forest must be sustainable, and that principle must be inherent, based on the mandate of the legislation.

2.1 Implementation and Implementation of Law Number; 23 of 2014 on Regional Governance of Forest Management

⁶ Maria,S.W Soemarjono, *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, Book Publishers Kompas: Jakarta 2001. p 12.

⁰ *Ibid.*

¹ Arif Arifin, *Hutan dan Kehutanan*, Kansius, Yogyakarta, 2001. p 22.

The transfer of authority is not as easy as turning the palm of the hand, issuing new regulations that often overlap with other policies issued by the central government, Regulation of Law Number 23 Year 2014 on Regional Government, on the transfer of authority between the Central, Provincial and District / city, in Article 9, namely: government affairs; Absolute, Concurrent and General. The division of affairs looks different from the previous Law regarding the implementation of governmental affairs in the field of forestry. where there is a very drastic change, the authority of the Regency / Municipal Government, in the affairs of the forestry sector has an authority that is the Implementation of Forest Park Management (Tahura) and becomes part of the sub-conservation of natural resources and ecosystem, when looking at the formulation of Government Regulation Number: 38 of 2007 Concerning the Division of Government Affairs between the Central, Provincial and Regency / Municipal Governments, there is a crucial change from the legal side, namely the aspect of formal and material change.

Formal changes that occur are detailed details of the field of government affairs that is shared between the Central Government, Provincial and Regency / City, which was originally set out in the attachment to Government Regulation Number; 38 of 2007 shall be amended to become part of the annex to Law Number; 23 of 2014, thus the assignment of assigned functions is expected not to be disregarded or excluded by other sectorial laws.⁹ And Material

Change (Substance) that happens is the change of things as follows:¹⁰

- 0 Changes in the classification of government affairs.
- 1 Setting the criteria for the distribution of kongkuren governmental affairs.
- 2 Attachment changes containing details of the field of government affairs shared between the Central, Provincial and Regency / City Governments.

In the rules of implementation and the transitional period, Article 410 of Law 23 of 2014 states that the enforcement Regulations of this Law shall be established no later than 2 (two) years after the law is enacted, all implementing rules, including Government Regulations governing further the division of government affairs must be established, but until now the government regulation has not been published.

During this transition period, the Ministry of Home Affairs issued a Circular Letter Number; 120/253 / SJ on the Implementation of Government Affairs after the stipulation of Law Number; 23 year 2014 as well as the Ministry of Forestry and the environment that issued Circular Letter Number; SE.5 / MenLHK-II / 2015 on the Implementation of Government Affairs in the Forestry Sector Between the Central Government and Local Government.

Related to this point, forestry affairs again become centralized, although there are provincial governments that still have considerable authority. However, the provincial government is actually an extension of the central government through the concept of DE concentration. This is what is said to be inversely proportional to the forest management orientation set forth in Law No. 41 of 1999 on Forestry, which expressly states that the government delegates some authority to the local government. With the submitted authority, the district / municipality government previously authorized to issue permits, recommends, endorses forestry planning, and establishes a regional apparatus unit (Forestry Service) prepares regional regulations related to forestry.

⁰ Reghi Perdana,“(Implikasi Perubahan Pembagian Urusan Pemerintahan Berdasarkan Undang-Undang Nomor 0 Tahun 2014 Tentang Pemerintahan Daerah)”. Legal Bureau of the Ministry of PPN / Bappenas February 2016. *Ibid.*,

This indicates that the overlapping of regulation between sectorial laws namely Law Number 41 Year 1999 on Forestry, with Law Number 23 Year 2014 on Regional Government, and this law product contradiction.

2.2 Implications of Transfer of Authority of Community Forestry Governance from Regency/City to Provinces

Implication of regulation of withdrawal of authority as mentioned above in the implementation and implementation of Law Number; 23 Year 2014 on Local Governance, on forest management in district/municipal government, which implies regional government among others;

- 0 Institutional changes in the organizational structure of regional apparatuses at district / municipal government are inevitable. Similarly, the provincial government. Although it does not alter the organizational structure of the regional apparatus, the addition of such authority has an impact on the changing duties and functions of the organization of the regional apparatus under it. The institutional movement of the regional apparatus organization has an impact on the mobilization of human resources, facilities and infrastructure and funding. This is quite a troublesome local government. Law Number; 23 of 2014 gives the order that the mobilization of resources must be completed at the latest 2 (two) years since the enactment.
- 1 The Regency / Municipal Regulations containing the old authority shall be revoked immediately. Provincial Regulations that have not yet accommodated new authorities should be revised.
- 2 Development Plans These changes also have an impact on the development plans that have been specified, especially the regional mid-term development plans (RPJMD) or strategic plans, on the organization of regional apparatus needs some adjustment of goals, targets, strategies, policy directions, programs, performance indicators in implementing RPJMN alignment with RPJMD.

The following can also be conveyed one case of transfer of authority of forest governance from Regency to Provincial Government / City and Regency in Special Region of Yogyakarta:

According Widodo Dwi Putro, Lecturer of the Faculty of Law, University of Mataram explained his opinion about the findings of Kanoppi research in Gunungkidul about the authority of the management of forest park assets Bura (Tahura). For example, issuing licenses for mining in forest areas, then there are bribery issues concerning forest utilization permits, but Law Number 23 Year 2014 on Regional Government should not be flat. For example the case of Gunung Kidul. Various policies actually managed to facilitate the development of community forests. According to Law Number 41 Year 1999 on Forestry, it is recommended 30% percent to qualify as a forest area that meets the ecological requirements covered by wood. In Gunung Kidul or Daerah Istimewa Jogjakarta, state forest area is not sufficient to 30% but is helped by community forest 42% covering area so it fulfills ecological requirement, exceeds more than 30% due to community forest. This means how big the contribution of community forests for ecological sustainability.¹¹

0 <http://a.nawir@cgiar.org>. Riset penelitian CGIAR tentang Hutan, Pepohonan dan Agroforestri, Penelitian Kanoppi yaitu. "Pengembangan Hasil Kayu dan Hasil Hutan Bukan Kayu (HHBK) dalam Sistem Produksi dan Strategi Pemasaran yang Terpadu untuk Meningkatkan Pendapatan Rumah Tangga Kehutanan di Indonesia". Year 2017.

Then Aset Tahura (Forest Park), because it is clear in Law No. 23 of 2014 that the remaining District Authority still needs further identification, the Provincial argument that Tahura is above Sultan Ground. If Tahura it is in the Sultan Ground then the applicable is Law No. 13 of 2012 About Privileges DIY. Because of this Act, it gives the provincial privileges to regulate land. So the sultanate is regarded as a legal subject having property rights covering the land either inside *keprabon* or outside *keprabon* throughout Yogyakarta Special Region. So, if so Tahura really is above the Sultan Ground then there is conflict between laws. Whether Tahura will be managed by the district or by the province, the question is de facto managed by the province.¹²

There are two opposing legal opinions, the first opinion assumes, there is no state land in DIY. That is, the land in this DIY is Sultan Ground. Some argue that the Tahura should not be on the property. So, it is necessary to clarify, for example, whether when the letter of appointment or letter of appointment of Tahura determination, whether there is or through (letter) lacuna (lease of land use) for example. If through the lie that means Sultan Ground. It is strange that Tahura whose legal status conservation protected area should be above property right even though it is Sultan Ground. There is a lack of clear legal conflicts, equally strong people who think that the Tahura district should be in the district because it is locked by a very technical regulatory regulation calling Tahura a district-scale should be in the district. But on the one hand because Sultan Ground must apply the Special Act.

2.3 *Management and Implementation of Community Forests after Law Number 23 Year 2014 on Regional Government*

Such rapidly changing national regulatory changes have had an impact and dynamics at the local level. The issuance of Law Number 23 of 2014 concerning Regional Government as amended by the First Amendment to Law Number 02 Year 2015 and the Second Amendment to Law Number 09 Year 2015 has marked a new chapter of autonomy and relationship between Central and Regional, especially for the forestry sector. In the context of forestry the birth of Law Number 23 Year 2014 on Local Government, explicitly draws the authority of the district in conducting supervision and guidance in the forestry sector. This is because the district government only has authority over the management of forest / City Park, as set forth in Article 14 paragraph 2. Forestry governance affairs related to the management of regency / municipal forest park become the authority of regency / municipality.

Changes to this policy have had substantial impacts on forestry operations, especially with regard to the implementation of the Social Forestry (HKm / HD / HTR) and customary forest in one area where one of its strategic approaches is through the local government. At the national level of achievement of 12.7 ha, the area of social forestry assessed by many people is still far from expectations.

According to Rosa Vivien Ratnawati. Director of conflict management, tenure, and customary forest, Directorate General of PSKL said; Social forestry aims to empower communities to gain autonomy in the forestry field. Social forestry currently provides legal access to communities with community-managed forest concepts, in the form of Community Forest (HKm) and Indigenous Forest.¹³

⁰ *Ibid.*,

¹ <http://Sumber:KPSHK.org>. *Rencana Strategis Mewujudkan 12,7 Juta Ha Perhutanan Sosial*. November 10, 2017.

In this case the role of local government in social forestry as stipulated in Law Number 23 of 2014 concerning Local Governments, which withdrew the authority of the district forestry service and located in the provincial forestry service, the first impact for social forestry is the government apparatus that will take care of social forestry becomes even further. During this time the Forestry Office of the Regency/City who processed the proposed social forestry and submitted it to the Ministry of Forestry. The Regency / Municipal Government also has responsibilities to the communities surrounding the forest, in accordance with this law the provincial forestry agency will process the proposed social forestry and submit it to the Ministry of Environment and Forestry (KLHK). While the district forestry department is no longer moving in processing and proposing social forestry.

The connection with that is indeed the enactment of Law Number 23 Year 2014, in fact there is already a Circular Letter of the Minister of Environment No. SE.5 / MenLHK-II / 2015 Date May 21, 2015 and Circular Letter of the Minister of Home Affairs Number: 120/253 / Sj Date 16 January 2015. However, almost no provincial government dares to proactively process and propose social forestry.

For example, only the Governor of Bengkulu who dares to establish the HKm working area, and the courage of the Governor of Bengkulu, takes place after a deep dialogue and consultation with the Ministry of LHK and Ministry of Internal Affairs, and until now all other provincial governors and foresters feel that the circular letter is not strong enough, because social forestry is governed by ministerial regulations, so it should also be changed with ministerial regulations. There are three ministerial regulations governing social forestry, namely:

- 0 Regulation of the Minister of Forestry Number P.55 / Menhut-II / 2011 as already amended by Regulation of the Minister of Forestry Number P.31 / Menhut-II / 2013 on the Procedure of Application for License of Timber Forest Product Utilization at Community Plantation Forest in Plantation Forest,
- 1 Regulation of the Minister of Forestry Number P.88 / Menhut-II / 2014 on Community Forest,
- 2 Regulation of the Minister of Forestry Number P.89 / Menhut-II / 2014 on Village Forest.

The current condition of social forestry is virtually vacuum, because until now the Minister of the Environment and Forestry has not issued a ministerial regulation which is a revision of ministerial regulations on Village Forest, Community Forest and Community Plantation Forest. Whereas in the Medium Term Development Plan (RPJMN) the government has targeted the achievement of social forest at least 12.7 million hectares until 2019.

In this case it can be conveyed that the Provincial Government up to this extent can only conduct guidance and supervision on existing and existing Community Forestry Business License (IUPHKM) holders, while for the proposed development of work area of management of social forest area has not existed at all except only the Governor of Bengkulu who dare to establish HKm working area, after a long and deep dialogue and consultation with the Ministry of LHK and the Ministry of Home Affairs. All other provincial governors and forestry agencies feel that circular letters are not strong enough, since social forestry is governed by ministerial regulations so it must be changed with ministerial regulations.

The author argues in accordance with what is the purpose and understanding of Community Forestry is a state forest whose utilization is primarily intended to empower communities living in the vicinity of forest areas or local communities, with the aim of

empowering local communities to enhance local self-reliance and to benefit forest resources optimally and fairly through capacity building and granting access in order to improve the welfare of local communities. Therefore, the government is very necessary to conduct guidance and control to ensure the implementation of the utilization of community forest (HKm) is effective and appropriate goals. And Business License for Community Forest Utilization (IUPHKm) is a business license granted to utilize forest resources in protected forest areas and / or production forest areas, which are prohibited to be traded, transferred, pledged or used for other purposes outside the planned management plan and approved, and prohibited to change the status and function of forest areas. This guidance and control is felt to be very important after the Act of 23 Phase 2014 on Regional Government is enacted.

0 CONCLUSION

- 0 The management and implementation of community forests (HKm) so far, which is one of the policies of granting forest management rights to community groups, or based on groups, and not based on the culture of local communities, and this is a unit of pattern -the compiled scheme of those groups that are actually based on the management of modern management, and the management modalities of these groups are not recognized by the community in its history of forest management.
- 1 Implementation and Implementation of Law Number 23 Year 2014 on Local Government, on forest management in local government resulted in changes from the legal side of the aspect of formal and material changes. Formal changes occurred on the details of the areas of government affairs divided between the Central, Provincial and District / City Governments previously set out in the annexes, later upgraded to be part of the annex to Law Number; 23 of 2014.
- 2 Community forest (HKm) involving the community through the issuance of Kepmenhut Number: 622 / Kpts-II / 1995. And finally refined through PerMenhut Number. P.88 / Menhut-II / 2014 About Community Forest, a forest management legal product that reflects State-based forest management ideology that is interpreted as Government-based forest management Since legislation is the realization of state law. Government legal forest management instrument is a more concrete government law is a bureaucratic law (Bureaucratic Law) instead of state law is known as a repressive law product.

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AUTHORITY OF THE MINISTER OF HOME AFFAIRS IN THE CANCELLATION OF PROVINCIAL REGULATIONS BASED ON LAW NUMBER 23 YEAR 2014 ON REGIONAL GOVERNMENT

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Abstract: *Regional Regulations as part of a Legislation and as a legal product underlying and underlying the implementation of a program and activities undertaken by the Regional Government. However, due to the imperfect process of its formation, it is often in its implementation to cause legal problems, therefore based on the provisions of Law Number 23 Year 2014, the government through the Minister of Home Affairs shall perform the role and function of supervision in the form of evaluation on the Provincial Regulation Draft and cancellation of Regulation Provincial Region. Implementation of the function of evaluation and cancellation caused Law Conflict, because the authority of evaluation on Provincial Regulation Draft and cancellation of Provincial Regulation is essentially contradictory to the provisions stipulated in the constitution namely Article 24A of the 1945 Constitution of the State of the Republic of Indonesia and caused the Conflict of Norms Law with the provisions of Article 9 of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations, whereby the Supreme Court is authorized to examine the Laws and Regulations under the Law allegedly contrary to the Law.*

Keywords: *authority, revocation of provincial regulation*

5888 INTRODUCTION

In the implementation of the Autonomy and Co-Administration Principles, the Regional Government is also given the authority to establish a Regional Regulation, as legality in the implementation of the duties and responsibilities given. In its formation, the Regional Regulation should be concerned and guided and should not conflict with the provisions of the higher Legislation.

But often the result of the still low human resources who play a role in the preparation of the Legislation Regulation, especially the Local Regulation (Legal Drafter) resulted in the

quality and quality of the Regional Regulation is reduced, coupled with the process of harmonization and synchronization and the process of deliberation of the Draft of Regional Regulation in the House of Representatives Provincial Region (DPRD) between the Executive and the imperfect Legislature, contributes to the low quality and quality of the Regional Regulations.

Therefore, in the implementation of the supervisory function of the legislation product, it is necessary to examine the formation and implementation of a product of the legislation. In connection with the Executive Review of the Local Regulations conducted by the Minister of Home Affairs as referred to in the provisions of Article 251 paragraph (1) of Law Number 23 Year 2014 on Regional Government has resulted in conflict of Law Norms, Of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations.

In the provision of Article 9 of Law Number 12 Year 2011, has explicitly regulates the institution authorized to examine the Laws and Regulations under the Law that is contrary to the Act, the test shall be conducted by the Supreme Court. The provision is in line with the meaning contained in the provisions of Article 24 A Paragraph (1) of the Constitution of the Unitary State of the Republic of Indonesia Year 1945, which states that the Supreme Court has the authority to hear at the Cassation level and to examine the Laws and Regulations under the Act -What.

In relation to the Authority of the State Institution in conducting the Tests of the Laws and Regulations under the Act on the Law, it is noteworthy that the Decision of the Constitutional Court Number 137 / PUU-XIII / 2015 on the Judicial Review application against the provision of Article 251 of Law Number 23 Year 2014 , stating that the cancellation of District Regulation by the Governor as referred to in the provisions of Article 251 paragraph (2), paragraph (3) and paragraph (4) of Law Number 23 Year 2014 is contradictory to the 1945 Constitution and has no power law binding.

If there is a contradiction between the legal considerations and the Decision of the Constitutional Court, where the Constitutional Court Judge considers Executive Review by the Government to be contradictory to the provisions of Article 24A Paragraph (1) of the 1945 Constitution, but in its Decision Letter the Constitutional Court does not cancel overall authority to examine the Local Regulations by the Government (either by the Minister of Home Affairs and the Governor). In its decision, the Constitutional Court only states that the authority of Cancellation of Regional Regulation by the Governor is contradictory to the 1945 Constitution and has no binding legal force. However, the authority of the Minister of Home Affairs to cancel the Provincial Regulation as referred to in Article 251 paragraph (1) of Law Number 23 Year 2014 shall not be canceled; this is of course contrary to the provisions stipulated in Article 24A of the 1945 Constitution and Law Number 12 Year 2011.

Departing from the construction of thinking above, the authors assume that there is conflict / Conflict of Law Norms which regulates the testing and evaluation of Legislation in particular Provincial Regulations. So that potentially cause legal problems resulting from the existence of conflict between the provisions set forth in Article 251 paragraph (1) of Law Number 23 Year 2014 which is then followed up with the issuance of Regulation of the Minister of Home Affairs Number 80 Year 2015 on the Formation of Regional Law Products with the provisions set forth in Article 24A of the Constitution of the Unitary State of the Republic of Indonesia Year 1945 and the provision of Article 9 of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations. Based on the above explanation, the writer focuses this research on several things, namely first how the mechanism of cancellation of Provincial

Regulation by the Minister of Home Affairs based on the provisions of Law Number 23 Year 2014 on Regional Government when associated with the provisions of Law Number 12 Year 2011 on the Rule Establishment Legislation; and second what is the direction of the regulation of the authority of the Minister of Home Affairs in the Cancellation of Provincial Regulations after the Constitutional Court Decision Number 137 / PUU-XIII / 2015 in the future.

This research is classified into normative legal research that examines legal materials (theory/concepts, principles and Legislation). In this research, writer use Statutory Approach, Conceptual Approach and Historical Approach.

DISCUSSION

2.1 Mechanism of Cancellation of Local Regulation Based on Provisions of Laws and Regulations

In the provision of Article 1 of the 1945 Constitution states that the State of Indonesia is a unitary state of the Republic, essentially in a unitary state (*Unitary Staat, Eenheidsstaats*), sovereignty rests solely with the Central Government or the State rather than the Region. Therefore, whatever the authority given by the Central Government to the Regional Government in the administration of the area, then the responsibility remains on the Central Government. With the understanding that all policies undertaken by the Region is an integrated policy flow and synergize with the policy of the Central Government. In the case of the concept of the Unitary State as set forth in the provisions of Article 18 of the 1945 Constitution which states that: "The Unitary State of the Republic of Indonesia shall be divided into provinces and provinces divided into regions of District and city which each province, These districts and municipalities have regional administrations, which are governed by the Law"

The provisions concerning the Unitary State as stipulated in the provisions of Article 18 of the 1945 Constitution are in line with the views of C. F. Strong¹ of the Unitary State, whereby the Unitary State is a State in which the highest Legislative authority is centralized within a National/Central Legislative Council. Power lies with the Central Government and not to the Regional Government. The Central Government has the authority to surrender some of its power to the Region on the basis of the Autonomy Principles (the country with the Decentralization system), but in the final stages the supreme authority remains in the hands of the Central Government. So sovereignty, both the ultimate sovereignty in and out of sovereignty, is entirely in the Central Government.

In order that the implementation and implementation of Regional Autonomy, Decentralization and Co-Administration in the Regions will not deviate from and exit from the established corridors, the implementation of supervisory and control function by the government against the Regional Government must be done. Notice the views of Sir William O. Hart and J. F. Garner²: It is a "binding" of unity so that the pendulum of autonomous freedom does not move so far that it threatens unity (Unitary).

In the framework of the implementation of Governmental duties based on Government affairs which are the authority of the Region, the Regional Government is given the authority to create and use the Regulation as the Juridical Foundation for the Region in the Implementation of Regional Autonomy. It cannot be denied that in the formation of a Provincial Regulation often

⁰ Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, (Jakarta, Gramedia Pusataka Utama, 2009). p. 269

¹ King Faisal Sulaiman, *Teori Peraturan Perundang-Undangan*, (Yogyakarta, Thafa Media, 2017), p. 237

the authoring institution does not pay attention and disregard the Principles of the Establishment of Good Law and Regulation, therefore the government performs the role and function of the supervision which is implemented into the form of evaluation on the draft of Local Regulation and Cancellation of Regulation Areas produced by the Provincial Government.

Then the question is whether the implementation of the Evaluation function against the Provincial Regulation Draft and Cancellation of Provincial Regulations and the supervision which is then interpreted into the form of Examination (Executive Review) on the product of the Local Regulation which has been done by the Government in this case by the Minister of Home Affairs against the Regulation The Provincial Region shall be in accordance with the provisions stipulated in the 1945 Constitution and shall not result in a conflict of law norms with the provisions of other laws and regulations. In Legality, the authority of the test of the Legislation Regulation is closely related to the Authority of Judicial Power as contained in the 1945 Constitution, the word “test” is contained in the provisions of Article 24A paragraph (1) which states: “The Supreme Court has the authority to hear at the Cassation, examines the Laws and Regulations under the Act on the Act and has other powers granted by the Law “.

In addition to the provisions of the 1945 Constitution, the term “Testing” or with other similar variants such as “Testing” or “Right of Test” is also found in several Legislation Regulations such as Law Number 48 Year 2009 on Judicial Power (Article 20 paragraph (2) letter b), Law Number 5 Year 2005 concerning Amendment to Law Number 14 Year 1985 concerning the Supreme Court and the provision of Article 12 of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations. In the jurisprudence, the term “test” or “test” is often paired with the Dutch term “*Toetsing*”. The word “Testing” is also synonymous with the word “Review” as used in the terms Legislative Review, Executive Review and Judicial Review. The word “Review” in the phrase means looking, judging, or reexamining that comes from the words “Re” and “view”.

However should be attention is the implementation of the role and function of supervision by the government as regulated in the provisions of Law No. 23 of 2014, causing refraction of meaning so that in its implementation led to multiple interpretations which resulted in the emergence of legal problems in the future due to violations of authority by a state institution. Because supervision is often misinterpreted into a test/evaluation that led to the cancellation. When considered in a grammatical context, the word “Supervision” in Law Number 23 Year 2014 is only used within the context of oversight of the Implementation of Regional Government in general as referred to in the provisions of Article 373 of Law Number 23 Year 2014 and not the supervision of the Regional Regulations. The granting of authority to evaluate the draft of Regional Regulation shall be regulated separately in the provisions of Article 245 up to Article 246, while the Revocation of Regional Regulation and Regulation of Regional Head shall be regulated in Article 249 up to the provisions of Article 252.

If examined in constitutionality, in relation to the material and subsidy of the evaluation of the draft of Regional Regulation and Cancellation of the Local Regulation conducted by the Government is not regulated in the provisions of the 1945 Constitution. The authority to conduct an evaluation and cancellation as regulated in the Act No. 23 of 2014 appears immediately without any legal basis in the form of the Authority Attribution of the 1945 Constitution. So that the implementation of the Evaluation and Cancellation by the Minister of Home Affairs and the Governor is only a delegate Delegation from Law Number 23 of 2014 and contrary to the provisions of Article 24A of the 1945 Constitution which mandates the examination of the Laws and Regulations under the Act on the Act by the Supreme Court.

Taking into account the conflict of Norms of the Law above, it is based on the Legal Preference Principle which states that the Rule of Law of its position is higher than the rule of law which is lower (*Lex Superiori Derogat Legi Inferiori*), where if it is observed that the position of the 1945 Constitution as the State Constitution has a position which is higher than the Law Number 23 Year 2014. Then when viewed from the Theory “*Die Lehre Von Dem Stufenbau Rechtsordnung or Die Stufenordnung Der Rechtsnorm*” proposed by Hans Nawiasky, then the position of the 1945 Constitution in the Hierarchy of the Structure of Legal Law in Indonesia is depicted in the Structure of the Top Hierarchy (by Hans Nawiasky described as a Basic Rule of the State (*staatsgrundgesetz*), while Law Number 23 of 2014 which hierarchically has a lower position than the 1945 Constitution, which is described as an Act -The Formal (*formell gesetz*), so it is fitting that the material and substance of Law Number 23 of 2014 shall be guided and shall not be contradictory to the 1945 Constitution.

In addition to the above matters, the position of Law Number 23 Year 2014, especially in the case of the implementation of the cancellation of the Regional Regulations conducted by the Government which can also legally lead to Conflict of Law Norms with other Legislation, especially with Law Number 12 Year 2011 regarding Establishment of Legislation. Conflict of Law Norms here can be seen from the regulation on the examination of the Laws and Regulations under the Law on the Law which is the authority of the Supreme Court as regulated in the provisions of Article 9 paragraph (2) of Law Number 12 Year 2011 stating “In the matter of a Legislation under the Act is allegedly contrary to the Act, its Testing is done by the Supreme Court “.

On the one hand when considering the provisions of Article 251 paragraph (1) of Law Number 23 Year 2014 states: “Provincial Regulations and Governor Regulations that are contrary to the provisions of the higher Laws Regulation, public interest and / or morality are annulled by the Minister” . So in relation to the conflict of legal norms above, then when considering the “*Lex Specialist Derogat Legi Generali* principle” where the rule of law is more specific to rule out the rule of law more general. If the material and substance characteristics are considered in the provisions of Law Number 23 Year 2014 regarding Regional Government and Law Number 12 Year 2011, it is appropriate that the formation of a Regional Regulation up to its examination shall be guided by the provisions of Law Number 12 Year 2011 concerning the Establishment of Legislation -invitation.

Then in the perspective of the examination of the Laws and Regulations, when considering the provisions of Article 9 of Law Number 12 Year 2011 which regulates the Authority of State Institutions in the implementation of the examination of the Laws and Regulations under the Law allegedly contrary to the Act is done by the Court Great. Therefore, the judicial review authority as referred to in the provision of Article 9 paragraph (2) of Law Number 12 Year 2011 above constitutionally in line with the provision of Article 24A Paragraph 0 of the 1945 Constitution which states: “The Supreme Court has the authority to hear at the appellate level, to examine statutory laws under the law, to have other powers granted by law”.

In this case, Consistency in the application of law in the implementation of constitutional life in Indonesia is very important, it is to assess the extent to which the compliance of state institutions in implementing the provisions of the Regulations and as a barometer in assessing the compliance of state institutions in implementing a consensus that has been built in the form of concepts Indonesian Law Country. Interesting to pay close attention to Verhey and H.D. Stout as quoted by Ridwan HR, who put forward the principle of legitimacy of the government (*het beginsel van wetmatigheid van bestuur*) contains three aspects namely the negative aspect (*het*

negative aspect) determines that government action should not conflict with the Act. Government action is illegal if it is against the higher Legislation Rules. The het-form-positive aspect determines that the government has only a certain authority as long as it is given or based on the Act. The material-positive aspect (het materieel-positieve aspect) determines that the Act contains rules that bind government action. This means that the authority must have a legal basis and also that the authority of its content is determined normally by the Act. Accordingly, the government in acting shall not be contrary to the provisions of the Laws and Regulations, the higher provisions of the Law and the Government acting under the authority granted by the Laws and Regulations.

2.2 *Implication of Legal Cancellation of Provincial Regulation by Minister of Home Affairs Post-Decision of Constitutional Court*

Noting the Decision of the Constitutional Court of the Republic of Indonesia Number. 137 / PUU-XIII / 2015, which in its Decision Letter stipulates that the cancellation of District Regulation by the Governor as referred to in the provisions of Article 251 paragraph (2), paragraph (3) and paragraph (4) of Law Number 23 of 2014 on Regional Government is contrary to the 1945 Constitution and has no binding legal force.

But it should be the attention of the above Decision is the fundamental problem of the Decision, where the Panel of Justices of the Constitutional Court is inconsistent in deciding a legal matter that is contextually so important because it concerns the constitutional rights of a State Institution. It is worth noting in relation to the legal considerations in the Decision, in which the Constitutional Court considers that the examination of the Laws and Regulations under the Act on the Act is conducted through a judicial review mechanism by the Supreme Court in accordance with the mandate of the constitution as referred to in Article 24A of the Constitution of the Unitary State of the Republic of Indonesia Year 1945 and not through the mechanism of cancellation (Executive Review) which has been done by the Government through the Ministry of Home Affairs and the Governor as a representation of the Central Government in the region.

But the fact is, where the Constitutional Court as a judicial institution granted the authority to examine the constitutionality of a law indicated to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia, in its ruling only annuls the provisions of Article 251 paragraph (2) to paragraph (4) of Law Number 23 Year 2014 which governs the authority of the Governor to cancel the Regional Regulation of the Regency / City, while the authority of Cancellation by the Minister of Home Affairs against Provincial Regulation as intended in Article 251 paragraph (1) Law Number 23 of 2014 is not canceled.

Therefore, it can be ascertained that the decision produced by the Constitutional Court has the potential to cause other constitutional problems, because if we refer to the questions petitioned for examination relating to the constitutionality of whether the provisions of Article 251 paragraph (2), paragraph (3) and paragraph (4) of Law Number 23 of 2014, wherein the authority of Cancellation of Regional Regulation of the Regency / City by the Governor shall be deleted by contradictory to the provisions of the Constitution of 1945. While the authority for cancellation of the Provincial Regulation by the Minister of Home Affairs is not permitted and declared not contrary to the provisions of the Constitution of 1945, it makes the cause of the government and its implementation in the future and also the implications of the cancellation made by the Government. The issue of inconsistency of the Constitutional Court in examination

of the validity of a law by judging whether it is contrary to the 1945 Constitution will be a precedent when tested product has a different verdict with each other.

It cannot be denied that the debate over the authority of a state institution in conducting the examination of the Laws and Regulations under the Act against the Law has been for a long time. The problem arises from the inconsistency of the application of the Laws Regulations that regulate the issue. The inconsistencies in the formation and application of these rules have an impact on the occurrence of conflicts between the Law Norms, either among the legal Norms that are parallel or even with higher legal norms. When referring to the provisions of Article 24A of the 1945 Constitution, the mechanism of its Tests on the Laws and Regulations under the Act on the Act shall constitute an Absolute Competence of the Supreme Court and not by any other State Institution, whether The Government (Executive) and the House of Representatives (Legislative), the provisions of Article 24A of the 1945 Constitution are in line with the concept of the State of Law adopted in the legal system and developed in the life of the state administration in Indonesia.

2.3 *Direction of the Arrangement of the Authority of the Minister of Home Affairs in the Cancellation of Provincial Regulations Post-Constitutional Court Ruling*

Provincial Regulations as part of the Laws and Regulations shall be appropriate if the mechanism of planning, drafting, discussion, approval or stipulation, the enactment and testing of the Regional Regulations especially the Provincial Regulations shall be guided by the provisions of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations juncto Presidential Regulation Number 87 Year 2014 on the Establishment of Laws and Regulations rather than referring to the provisions of Law No. 23 of 2014 juncto Minister of Home Affairs Regulation No. 80 of 2015 on the Establishment of Regional Law Products. Thus, in the future when considering the above theoretical and normative aspects, the implementation of the ideal Evaluation and should be applied to the Provincial Regulation is in the form of Legislative Review and Executive Preview and not in the form of Examination in the form of Executive Review.

In this perspective, the implementation of the “Executive Prevail” by the Government through the Minister of Home Affairs on the Draft Provincial Regulation has actually been applied and applied in the provisions of the Law on Regional / Regional Autonomy. Provisions on the evaluation of the current Provincial Draft Regulation are also stipulated in Law Number 23 Year 2014 juncto of the Minister of Home Affairs Regulation No. 80 of 2015, whereby the Government through the Minister of Home Affairs undertakes a verified evaluation process against each Provincial Draft Provincial Draft The draft of Regional Regulation on Regional Budget Draft, Regional Budget Change, Regional Tax, Regional Retribution and Regional Spatial Plan which have obtained the joint approval between the Provincial House of Representatives and the Governor but have not been enacted.

In this case, the Minister of Home Affairs is sufficiently to evaluate or review the draft of the Provincial Regulation (Legal Drafting) as regulated in the provision of Article 245 of Law Number 23 Year 2014 juncto Article 91 to Article 94 of the Minister of Home Affairs Regulation Number 80 Year 2015 Formation of Local Law Products. Evaluation of the draft of Provincial Regulation is intended for the material aspect or Formal aspect contained in the Provincial Regulation is not contradictory to the provisions of the higher Legislation and in accordance with the Principles of the Establishment of Good Regulation and not contrary to the interest public and decency.

If the draft of the Provincial Regulation is deemed to be contradictory to the provisions of the higher Laws and is not in accordance with the Principles of the Establishment of good and contrary legislation and violates the public interest and morality, the Minister of Home Affairs shall submit the results of his evaluation in the form a recommendation to the Governor with accompanying notes to be followed up by the Governor as well as for the improvement and / or harmonization and synchronization in accordance with the evaluation of the Minister of Home Affairs.

However, the draft Provincial Regulation which is the object of evaluation by the Minister of Home Affairs should not only be limited to the Provincial Regulation Draft regulating the Long Term Development Plan of the Region, the Medium Term Development Plan, the Regional Revenue and Expenditure Budget, the Changes in the Regional Revenue and Expenditure Budget, Responsibility for Implementation of Regional Revenue and Expenditure Budget, Regional Taxes, Regional Levies, Spatial Plans, Industrial Development Plans as referred to in the Provisions of Article 245 of Law Number 23 Year 2014 junto Article 91 of Regulation of the Minister of Home Affairs Number 80 Year 2015. However, its scope to the draft of other Regional Regulations as well as the Concurrent Authorities granted to the Provincial Governments.

In the future, it should also be considered in the perspective of “legislative review” of Legislative Acts Legislation Products, in particular to the Provincial Regulation Draft which is contextually a legal product proposed and discussed jointly by or involving the Regional Representative Council -legislator with the Governor. In the current Indonesian legal system at the national level which may be referred to as the main legislator body is the House of Representatives, the words of the Primary Legislator are important to distinguish them from a supportive legislative body or co-legislator.³

The existence of the Regional People's Legislative Assembly at the Provincial Level as well as the Regency / Municipal Level which in essence has a role in exercising the legislative power at the regional level. The position of the Regional People's Legislative Assembly as a legislative power holder is normatively reinforced by Law Number 27 Year 2009 on MPR, DPR, DPD and DPRD. Normatively considering the provisions of Article 56 of Law Number 12 Year 2011 states that the draft Provincial Regulations can come from the Regional People's Legislative Assembly or the Governor. Thus, the submission of the draft Provincial Regulation is not only a monopoly of the Provincial People's Legislative Assembly, but the Governor is also given authority in the submission of the Provincial Regulation Draft.

So in the above perspective it is not appropriate if the Provincial Regulation Draft as a product of joint work of two institutions, the Provincial House of Representatives with the Governor, both of which are directly elected by the people through the mechanism of elections and the election of regional head can not only evaluated and canceled by the Minister of Home Affairs unilaterally. Therefore it is appropriate if the authority in conducting an evaluation of the Provincial Regulation Draft is in the Provincial People's Representative Council as the institution forming the Provincial Regulation and not by the Government in this case the Minister of Home Affairs.

Therefore, it is fitting that the Evaluation of the Draft of Provincial Regulation shall be conducted in the stage of formation and discussion together with the Governor in the plenary session of the Provincial House of Representatives. Then related to the Evaluation of the implementation of Provincial Regulations, conducted in the framework of the implementation of

³Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta, Bumi Aksara, 2012), p. 20

the role and function of supervision of Provincial People's Representative Council. In the context above, the evaluation by the Provincial People's Legislative Assembly is not in the context of the Review, since the normative authority of the test of the Regional Regulation is only the domain of the Supreme Court. Thus, the Evaluation is only limited to the implementation of synchronization and harmonization of the draft of the Regional Regulation whether it is contradictory or not with the provisions of the higher Legislation Rules. If the legal basis underlying the establishment of the Provincial Regulation has been replaced, amended or revoked by a higher Legislation Rule or under the Decision of the Constitution and the Supreme Court, the Provincial House of Representatives may request to the Provincial Government or by an Initiative Right which it has to make a Change or Revocation of the Provincial Regulations.

Then in the future in order to maximize the role and function of the Judicial Review in the Supreme Court and to anticipate the more complex problems arising in the process of trial in the Judiciary, which will have implications for the Testing Application Case on Blood Regulations submitted to the Supreme Court, located within the General Courts and domiciled in the Provinces. The Judicial Testing of Local Regulations itself is intended for the implementation of the test can be maximized, it can be seen from the beginning of the implementation of the eradication of Corruption Crime, where the handling of cases of Corruption Crime is only in the prosecutor's office and the police and the process still follows the judicial mechanism, the enactment of Law Number 31 Year 1999 concerning the Eradication of Corruption and the Law Number 30 Year 2002 concerning the Corruption Eradication Commission (KPK) which is granted the authority of Attributive and Delegative authority to conduct special handling on the Corruption Crime starting from the Stages of Investigation, investigations, prosecutions and their courts through the Corruption Crime Courts still under the jurisdiction of the General Courts.

Thus, for the sake of the realization of effectiveness, evisiensi and meet the sense of community justice, and in improving the quality and quality in the implementation of testing of the Laws and Regulations under the Act on the Act especially Provincial Regulations, the Supreme Court can initiate the establishment of Judicial Tests Regional Regulations by making amendments to the Law on the Principles of Judicial Power and the Law on the Supreme Court. The Regional Regulatory Testing Tribunal is domiciled in the Provincial Capital which aims to facilitate access for both litigant parties (both applicant and requested) in carrying out the procedures in the hearing.

0 CONCLUSION

From the description above can be drawn some conclusions as follows:

Whereas in the provisions of Law Number 23 Year 2014 regarding Regional Government, the evaluation mechanism on Provincial Regulation Draft and Cancellation against Provincial Regulation by the Minister of Home Affairs shall be stipulated. With respect to Provincial Regulations that are contradictory to the provisions of the higher Laws Regulation, public interest and / or morality, it shall be canceled by the Minister of Home Affairs through the Decree of the Minister of Home Affairs. Whereas in the provisions of Law Number 12 Year 2011 on the Establishment of Legislation regulates the agency authorized to conduct Testing of the Laws and Regulations under the Act on the Law including among others the Regional Regulations conducted by the Supreme Court.

- 0 Whereas the direction of the Minister of Home Affairs arrangement is in the form of “Executive Preview” and not through the “Executive Review” testing mechanism, whereby supervision and evaluation is only conducted on the Provincial Rupture Provincial Draft Product by coordinating through the relevant technical ministries. In this case, the Minister of Home Affairs is enough to verify or review the draft of the Provincial Regulation (Legal Drafting). Evaluation of the Draft of Provincial Regulation is intended for the material aspect or the Formal aspect contained in the draft of the Provincial Regulation is not contradictory to the provisions of the higher Legislation and in accordance with the Principles of the Establishment of Good Law and Regulation as opposed to the public interest and decency.

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LEGAL REVIEW OF TRANSFER OF AUTHORITY OF GOVERNMENT AFFAIRS ON ENERGY AND MINERAL RESOURCES UNDER LAW 23 YEAR 2014 ON REGIONAL GOVERNMENT

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Abstract: *The division of authority of concurrent governmental affairs under Law 23 of 2014 on Regional Government is based on the principle of accountability, efficiency, and externalities, as well as national strategic interests. The central government in the transfer of the affairs of this concurrent authority leaves behind new problems to be resolved. The absence of implementing regulations from the law makes the relevant ministries issued circulars as the basis for the implementation of the transfer of authority. Based on the nature of the circular, the circular shall have no binding legal force. The consequence is that the circular can be implemented and also not implemented because there is no binding legal sanction for those who do not obey it.*

The transfer of authority over government affairs also has an impact on legal products in the regions. The district government should revoke the conflicting regional regulation, while the provincial government must adapt its local regulations to the prevailing laws and regulations.

Keywords: *energy and mineral resources, authority, local government*

0 INTRODUCTION

One of the important changes in the 1945 Constitution of the Republic of Indonesia is the inclusion of the concept of democratization and decentralization of government, which is interrelated with the concept of regional autonomy run by the provincial government, as well as the districts and municipalities. The local government performs its function as a state subsystem, mainly in the form of a unitary state owned by Indonesia.

This was then followed up by the amendment to No. 22 of 1999 on Regional Government with Law Number 32 of 2004 on Regional Government which has also been amended by Law No. 23 of 2014 on Regional Government (hereinafter referred to as the Regional Government Law). With the law, making the national development paradigm has undergone a very significant change. The initially centralized development process was transformed into a decentralized

development paradigm that relied more on giving the widest possible authority to regions to manage their own territories.¹

The enactment of the Regional Government Law actually created a new complex problem, especially in terms of management of Minerals and Coal. The management and control of Minerals and Coal as referred to in Article 4 paragraph (2) of Law No. 4 of 2009 concerning Mineral and Coal Mining (hereinafter referred to as the Minerba Law), is held by the Government and / or Regional Government. While the provisions in Article 14 paragraph (1) of the Regional Government Law states that the implementation of government affairs in the field of energy and mineral resources is shared between the Central Government and Provincial Region.

The division of authority of concurrent governmental affairs under Law 23 of 2014 on Regional Government is based on the principle of accountability, efficiency, and externalities, as well as national strategic interests. Theoretically, the authority derived from the legislation is obtained through 3 (three) ways, namely: Attributive, Delegate and Mandate.²

The absence of implementing regulations from the law makes the relevant ministries issued circulars as the basis for the implementation of the transfer of authority. Based on the nature of the circular, the circular shall not have binding legal force so that the area has no obligation to follow it.

The transfer of authority over government affairs also has an impact on legal products in the regions. The district government should revoke the conflicting regional regulation, while the provincial government must adapt its local regulations to the prevailing laws and regulations.

0 DISCUSSION

2.1 Arrangement and Distribution of Government Authority Affairs

The system of government of the Unitary State of the Republic of Indonesia according to the 1945 Constitution provides the freedom of regional heads to organize regional autonomy. In the implementation of regional autonomy, it is deemed necessary to put more emphasis on the principles of democracy, community participation, equity and justice and attention to the potential and diversity of the region. Therefore, the implementation of regional autonomy is to provide broad, real and responsible authority to the region proportionally.³

The authority of the regional government is implemented in accordance with the provisions of the prevailing laws and regulations. Although local governments are authorized for general mining management, all policies related to general mining are still dominated by the central government. As it signed the work contract on the territory of the district / municipality authority is the regent/mayor with the mining company. This means that the district/city government cannot develop the substance of the work contract in accordance with the needs of the region.⁴

The process of delegation of authority in the management of licensing of the natural resources sector is not accompanied by a control mechanism on the authority of the permit. The

¹ Solly Lubis, *Pembangunan Hukum Nasional*, Makalah, Disampaikan pada Seminar Pembangunan Hukum Nasional VIII, Badan Pembinaan Hukum Nasional, Deprtemen Kehakiman dan Hak Asasi Manusia, Denpasar, 2013, p. 1

⁰ Ridwan HR, "Hukum Administrasi Negara" Publisher Rajawali Pres, Jakarta, 2007, p. 103.

¹ Diana Halim K, 2004, *Hukum Administrasi Negara*, Ghalia Indonesia, Bogor, p.30.

² Salim HS, 2005, *Hukum Pertambangan di Indonesia*, PT. Raja Grafindo Persada. Jakarta. p. 52-53.

lack of supervision and control of licensing by the central to the regions has been a gap for investors to exploit and have a negative impact on the local ecosystem. The authority of the regional government in processing natural resources and the authority of licensing is contained in Article 17 paragraph (1) and (2) of Law Number 32 Year 2004 regarding Regional Government which reads:

- 0 The relationship in the utilization of natural resources and other resources between the government and regional governments as referred to in Article 2 paragraph (4) and paragraph (5) includes:
 - 0.0 Authority, responsibility, utilization, maintenance, impact control, cultivation, and conservation;
 - 0.1 Profit sharing on the utilization of natural resources and other resources; and,
 - 0.2 Harmonization of the environment from spatial and land rehabilitation.
- 1 Relations in the field of utilization of natural resources and other resources between regional governments as referred to in Article 2 paragraph (4) and paragraph (5) include:
 - 1.0 Implementation of the utilization of natural resources and other resources under the authority of the regions;
 - 1.1 Cooperation and profit sharing on the utilization of natural resources and other resources between local governments; and
 - 1.2 Management of shared licensing in the utilization of natural resources and other resources.

2.2 *Arrangement and distribution of government affairs pursuant to Act 23 of 2014*

Concurrent governmental affairs are government affairs that are shared between the central government and the provincial and district / municipal governments. This affair is at the same time the basis for the implementation of regional autonomy. Based on the Law on Regional Government it is explained that the affairs of the concurrent government which become the regional authority consists of; first, government affairs must mean governmental affairs related to basic services and government affairs that are not related to basic services, such as basic education, health, minimum living needs, environmental infrastructure, and others. Second, governmental affairs that are optional are closely related to the superior potential and regional peculiarities.

The principle of sharing power / authority or affairs in a unitary state is as follows:⁵

- 0 Power or authority is basically the property of the central government, the blood is authorized or the right to administer and administer any part of the government authority delegated or submitted. So the process of surrender or delegation of authority.
- 1 The central government and regional governments still have a command line and hierarchical relations. The relationship made by the central government is not to intervene and dictate the local government in many ways.
- 2 Authority or power transferred or transferred to the territory under certain conditions, in which the region is incapable of performing duties with good authorization or matters delegated or submitted, may be withdrawn by the central government as the owner of such power or authority.

⁰Muchlis Hamdi, Supriyanto, R. Endi Jaweng (Et al), Academic Draft of the Bill on the Authority Relationship of Central and Regional Government of BPHN Year 2011

2.3 *Authority of Regional Government in Energy Sector of Mineral Resources*

In line with the enactment of Law Number 23 Year 2014 on Regional Government, the Ministry of Energy and Mineral Resources of the Republic of Indonesia issued a circular letter which in essence that there is a change in the status of mining business permits. The district / city government no longer has the authority but is the authority of the central government and the provincial government.

In relation to the issuance of government regulations relating to the implementation of government affairs in the field of mining, the Ministry of Energy and Mineral Resources of the Republic of Indonesia issued Circular Letter Number 04.E/30/DJB/2015 on the Implementation of Government Affairs in the Field of Mineral and Coal Mining after the coming into effect of Law -Decree No. 23 of 2014 on Regional Government. This circular is issued by the government to provide direction to the implementation of government affairs in the field of ESDM. In points 1 and 2 this circular states that:

- 0 Regent / Mayor no longer have authority in the administration of government affairs in the field of mineral and coal mining commencing from October 2, 2014 ". This makes.
- 1 With the enactment of Law Number 23 Year 2014, the articles of Law Number 4 Year 2009 regarding Mineral and Coal Mining (Law Number 4 Year 2009) and its implementing regulations governing the authority of Regents / Mayors do not have binding legal force.

2.4 *Legal Impact of the Implementation of Law 23 of 2014 Against Governance of the Field of ESDM Field at Regency/City Government and Provincial Government*

With the transfer of authority of the Regent / Mayor in the management of natural resources, especially as regulated in Law Number 23 Year 2014 on Regional Government, the Regent/Mayor is not authorized to issue a decision of the regional head related to the stipulation of such natural resource management permit. The authority of natural resource management is more emphasized to the central government and provincial government so that the licensing process can be controlled by the government. Meanwhile, the decision on licenses that have been issued is declared still valid until the end of license period.

0 *Changes in Institutional Structures*

Changes in the organizational structure of regional apparatus, both provincial and district/municipal governments are inevitable. At the beginning of its application get the pros and cons of the local government. This gives a significant effect on the financial condition of the region. Although it does not alter the organizational structure of the regional apparatus, the addition of the authority has an impact on the changing duties and functions of the organization of the regional apparatus beneath it. The institutional movement of the regional apparatus organization has an impact on the mobilization of human resources, facilities and infrastructure and funding. This process is quite troublesome local government because in Law No. 23 of 2014 gave the order that the mobilization of resources must be completed no longer than 2 (two) years since the enactment.

23 *Influence on the results report Regional audits*

This transfer of authority will have implications for the provincial government's financial reports, particularly those related to assets managed by the provincial and district/city

governments. If the transfer of P3D is not completed then the P3D in the district/city government is still recorded and not recorded in the provincial government. In fact we have known that P3D has become the authority of the provincial government. Thus the financial assessment of the provincial and district governments could be a Disclaimer because the district government is still dealing with matters that are not within its authority while the provincial government does not take care of its authority.

23 *Potential conflict*

The transfer of authority in the administration of the natural resource sector affairs of the district/municipality into provincial/central affairs can be a potential for conflict or disharmony between the district government and the provincial/central government. Moreover, if the district / city have the abundant natural resources potential, with the scheme for perceived income is not sufficient, it will trigger a growing conflict. The government must be careful and careful in the management and utilization of natural resources that are territorially located in the district/city. If the government does not pay attention to the principle of equity and equity, it is feared that there will be excessive regional sentiments and conflicts of interest, which will certainly affect the smoothness of regional development and national development.

5888 *Implications for sectorial regulations and various local legal products*

The adjustment and alignment of these sectorial laws can be debated, which must adapt whether sectoral laws or LG laws, which are specialists and which are generalists. Especially to make improvements / adjustments so as not to conflict with the legislation is not an easy task and it takes a long time and the cost is not small. This will have an impact on the quality of service that will be provided to the community.

Consistency of the central government in making legislation should be questioned. How not, by enacting Law 23 of 2014 opened a new hole in the implementation of local government. Various sectorial legislation should adapt to this LG Law. Any regulations under the Ordinance such as a Government Regulation, Ministerial Regulation are automatically revoked and not applicable. For individual sectorial laws related Articles governing the affairs of the transferred government shall be declared revoked.

0 *Local legal products*

With the enactment of Law No. 23 of 2014 on local government also influences local regulations at all levels of local government. The change is the adjustment of legislation related to mining. Regency / City Regulations currently in effect based on the old legislation are declared null and void because the content contained in these local regulations still refers to the old rules. Therefore the provincial government should revoke the district regulation related to mining.

The Provincial Government which gets additional authority from the coming into effect of Law 23 of 2014 should immediately adjust its local regulations mainly related to mining.

With the transfer of authority of the regent/mayor in the management of natural resources, especially as regulated in Law Number 23 of 2014, the Regent/Mayor is not authorized to issue a decision of the regional head related to the stipulation of such natural resources management permit. As for the licensing decisions that have been issued, based on the

AUPB (the principle of trust, the principle of legal certainty, the principle of justice, the principle of incriminating policy should not be retroactive) should still be declared valid until the expiry of the permit granted.

0 *Concept of Transfer of Authority Affairs in the Field of ESDM in the future*

The central government should accompany each level of government, both provincial and district / municipal governments in the transfer of such authority. This transfer of authority is not easy because it tends the central government itself as an initiator not yet ready. The laws made by the central government have not been well executed. Thus the compliance of local governments to the central government is also doubtful. Central government, provincial and district / city governments should sit together in solving this problem. How not, if the transfer of these assets cannot be solved then it will be a bad precedent for the administration of the government. Provincial and district/municipality governments cannot budget for asset maintenance costs because the delivery process has not been completed.

Therefore, the central government should be more proactive in solving the problem. The Ministry of Home Affairs has a role in guarding and ensuring the passage of this governmental authority. The role is as follows:

- 0 Ensure that the distribution of energy affairs goes according to the authority between levels of government;
- 1 Ensuring that the role of governor as a government representative is effective in order to support the national program of ESDM;
- 2 Ensure that there is an emergency action plan when provinces/districts/municipalities are unable to meet the affairs of this energy field;
- 3 Facilitating the settlement of conflicts of energy affairs that intersect (cross province or bordering with other countries)
- 4 Supporting regulatory and active needs in energy development programs in the regions, e.g. through:
 - 0 Simplification of licensing service (PTSP);
 - 1 Be actively involved in the national program of energy sector in accordance with the functions and capacities of the Ministry of Home Affairs as the general coach of the Regional Government;
 - 2 Encouraging areas to facilitate land availability;
 - 3 Improving the quality of ESDM-related licensing and related licenses that incriminate investment in energy fields;
 - 4 Studies/studies, pilot projects such as studies to streamline the role of SKPD in the field of energy to carry out its affairs.

0 **CONCLUSION**

The authority of the Regional Government after the enactment of Law Number 23 Year 2014 on Regional Government has undergone drastic changes one of them in the implementation of authority affairs in the field of ESDM. Provincial Government obtains authority transfer from Regency/City government. Delivery of P3D from the district government to the provincial government and/or to the central government shall be implemented no later than October 1, 2016.

In the implementation of Law 23 of 2014 on local government there are several implications in the implementation. The implications are as follows: First, the change of institutional structure at every level of government.

Secondly, the transfer of authority over government affairs leads to changes to sectorial regulations and legal products in the regions.

Third, the transfer of authority in the ESDM field will lead to potential conflict between the district/city government and the provincial/central government. The conflict occurred because the central government has not issued a regulation (PP) related to the guidance of the transfer of authority of government affairs in the field of ESDM.

Fourth, the concept of transferring authority of ESDM from the district/municipality government to provincial and/or central government should be accompanied by the central government. The success and failure of local governments in the implementation of the tasks of the central government should be rewarded and punishment.

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LEGAL IMPLICATION OF AGRICULTURAL LAND OWNERSHIP BY ABSENTEE IN SUB- DISTRICT OF TANJUNG REGENCY OF NORTH LOMBOK

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Abstract: *One of the land reform programs is the absentee prohibition of agricultural land. However, in reality there are still many people who have absentee farmland in Tanjung Sub-district of North Lombok, so in practice the regulation on the prohibition of absentee farming cannot be applied effectively. This study aims to find out why the ownership of agricultural land in absentee is prohibited.*

This study uses a social-legal method of research that emphasizes the behavior of individuals or communities in relation to the law. All primary and secondary data are classified with issues relevant to the problem and then analyzed qualitatively descriptively.

The result of research on the prohibition of farm ownership in the absentee philosophically that the agricultural land must be owned by the people who reside in the Tanjung sub district and the land must be used and used for agriculture, so that it can improve the welfare of farmers, farmers and farm laborers in the district of Tanjung. The legal basis for the prohibition of absentee/guntai landholding is Article 10 of the Basic Agrarian Law (UUPA), in this article is contained a principle requiring the owners of agricultural land to actively work or cultivate farmland. As the implementer of Article 10 of the BAL is the Government Regulation (PP) No 224 of 1961 concerning the implementation of land distribution and compensation and Government Regulation No. 41 of 1964 concerning the amendment and addition of Government Regulation No. 224 of 1961 on the implementation of the division land and compensation. Sociological Foundation, Although the ownership of farm land in absentee is prohibited but in fact in sub-district there are many people who own agricultural land but live outside the district of Tanjung Tanjung and some live outside the province. Likewise, the economic situation of the people after selling their agricultural land does not get better than before and even decreased.

Keywords: *Prohibition, Ownership, Land, Absentee*

0 INTRODUCTION

Indonesia already has a special provision that regulates the land that is Law No. 5 of 1960 on the Basic Regulation of Agrarian Principles, commonly called UUPA, which came into effect since September 24, 1960.

One important legal aspect with the enactment of the Basic Agrarian Law (UUPA) is the proclamation of "Landreform Program" which is the core of Agrarian Reform. Generally, landreform aims to enhance the standard of living and income of farmers, as the foundation of economic development towards a just and prosperous society based on Pancasila.

One of the land reform programs is the absentee prohibition of agricultural land holding, which rests on the basic law of the Basic Agrarian Law (UUPA) Article 10. The principle contained in Article 10 paragraphs (1) and (2) is a principle which obliges the land owner must work on or actively cultivate the farmland. As a step towards the implementation of the principle, a provision for the abolition of agricultural land in what is called the "absentee" or in Sundanese "guntai", is the possession of the land which is located outside the area of residence.

The prohibition of absentee farm ownership when viewed from the current conditions is still in accordance with the needs of the community, with the development of transportation and communication tools that can facilitate the land owners to work the land actively and efficiently without the need for a long time even though the land is located far from the place stay. In addition to the development of transportation and communication tools, now also occurs the development of tools and mechanisms in processing in agriculture.

Now the processing of agricultural land is not like the old days. Farmers used to rely more on farming. But at this time has found many tools for agricultural land cultivation using engine power so that productivity will be higher and also the process of soil will certainly be faster than using human power alone.

In Tanjung Sub District, which is the capital of North Lombok Regency, the ownership of agricultural land in absentee is still ongoing because North Lombok regency is an expanding regency, let alone Tanjung District is the center of government so that the future development of all sectors, industry, tourism, agriculture will be prioritized in Tanjung . Besides, the facilities of public facilities that continue to be built include the access road, making transportation easy to enter in Tanjung. Seeing this condition many people who have more capital to buy agricultural land and used as an investment tool. Whereas before the division it occurred the price of land in Tanjung District is very cheap and does not have the selling power.

The land itself should not be the object of investment solely. Even if there is a possibility that the land has the right to gain from the increase in land prices, due to development carried out by the government or other parties.

From the above background then the problem is why is the absentee farm ownership prohibited?

DISCUSSION

2.1 Understanding of absentee land

According to the English dictionary, Absentee is absent or absent in its place, or landlord is the non-resident landowner, landlord who resides in another place.¹ Land absentee is land located outside the area of residence that owns the land.² In other words the absentee ground is a land that is located far from the owner.

There are several essences which are the provisions of the absentee, among others:³

John M. Echols and Hasan Sadily, *Kamus Inggris-Indonesia*, Gramedia, Jakarta, 1996, p. 3

Boedi Harsono, *Op.cit.*, p. 385

Parlindungan, *Pendaftaran Tanah di Indonesia*, Mandar Madju, Bandung, 1999, p. 123

- 0 Farms shall be actively waged or actively undertaken.
- 1 Owners of agricultural land are obliged to reside in the sub district where the land is located.
- 2 Owners of agricultural land residing outside the sub-districts where the land is located, shall transfer the right to their land or move to the sub-district of the location of the land.
- 3 It is prohibited to transfer or transfer the right to agricultural land to a person or legal entity residing or domiciled outside the sub district where the land is located.

Absentee farm ownership is prohibited, it is related to the validity of the principle of agricultural land must be done actively by its own owner by preventing ways that extortion as contained in Article 10 UUPA. The intention of actively working on their own is that those who own or control the agricultural land do not have to work on or cultivate their land with their own strength, but can ask for help to the peasants by paying a decent wage or using other means of production, such as rakes, tractors.

In order to realize the principles contained in article 10 of UUPA, there are provisions on the maximum or minimum limit of land ownership in order to avoid concentration of land ownership in the hands of capable groups.⁴

2.2 *The purpose and objective of the prohibition of absentee agricultural land ownership*

In general, farmland is found in rural areas, while many people who own land in absentee/guntai generally reside in the city. People who live in cities have farmland in the village certainly not in line with the principle of agricultural land for farmers. People who live in the city obviously not belong to the category of farmers. The objective of prohibiting the absentee / guntai agricultural land ownership is that the results obtained from the cultivation of agricultural land can be largely enjoyed by those who do not live in the village.

According to Boedi Harsono, the objective of this prohibition is that the proceeds obtained from the land concession are mostly enjoyed by the rural community where the land is concerned, since the landowner will reside in the producing area.⁵

The absentee/baggage of this agricultural land, resulting in inefficient cultivation, such as the implementation, control, transportation of the results, may also lead to exploitation systems. This means that the peasants of the land belong to another person with all their might, responsibility and risk, but only accept part of the results they manage. On the other hand, landowners who are far from the land and do not work their land without taking any risks and without sweating will get a larger share of the land. Therefore, it is not in accordance with the objective of land reform in Indonesia that is to increase the income and living standard of the farmers of the land and as a foundation or requirement to conduct economic development towards a just and prosperous society based on Pancasila.⁶

2.3 *Exclusion of prohibition of agricultural land ownership in absentee*

Persons excluded from the prohibition of absentee farmland are the following:⁷

⁰ Urip Santoso, *Perolehan Hak Atas Tanah*, Prenada Media Group, Surabaya, 2015, .10

¹ Boedi Harsono, *Op.cit*, p. 385

² Effendi Perangin, *Hukum Agraria di Indonesia, Suatu Telaah dari Sudut Pandang Praktisi Hukum*, CV. Rajawali, Jakarta 1986, p. 122

³ *Ibid*, p.190

- 5888 Those domiciled in the sub-districts adjacent to the sub-district where land is located by the district/municipality land reform consideration committee still enabled the efficient cultivation of the land and the land it has owned since before the enactment of PP No.224 of 1961.
- 5889 Civil Servants and members of the TNI and others who are likened to them.
- 5890 Those who are performing religious duties
- 5891 Those who have other special reasons received Widows of civil servants and retired civil servants widows as long as they do not marry a non-government employee or a retired civil servant.

Based on Government Regulation no. 4 Year 1977 on Absentee Land Ownership For Retired State Employees provides for the exception of civil servants, the provisions of exceptions concerning the ownership of agricultural land applicable to public servants apply also to retired civil servants. Such ownership may be transmitted after retirement, if he then moves to the sub-district of the land concerned, by itself the ownership may be increased to the maximum extent.

With the exception of a civil servant within 2 years of retirement is allowed to purchase agricultural land in absentee to the limit of 2/5 maximum area for the regency/municipal area of the land concerned. In this exemption also includes ownership by the wife and children who are still dependent. But at any time a civil servant or equivalent of them ceases to perform the duties of the State, such as obtaining a pension, then he shall comply with the provisions within one year from the end of his duties. The period may be extended by the Minister of Agrarian Affairs if there is a reasonable reason.

2.4 *The philosophical, juridical and sociological basis of the prohibition of absentee farmland*

2.4.1 *Philosophical Ground*

That the land must be owned by a person residing in the Tanjung sub district and the land should be used and used for agriculture. If the land is used in accordance with the conditions then the land will remain productive, will not experience a decline in the quality of fertility, so beneficial to the welfare and happiness of farmers, farmers and farm laborers in the District Tanjung.

The soil works for the welfare of human life so that the land should be used to improve the prosperity of the people. That is why ignoring the obligation to use, properly manage, is an act of violation of social functions and the neglect of the philosophy of the land (the land is not justified not managed).

The significance of land can be seen in Article 33 paragraph (3) of the 1945 Constitution which states:

"The earth, the water and the natural wealth contained therein are controlled by the state and used for the greatest prosperity of the people."

The above provision explains that the land as a place of business, which is part of the earth's surface should be utilized as much as possible for the welfare of the people.

Philosophically, the prohibition of absenteeism of agricultural land is a legal protection against the interests of farmers who are relatively weak when dealing with the owners of capital who see the land as a factor of production alone. Land is an important resource for the

community, especially farmers. Farmers need agricultural land as a means of enhancing agricultural production and survival efforts.

Farmland is very important value in a nation because as one of the support of food security in a country. Land is also one of the factors of production that is vital to human life and the development of a nation. Because of the importance of agricultural land, so that the agricultural land needs to be set in order not to be controlled massively by some parties only. Therefore, the government needs to make arrangements through Land reform.

The implementation of land reform is an unavoidable necessity and necessity in order to bring about social justice and for the utmost utilization of the land for mutual prosperity. The programs of the land reform are:⁸

- 0 Limitation on the maximum area of land tenure;
- 1 Prohibition of absentee land ownership (cunt);
- 2 Redistribution of the remaining lands to the maximum extent, lands exposed to absentee restrictions, lands former self-government and state lands;
- 3 Arrangement on the return and redemption of pawned agricultural lands;
- 4 Rearrangement of production sharing agreements;
- 5 Determination of minimum area of agricultural land ownership with the prohibition to perform acts that result in the split of the ownership of agricultural lands becomes the parts that are too small.

2.4.2 Juridical Foundation

Judicially, the legal basis for the prohibition of absentee / guntai land ownership has been set forth in Article 3 of Government Regulation No. 224/1961 on the implementation of land distribution and compensation and Government Regulation No. 41 of 1964 concerning amendments and additional government regulation No. 224/1961 implementation of land distribution and compensation (additional Article 3a s / d 3e). These two Government Regulations are the implementing rules of the provisions stipulated in Article 10 of the BAL, which aims to prevent the occurrence of extortion systems conducted on weak economic groups.

In Article 10 of the UUPA it has been argued that those who own agricultural land are obliged to do or actively work on it themselves, so that then the provision to eliminate the agricultural authorities in what is called absentee / guntai is the ownership of land located outside the district of the landowner's residence.

Basically it is prohibited to own land outside the sub-district where the land is located. The prohibition does not apply to owners who reside in the sub-districts adjacent to the sub-district where the land is concerned, provided the distance from which the landlord and his land still enable him to work the land efficiently.

Considering that the objective provisions of Article 10 of this UUP are related to the public interest, then the juridical provisions of this article include the provisions of the law of force or "*Dwingend Recht*".

According to the provisions of Article 3 of Government Regulation No. 224 of 1961, it states that:

Paragraph (1)

⁸Supriadi, *Hukum Agraria*, Sinar Grafika, Jakarta, 2007, p. 203

Owners of agricultural land residing outside the sub-district where the land is located, within a period of 6 months shall transfer the rights to the land to another in the sub-district where the land is located or move to the sub-district of the land.

Paragraph (2)

The obligations under subsection (1) shall not apply to landowners who reside in the sub-districts adjacent to the sub-district of the land, if the distance between their residence and land is still possible to work the land efficiently.

Paragraph (3)

Without prejudice to the provisions of paragraph (2) of this article, if the landowner moves to or leaves his residence outside the sub-district where the land is located for 2 consecutive years, he shall transfer the ownership of his land to another resident in the sub-district that.

Paragraph (4)

The provisions of paragraphs (1) and (3) shall not apply to those who perform the duties of the State, perform their religious duties or have other special reasons that the Minister of Agrarian may accept. For State employees and Military Officials and performing the duties of the State, the exceptions referred to in this paragraph are limited to the ownership of agricultural land up to 2/5 of the maximum area specified for the area concerned pursuant to Law No.56 of 1960

Paragraph (5)

If the obligations under paragraphs (1) and (3) are not met then the land concerned is taken by the Government.

The period of transfer of title to the agricultural land referred to in that article needs to be limited so that the owner of the land concerned shall not take time in his attempt to transfer his property. If such obligations are not exercised or there is a breach of such a prohibition then the relevant land will be taken over by the Government for ease of distribution to the local community, and to the former owner to be given compensation under applicable regulations.

The compensation is provided for in Article 6 and Article 7 of Government Regulation Number 224 of 1961. So anyone in connection with the issue of absentee / guntai land ownership shall be subject to such Government Regulation. Furthermore, in Article 19 of Government Regulation No. 224/1961, criminal sanctions are imposed on landowners who refuse or deliberately prevent the taking of land by the government.

2.4.3 Sociological Foundation

The fact that there are in the field, in Tanjung sub-district is still found many people who have farmland in absentee, then automatically the owner does not live in Tanjung District even there are also living in other provinces. Because the farm is an absentee, the owner does not work on his own farm, but the worker is the people or his own family who live in Tanjung Sub-district. So that the cultivation of agricultural land is not intensively done by landowners. This is contrary to the principle of social justice.

0 CONCLUSION

Land absentee is land located outside the area of residence that owns the land. The objective of the prohibition of absentee farming is that the results obtained from the agricultural land cultivation are mostly enjoyed by the people who live in Tanjung Sub

Philosophically, the prohibition of absentee ownership of land is a legal protection against the interests of farmers who are relatively weak when dealing with the owners of capital who see the land as a factor of production alone.

Juridical, the legal basis for the prohibition of absentee/guntai land ownership has been set forth in Article 3 of Government Regulation No. 224 of 1961 and Government Regulation No. 41 of 1964 (additional Article 3a s / d 3e).

Sociologically, the fact that there are in the field, in Tanjung sub-district is still found many people who have farmland in absentee, then automatically the owner does not live in the District of Tanjung even some living in other provinces, this means contrary to the principle of social justice.

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Regulations

- 1945 Constitution of the Republic of Indonesia
- Law Number 5 Year 1960 on Basic Regulation of Agrarian Principles.
- Government Regulation No. 224 of 1961 on the Implementation of Land Distribution and Indemnification.
- Government Regulation No. 41 of 1961 concerning Amendment and Supplement of Government Regulation Number 224 of 1961 concerning the Implementation of Land Distribution and Indemnification.

THE AUTHORITY OF THE RELIGIOUS COURTS IN THE SETTLEMENT OF SHARIA BANKING DISPUTES (ANALYSIS OF DECISION OF PA MATARAM NUMBER 0508 / PDT.G / 016 / PA.MTR CONCERNING ACTS AGAINST THE LAW)

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Abstract: *The purpose of this study is to know and analyze why the Religious Courts in resolving the dispute Sharia Banking based on cases contained in the Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR about Acts Against the Law. The benefits of this study consist of theoretical benefits and practical benefits. The research method used is normative research. Based on the results of existing research then after the author analyzes the authority of the Religious Courts in the Settlement of Sharia Banking Disputes based on cases contained in the Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR concerning Acts Against the Law is a dispute between Mr. Suharyono (customer) with BRI Sharia. In Law no. (2) In the event that parties have agreed, dispute resolution other than as meant in paragraph (1), dispute settlement done in accordance with the contents of the Agreement. Based on the above, if referring to Law no. 3 of 2006 on Religious Courts, the Religious Courts have absolute and absolute authority in the dispute over Islamic economic case.*

Keywords: *settlement of disputes, religious courts, sharia banking*

0 INTRODUCTION

1.1 Background

The Religious Courts are one of the four courts of law mentioned above where the existence is further stipulated in Law Number 14 Year 1970 on the Principles of Judicial Power and which have been replaced by Law Number 4 Year 2004 on Judicial Power and which last replaced by Law No. 48 of 2009 on Judicial Power, the Act is a law that is organic, so that the need for implementing regulations.¹

¹ Listyo Budi Santoso, *Kewenangan Pengadilan Agama Dalam Menyelesaikan Sengketa Ekonomi Syari'ah (Berdasarkan Undang-Undang Nomor 3 Tahun 2006)*, Program Studi Magister Kenotariatan Universitas Diponegoro Semarang, 2009.

Religious Courts as a judicial environment under the Supreme Court, based on Law Number 50 Year 2009 on the Second Amendment to Law Number 7 Year 1989 on Religious Courts Article 1 point (1) that the Religious Courts are justice for people who are Muslims.

While the authority of the Religious Courts in Law No. 3 of 2006 concerning Amendment to Law No. 7 of 1989 concerning Religious Courts Article 49, that the Religious Courts are on duty and authorized to examine, decide upon, and resolve cases in the first instance between persons Muslims in the field of marriage, inheritance, will, grant, endowment, zakat, infaq, shadaqah; and sharia economy. Sharia Economics is defined by: "Acts or business activities carried out according to Sharia principles." The authority includes:²

- 0 Sharia Bank;
- 1 Sharia Micro Finance Institution;
- 2 Sharia Insurance;
- 3 Reinsurance of Sharia;
- 4 Sharia Mutual Funds;
- 5 Sharia Bonds and Sharia Medium Term Notes;
- 6 Sharia Securities;
- 7 Sharia Financing;
- 8 Sharia Pawn Shop;
- 9 Pension Fund of Sharia Financial Institution; and
- 10 Sharia Business.

Normatively and empirically juridical, the Sharia Bank is recognized in the state of the Republic of Indonesia. Normative juridical recognition is recorded in Indonesian legislation. In addition, empirical juridical recognition can be seen in sharia banking is growing and developing in general across the provincial and district capitals in Indonesia, even some conventional banks and other financial institutions open a sharia business unit (sharia banks, Takaful, sharia pawnshops, and the like).³

Aspects of dispute settlement in financial transactions on sharia banking are important. This is because in every business relationship there is inevitably a dispute between parties that start with a sense of dissatisfaction of one party or due to the occurrence of default from either party.⁴

On Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR. the case of the Sharia (Islamic Banking) Disputes between Plaintiffs (BRI Bank Customer Tuan Suharyono) and the Defendant (PT Bank BRI Syariah Branch Mataram). Sitting the case is Plaintiff was visited by the Defendant named Rudy Andiprayoto (employee of PT Bank BRI Syariah Branch Mataram) offered credit with profit sharing system, originally Plaintiff refused because Plaintiff still has credit to Bank BCA Branch Mataram and Bank Danamon Branch Mataram which still

⁰ Ridha Eka Rahayu, *Kewenangan Pengadilan Agama*, <https://ridhamujahidahulumuddin.wordpress.com>. accessed on December 7, 2017. at 11.05 WITA.

¹ Rachmadi Usman, *Aspek Hukum Perbankan Syariah Di Indonesia*, SinarGrafika, Cetakan Kedua, Jakarta, 2014, p. 0

Abdul Ghofur Anshori, *Hukum Perbankan Syariah (UU No. 21 Tahun 2008)*, Refika Aditama, Cetakan Kesatu, Bandung, 2009, p.109.

not paid, but because the Defendant often came to the Plaintiff and said he would settle the Plaintiff's credit at Bank BCA of Mataram Branch and Bank Danamon of Mataram Branch, provided that Plaintiff takes credit to the Defendant on a profit sharing system and there is no interest. Having been promised the same thing, the Plaintiff finally accepted the offer. After some time the Plaintiff was summoned by the Defendant to sign the financing contract of Murabahah Number 51, and Murabahah financing agreement Number 54. After some time the Plaintiff suffered an accident because it had been robbed, then the Plaintiff in good faith came to the Bank BRI Branch Office of Mataram to request restructuring of payment relief on both Murabaha contracts. However, those approved for restructuring by Defendant only Murabaha Number 54, with the agreement of Addendum Number 103, dated 29 December 2009 by changing the Murabahah contract into Musyarakah contract.

In such cases, the Plaintiff won the award because one of the reasons for the judge's consideration in the case was the existence of a Defendant against the Law (PMH) committed by the Defendant against the Plaintiff. Whereas in the financing contract Article 19 the parties agree that the competent dispute resolution body is the National Sharia Arbitration Board (BASYARNAS) as follows:

- 0 All disputes and disagreements arising in understanding / interpreting parts of the content or in executing this Agreement, the FIRST PARTY and SECOND PARTY shall endeavor to settle consensus and consensus;
- 1 If the settlement of disagreements or disputes through deliberations to consensus does not result in a decision agreed upon by the parties agreeing and agreeing to designate and authorize and authorize the National Sharia Arbitration Board (Basyarnas);

In Law Number 21 Year 2008 regarding Islamic Banking Article 55, states that:

- 0 Settlement of Sharia Banking disputes is conducted by the courts within the Religious Courts.
- 1 In the event that the parties have agreed, dispute resolution other than as intended in paragraph (1), dispute settlement shall be conducted in accordance with the contents of the Agreement.
- 2 The settlement of disputes as referred to in paragraph (2) shall not be contrary to Sharia Principles.

Based on the description, the authors want to examine and analyze relating to the authority of the Religious Courts in the Settlement of Sharia Banking Disputes (Analysis of Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR).

THEORETICAL FRAMEWORK

2.1 Theoretical basis

2.1.1 Authority Theory

The word authority comes from the word "arbitrary" which is defined as the authority, right and power that belong to do something.⁵ Authority is what is called formal power, power derived from legislative power (given by law) or from administrative executive power.⁶

⁰Prajudi Atmosudirdjo. *Hukum Administrasi Negara*. Ghalia Indonesia, Jakarta, p. 78.

Theory of authority is used to analyze the first problem that is about Why the Religious Courts resolve the dispute of Sharia Banking based on cases in which there is Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR about Unlawful Acts.

2.1.2 Dispute resolution theory

The term dispute settlement theory is derived from the English translation of dispute settlement of theory, the Dutch language of *theorie van de beslechting van geschillen*, while in German it is called *theorie der streitbeilegung*. Dispute resolution theory is a theory that examines and analyzes the categories or classification of disputes or disputes that arise in society, the causes of disputes and the ways or strategies used to end the dispute.⁷

The theory of dispute settlement is used to analyze the first problem that is why the Religious Court solve the dispute of Sharia Banking based on the case that there is Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR concerning Action Against Law.

2.1.3 The Theory of Legal Certainty

According to Apeldoorn, his legal certainty has two aspects:⁸

- 0 Regarding the matter can be determined (*bepaalbaarheid*) law in concrete money matters. This means that the parties seeking justice want to know what the law is in a special case, before he started the case.
- 1 Legal certainty means legal security. This means protection for the parties to the abuse of judges.

This theory of legal certainty is used to analyze the second problem of What is the Law Effects of the Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR about the Acts Against the Law.

2.2 Conceptual Base

2.2.1 The concept of the Religious Courts

The 1945 Constitution of the State of the Republic of Indonesia determines Article 24 paragraph (2), that the Religious Courts are one of the judiciary judicial justice bodies under the Supreme Court along with other judicial bodies within the general courts, State Administrative Courts and Military Courts. Religious courts are one of the judicial bodies of the judicial authorities to organize law enforcement and justice for the justice seekers in certain matters among people who are Muslim in the field of marriage, inheritance, will, grant, wakaf, aqad, infaq, shadaqah, and economy sharia.⁹

2.2.2 Concepts of Sharia Banking

According to Law Number 21 Year 2008 concerning Sharia Banking, Sharia Banking is anything that concerns sharia bank and sharia business unit, covering institution, business

⁰ Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, Gramedia Pustaka Utama, Jakarta, 1998, p. 35-36.

¹ *Ibid*, p. 137.

² *Ibid*.

³ Sufiarina & Yusrial, *Op. Cit*, p. 65.

activity, and way and process in conducting its business activity. While Sharia Bank is a bank that runs its business activities based on sharia principles and according to its type consist of Sharia Commercial Bank and Sharia Rural Bank."

2.2.3 Dispute resolution

Completion is a process, action, how to complete. Resolving is defined as making it easy, making it end, clearing or deciding, organizing, reconciling (disputes or arguments), or arranging things to be good.¹⁰

According to Dean G. Pruitt and Jefry Z. Rubin argued the definition of dispute is:¹¹ "Perceptions of perceived divergent of interest or a belief that the aspirations of the disputants are not achieved simultaneously".

2.2.4 Act against the law

Unlawful acts are acts that violate the subjective rights of others or are contrary to the legal obligations of the author himself as provided for in law. In Article 1365 the Civil Code contains the following provisions:

"Any proceedings against the law which thereby cause harm to others, require a person who, by his guilt, causes the loss to compensate him for his loss."

0 METHOD

The type of research used in this study is the type of research Normative. which is a study conducted by examining court decisions or legal norms in legislation and other sources of reference related to the Authority of the Religious Courts in the Settlement of Sharia Banking Disputes (Analysis of Decision of PA Mataram Number 0508 / PDT.G / 016 / PA. MTR) on Unlawful Acts.

To examine the problems in this study used techniques or approaches, as follows Statutory Approach, Conceptual Approach, Case Approach.¹²

IV. RESULT AND DISCUSSION

4.1 The jurisdiction of religious courts in resolving the dispute of sharia banking based on positive law in Indonesia

4.1.1 Religious courts

0 History of Religious Courts

In the early independence of the Republic of Indonesia the Religious Courts were still guided by the laws of the Dutch Colonial Government based on Article II of the Transitional Rules of the 1945 Constitution which reads:¹³

²³ Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, 1989, p. 801.

²⁴ Dean G. Pruitt & Jeffrey Z. Rubin, *Konflik Sosial*, Pustaka Pelajar, Yogyakarta, 2000, p. 9-10.

²⁵ Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2011, p. 93.

²⁶ Abdullah Tri Wahyudi, *Op Cit.* p. 13

"All State bodies and regulations that are still directly applicable as long as the new one has not been implemented according to this Constitution."

In 1948 the Government of Indonesia issued a regulation on Religious Courts namely Law Number 1948 on the Composition and Authority of Judicial Bodies and Attorney. Based on this law Judicial power in Indonesia is carried out by three courts of justice, namely:

- 23 General Court;
- 24 Government Administrative Court;
- 25 The army trial.

Law Number 48 Year 1948 has never been enacted as a law because this law is valid after the determination of the Minister of Justice while the Minister of Justice has never made the enactment of the law.¹⁴

The setting of the Religious Courts back to the original arrangements as set forth in Article II of the Transitional Rules, namely *Staatsblad* Year 1882 Number 152 jo. *Staatsblad* Year 1970 Number 116 and 610 which applies to Religious Courts in Java and Madura.

In 1951 the Government of the Republic of Indonesia issued Emergency Law No. 1 of 1951 on Provisional Measures to Conduct Unity of Structure, Power and Events to the Civil Court. Based on this Regulation, Religious Courts are regulated separately by Government Regulation. To implement the contents of Emergency Law Number 1 Year 1951 stipulated Government Regulation Number 22 Year 1957 concerning Establishment of Sharia Court / Court for Aceh Region but this regulation is revoked because it cannot provide settlement for other regions and replaced by Government Regulation Number 45 Year 1957 on the Establishment of Religious Courts / Sharia Courts in areas outside Java and Madura.¹⁵

In 1970 it has been enacted and enacted Law Number 14 Year 1970 on the Basic Provisions of Judicial Power. Pursuant to Article 10 paragraph (1) of the Religious Courts is one of the judicial environment that exercises judicial powers in Indonesia in addition to other courts. The Religious Courts have equal and equal position with other courts.¹⁶

The position of the Religious Courts is stronger with the enactment of Law No. 1 of 1974 on the Code and the enactment of Government Regulation No. 9 of 1975 on the Implementation of Law No. 1 of 1974 on Marriage.

In 1989 it was only realized what would be the intention of Law Number 14 Year 1970 regarding the regulation which regulate the Religious Court with the enactment of Law Number 7 Year 1989 on Religious Courts. So that this Law restores the position of Religious Court to its original position as an executor of the judicial power which is independent and parallel with other judiciary. The Religious Courts are no longer dependent on the General Courts.

In Article 49 of Law Number 7 Year 1989 states there are six competencies of religious courts, namely marriage, inheritance, grants, wills, *waqaf*, and *zaqad*. Such powers include the arbitrary authority such as divorce. The powers set forth in this Section 49 are then further elaborated into 22 kinds.¹⁷ Article 49 paragraph (1) reads:

¹⁴*Ibid.* p. 14

¹⁵*Ibid.* p. 15.

¹⁶*Ibid.* p. 16.

¹⁷Bagir Manan in Sufiarina and Yusrial, *Loc.Cit*, p. 63

"The Religious Courts shall have the duty and authority to examine and settle matters in the first instance between Muslims in the field of marriage, inheritance, wills and grants made under Islamic law, wakaf and shadaqah."

The birth of Law No. 3 of 2006 has brought great changes to the competence of religious courts. In Law Number 3 Year 0066 the competence of religious courts is expanded by including, among others, sharia economy as one of its competence areas. Law Number 3 Year 2006 explicitly states that Islamic economics has become the absolute competence of Religious court.

Religious courts not only resolve disputes in the areas of marriage, inheritance, wills, grants, endowments, and shadaqah, but also have the authority to handle the appointment of children, zaqad disputes, infaq, and other property and civic disputes among fellow Muslims, as well as sharia economics.

5888 The purpose of Religious Judicature law

The objective of Law Number 7 Year 1989 on Religious Courts which has been amended by Law Number 3 Year 2006 and Law Number 50 Year 2009 are as follows:¹⁸

- 0 Reinforce the position and authority of religious courts as the executor of judicial power.
- 1 Implement Act No. 14 of 1970 on Basic Provisions of Judicial Power.
- 2 Realizing the uniformity of court powers within the religious courts of Indonesia
- 3 Aligning the religious court with other courts.

The authority of the Religious Courts

The authority or competence of the judiciary in relation to the procedural law concerns two things, namely "Relative Competence" and "Absolute Competence".

The domain of the relative competence of the judicial environment is governed by the underlying laws. For religious court based on Law Number 7 Year 1989 concerning Religious Courts which has been amended by Law Number 3 Year 2006 and Law Number 50 Year 2009 Article 4 paragraph (1) reads:

"Religious Courts are domiciled in the district / city capitals and their jurisdictions cover the districts / municipalities."

In the Elucidation of Article 4 paragraph (1) reads:

"Basically, the place of the Religious Court is in the capital, but there is no possibility of exceptions."

The provisions of Article 4 paragraph (1) relate to the relative competence. Relative competence is defined as the power of the courts by region or jurisdiction in the same court environment of the type and level. Each religious court has a particular legal area as an exception, perhaps more or less."

Regarding absolute competence, the setting of absolute authority is found in Article 2 and Article 9 until Article 53 of the Religious Judicature Law.

Section 2:

"Religious Judiciary is one of the judicial authorities for the people of Islamic justice seekers on certain matters as referred to in this law."

¹⁸Abdullah Tri Wahyudi, *Loc.Cit*, p. 22.

Article 9 of the Religious Judicature Law determines the absolute authority of religious courts in more detail which states:

"The Religious Courts are on duty and authorized to examine, decide, and resolve first-level cases among Muslims in the areas of: a) marriage; b) inheritance; c) testament; d) grants; e) waqf; f) zaqad; g) infaq; h) shadaqah; and i) sharia economy."

0 General Principles of Religious Courts

From all articles in Law Number 7 Year 1989 concerning Religious Courts that have been amended by Law Number 3 Year 2006 and Law Number 50 Year 2009 can be found the principles applicable to the court within the Religious Courts as follows:¹⁹

- 23 The principle of Islamic personality
- 24 The principle of examination in two levels
- 25 The principle of authority to try a particular case
- 26 The principle of authority to adjudicate does not include property rights disputes.
- 27 The principle of judges is waiting (Nemo Yudex Sine Actore)
- 28 The principle of the obligation to examine cases brought to court.
- 29 Judicial principle is simple, fast, and low cost
- 30 The principle of judgment according to law and equality of rights
- 31 The principle of providing assistance.
- 32 The trial principle is open to the public
- 33 The Judicial Ruling Principle Should Include Considerations
- 34 Principle of Compulsory Justice
- 35 The Principle of Late Must With Cost

The other principles applicable in the general court environment that apply also in the Religious Courts are as follows:

- 5888 Principle of Judge's Freedom
- 5889 Judge Principle is Passive
- 5890 The Principle of Lit No Must Be Represented
- 5891 The Principle Must Listen Both Parties
- 5892 The Lawyer Principle Can Oral And Written
- 5893 The Principle of Ne Bis In Idem
- 5894 Principle of the Assembly of the Assembly

In addition to the above principles there are also principles of Procedural Law of Religious Court in the Settlement of Islamic Case is as follows:²⁰

- 0 The Godhead
- 1 The Principle of Islamic Personality and Self-Submission
- 2 The principle of Freedom
- 3 A Waiting Principle
- 4 Judge Principle is Passive
- 5 Open General Assembly

¹⁹Abdullah Tri Wahyudi, *Op.Cit*, p. 27.

⁰ Ahmad Mujahidin, *Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia*, Ghalia Indonesia, Jakarta, 2010, p. 30

- 0 Equality Principle (Listening to Both Parties)
- 1 Decidendi Ratio Principle (Verdict Must Be Accompanied)
- 2 Case Cost Principle
- 3 The Flexibility Principle
- 4 Legality Principle
- 5 The principle of peace.
- 6 Active Principles Provide Help
- 7 The Inter Partes and / or Erga Omnes Principles

4.1.2 Sharia Banking

0 History of Sharia Banking

The position of Muslims as Indonesia's largest population greatly affects the development of sharia banking. Basically the teachings of Islam that forbid usury 'or interest is a fundamental rule that must be followed by his people.

The first establishment of a sharia bank in Indonesia is the signing of the Deed of Establishment of Bank Muamalat on November 1, 1991 which was officially operated on May 1, 1992.

Legalization of the banking system by using the profit sharing principle begins with the issuance of Law Number 7 of 1992 concerning Banking with the imposition of Article 13 letter c which explains that one of the Bank Perkreditan Rakyat (BPR) businesses provides financing for customers based on the profit sharing principle.

The basic use of sharia principles in banking operations as a whole is only legalized at the time of the issuance of Law Number 10 of 1998 concerning Amendment to Act Number 7 of 1992 concerning Banking. With the enactment of Law Number 10 Year 1998, officially recognized the existence of dual banking system (dual banking system), that is conventional banking system and sharia banking system.

The existence of sharia banking is strengthened by the issuance of Law Number 21 Year 2008 regarding Sharia Banking (UUPS). With this law, constitutionally the legal system of banking in Indonesia has opened the widest opportunity to establish and develop banks that use the name and implement system of business activities based on the contracts or agreements contained in the provisions of sharia.

0 Definition, Principles, Objectives, Functions and Characteristics of Sharia Banking

Based on Law Number 21 Year 2008 Article 1 number (7) is a bank conducting business activities based on sharia principles, and according to its type consisting of Sharia Commercial Bank and Sharia Rural Bank.²¹ While Sharia Banking according to Law Number 21 Year 2008 Article 1 number (1) is anything concerning Sharia Bank and Sharia Business Unit, covering institution, business activity, and manner and process in conducting its business activity.

In carrying out its activities the Islamic bank embraces the following principles:²²

0 Principles of Justice

- 1 The principle of equality

⁰ Neneng Nurhasanah dan Panji Adam, *Loc. Cit.* p. 7

¹ Rachmadi Usman, *Loc. Cit.* p.35

3) The principle of tranquility

The purpose of Sharia Banking is stipulated in Law Number 21 Year 2008 regarding Sharia Banking Article 3 which states as follows:²³

"Syariah banking aims to support the implementation of national development in order to improve justice, togetherness and equity of people's welfare".

The function of sharia banking is regulated in Law Number 21 Year 2008 concerning Sharia Banking Article 4 paragraph (1) stating that:

"Islamic banks and UUS must perform the function of collecting and channeling public funds." Characteristics of Islamic banks, among others, are:²⁴

- violation of usury in various forms;
- not knowing the concept of time of money;
- the concept of money as a non-commodity exchange medium;
- shall not be allowed to engage in speculative activities;
- it is not permissible to use two prices for one good;

Products of Sharia Banking

Sharia Banking Products can be presented as follows:²⁵

- 0 Fund Raising Products
Similar to conventional banking products, Islamic banking products in the field of fundraising are referred to as savings, in the form of demand deposits, deposits, certificates of deposit, savings and or other similar forms.
- 1 Fund Distribution Products
As an intermediary institution, sharia banks disburse these funds in the form of financing (financing). The financing shall consist of the following:
 - 1.0 Financing based on the Sale and Purchase Agreement, consisting of Murabahah Financing, Salam Financing, and Istishna Financing.
 - 1.1 Financing based on a Lease-Rent Agreement, Ijarah and Ijarah Muntahiyah bit Tamlik.
 - 1.2 Financing under the Production Sharing Agreement, which is Mudarabah Financing and Musyarakah Financing.
 - 1.3 Financing based on the Loan-Borrowing Agreement, which is Qardh Financing.
- 2 Products Services
Letter of Credit (L / C) of Sharia Import
Bank Guarantee Sharia
Transfer and collection
Pawn of Sharia (Rahn).
Sharia Charge Card
Exchange of Foreign Exchange (Sharf)
Multi-service financing

⁰ Neneng Nurhasanah dan Panji Adam, *Op. Cit.* p. 11

¹ *Ibid*, p. 30.

² Neneng Nurhasanah dan Panji Adam, *Loc. Cit.* p. 47



4.2 *The Authority of Religious Courts in Settling the Disputes of Sharia Banking Based on Cases Available in the Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR About Unlawful Acts*

4.2.1 *Identity of the Parties*

The Religious Courts of Mataram, have examined and prosecuted at the first level of the Sharia Economic dispute case and have passed the following verdict, in the case between:

- 0 SUHARYONO, Male, age 50, religion Islam, Occupation of Self-employed, residence in Komodo Street No. 4, BTN Gunungsari, Gunungsari Sub-District, West Lombok Regency; In this case he is represented by his Attorney; ILHAM, SH., Advocate & Attorney at "Law Office ILHAM, SH" office. having his / her address at Jalan Batu Bolong-Pagutan, Aura Mutiara Housing, Aura III-Kav. 7, West Pagutan Village - Mataram City, based on Special Power of Attorney dated 01 October 2016, registered in the Registrar's Office of Religious Court dated 05 October with Number W22.A1 / 0203 / HK.05 / X / 2016, as Plaintiff;

Against

- 0 PT. Bank BRI Syariah, cq. PT. Bank BRI Syariah Branch Office of Mataram, having its address at Jalan Pejanggik Number 103 Cakranegara, Mataram City, West Nusa Tenggara, in this case represented by Reni Suciati, Amirin and Lalu Ahmad Rozikin; They are Employees of Bank BRI Syariah Branch Office of Mataram, as authorized by PT Bank BRI Syariah based on letter SUBSTITUTION SUBSTITUTION & RESPONSE No. R.134 / KC-MTM / PINCA / 11/2016, dated November 8, 2016, registered in the Registrar Religious Court of Mataram dated 29 November 2016 with Number W22.A1 / 0248 / XI / 2016, as Defendant;

4.2.2 *Case Position*

Based on the cases contained in the Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR About the Law Against Act between Plaintiffs namely Mr. Suharyono as bank customer and Defendant namely PT. tbk Bank Rakyat Indonesia Syariah (BRI Syariah), where the site is sitting as follows:

Whereas the Plaintiff with his letter dated October 5, 2016 has filed a lawsuit filed as a case at the Registrar's Office of the Religious Court of Mataram, dated 05 October 2016 under Number 0508 / Pdt.G / 2016 / PA.Mtr., Later furnished with his statements before the court, essentially postulates the following matters;

- 0 Whereas at first the Plaintiff was approached by a person named Rudy Andiprayoto who is none other than the Defendant's employee, offering credit with a profit sharing system; Originally the Plaintiff refused because the Plaintiff still has credit to BCA Bank Branch of Mataram and Bank Danamon of Mataram Branch which is still not paid off;
- 1 Whereas due to the frequency of the Defendant's employees the a quo went to the Plaintiff and said that the Plaintiff's credit to BCA Bank of Mataram Branch and Bank Danamon of Mataram Branch shall be settled by the Defendant, provided that the Plaintiff takes credit to the Defendant on a profit-sharing system and there is no interest;

- 0 Whereas after the Plaintiff considers the credit to the Defendant is a profit-sharing system, the Plaintiff agrees to take credit to the Defendant provided that a minimum period of 10 years is given; And that condition is accepted by the Defendant's employees;
- 1 Plaintiff was summoned by the Defendant to arrive at the Defendant's office. Upon receipt of the Plaintiff at the Defendant's office, the Plaintiff was invited by the Defendant's employees to come to Bank BCA of Mataram Branch and Bank Danamon of Mataram Branch to repay the unsolved Plaintiff's loan ;
- 2 Whereas after the Defendant has settled the Plaintiff's two credits, 4 (four) land certificates belonging to the Plaintiff which originally served as collateral to Bank BCA of Mataram Branch and Bank Danamond of Mataram Branch are taken and controlled by the Defendant;
- 3 Whereas for a long time, the Plaintiff was requested by the Defendant's employees to come to the Defendant's office to sign the Murabahah financing contract; Prior to signing the Murabahah financing agreement, the Defendant's employee submitted the Letter of Financing to the Plaintiff, it turned out that the provision of ten-year credit term (120 months) was only for financing of Rp. 400,000,000, - (four hundred million rupiah), while the financing of Rp. 350.000.000, - (three hundred fifty million rupiah) is only given 3 (36 months), so the Plaintiff refused directly;
- 4 That since the Plaintiff feels that there is no other option, because if the Plaintiff does not agree / sign the Murabahah financing contract, the Plaintiff must return the Defendant's cash used to settle the Plaintiff's loan at Bank BCA and Bank Danamon, the Plaintiff sign 2 (2) two) financing contracts, namely:
- 4.0 a. Akad Pembiayaan Murabahah Number 51, dated August 12, 2009, drawn up before Notary Indah Purwani, SH. Rp. 400.000, - (four hundred million rupiah) for a period of 120 months,
- 4.1 b. Murabahah Financing Agreement Number 54 dated August 12, 2009, drawn up before Notary Indah Purwani, SH. Rp. 350.000.000, - (three hundred and fifty million rupiah), period of 36 months,
- 5 Whereas from both Murabahah Akad the total financing given by the Defendant to the Plaintiff is Rp. 750.000.000, - (seven hundred fifty million rupiah) to be 1,220,379,000 (one billion two hundred twenty million three hundred million seventy nine thousand rupiah),
- 6 Whereas initially the Plaintiff's business is running well, so the Plaintiff can pay the installments smoothly and time-lapse; However, in November 2009 the Plaintiff received a disaster, the Plaintiff's attempt was broken into the group and all the Plaintiffs' merchandise was exhausted without any remaining goods in the Plaintiff's business premises;
- 7 Whereas in respect of the disaster, the Plaintiff has reported to the Police and in good faith, the Plaintiff also came to the Defendant to inform the accident as well as to request the relief of the payment or to request restructuring of the two Murabahah financing contracts;
- 8 Whereas initially, the Defendant promised to approve the restructuring request from the Plaintiff, but in the end only 1 (one) financing contract approved for restructuring, namely Akad Murabahah number 54, with the agreement of Addendum Number 133, dated December 29, 2009, by changing Akad Murabahah

become Musyarakah Agreement with the deadline of the Defendant's capital return of Rp. 326,947,676, - (Three hundred twenty six million nine hundred forty seven thousand six hundred seventy six rupiahs) for 5 years, which ends in August 2014;

Whereas with the Musyarakah Agreement the Plaintiff shall return the Defendant's capital / repay the installment en 5 (five) stages, namely:

First Year (I) of Rp. 30,000,000 for the principal installment;

Second Year (II) of Rp. 30,000,000 for the principal installment;

Third Year (III) of Rp. 60,000,000 for the principal installment;

Fourth year (IV) of Rp. 100.000.000, - for principal installment.

Fifth Year (V) of Rp. 106,947,676, - for principal installments

Whereas the Plaintiff, while still feeling heavy and non-related to the restructuring, the Plaintiff remains in good standing to be able to repay the Defendant, but in fact the Plaintiff is not able to repay; On December 6, 2012, the Plaintiff requested the Defendant to sell the plaintiff's land to settle the Plaintiff's claim to the Defendant, as well as the Plaintiff's assigned land certificate of the Plaintiff (SHM) Number 2548 on behalf of SUHARYONO; Area + 450 M2 or 4.5 (four and a half) are, located at Lokok Rangan, Desa Kayangan, Kecamatan Kayangan, Kab. North Lombok, West Nusa Tenggara Province; Hereinafter referred to as OBJECT SENGKETA V;

Whereas after the Plaintiff handed over the Object of Dispute V (original SHM Number 2548) to the Defendant, the Plaintiff never received any news from the Defendant in relation to the sale of the V Dispute Object;

Whereas after the Defendant received the original SHM No. 2548 never again came to give any information to the Plaintiff, so that the Plaintiff thought that the land as referred to in SHM Number 2548 (Object Dispute V) has been sold and the proceeds of the sale have been used to pay off *Murabahah* financing and *Musharaka*. Therefore the Plaintiff began to focus on starting the business again and Alhamdulillah now the Plaintiff's business has started running;

On April 4, 2014, the Plaintiff was shocked and shocked by a letter from Defendant B.509-KC-MTM / ADP / 04/2014 regarding the Auction of Execution Auction of 4 (four) disputed objects guaranteed on the *Murabahah* financing contract Plaintiffs;

Based on the Plaintiff's claim above, the Defendant objected to the lawsuit and submitted an exception:

4.2.3 Absolute Exception:

0 Whereas Article 55 of Law Number 21 Year 2008 concerning Sharia Banking which in essence states that the dispute relating to Sharia Banking is submitted to Religious Court unless specified otherwise in the contract. As for the dispute with the sharia banking has been tested by the Constitutional Court Case Number 93 / PUU-X / 2012 which examines the Elucidation of Article 55 Paragraph (2) of Law Number 21 of 2008 concerning Sharia Banking;

1 Whereas the Defendant is a Sharia Banking institution conducting banking business based on sharia principles based on Law Number 21 of 2008 concerning Sharia Banking so that Defendant is subject to the provisions of Article 55 of Law Number 21 of 2008 concerning Sharia Banking as a more specific provision regulating on sharia banking;

- 0 Whereas the Defendant has made a binding with the Plaintiff based on:
- 0 Murabahah Financing Agreement Number 51, dated August 12, 2009 made before Notary Indah Purwani, S.H .;
 - 1 Murabahah Financing Agreement Number 54 dated August 12, 2009 made before Notary Indah Purwani, SH and subsequently converted into Musyarakah based on Deed of Addendum Number 133 dated December 29, 2009 Notary Indah Purwani, SH .;
- (Hereinafter referred to as "Financing Agreement")
- 0 Whereas pursuant to the Financing Agreement in Article 19 the Parties agree that the competent dispute resolution body is the National Sharia Arbitration Board (BASYARNAS) as follows:
- Article 19 Financing Agreement
- 0 All disputes and disagreements arising in understanding / interpreting parts of the content or in executing this Agreement, the FIRST PARTY and SECOND PARTY shall endeavor to settle consensus and consensus;
 - 1 Where the attempt to settle disagreements or disputes through deliberations to consensus does not result in a decision agreed upon by the parties agreeing and agreeing to designate and authorize and authorize the National Sharia Arbitration Board (Basyarnas);
 - 1 Whereas the choice of law for the settlement of agreed disputes has been regulated in the provisions of applicable legislation whereby if the parties have determined the choice of law for dispute resolution to arbitration, the Court is not authorized to adjudicate the aquo case as follows:
- Law Number 48 of 2009 on Judicial Power Article 59;
- 0 Arbitration is a means of settling a civil dispute outside the court based on an arbitration agreement made in writing by the parties to the dispute;
 - 1 The award of the arbitration shall be final and has a permanent legal force and binding on the parties;
 - 2 In the event that the parties do not implement the arbitral award voluntarily, the decision shall be made by order of the chief of the district court at the request of one of the parties to the dispute.

Elucidation of Article 59 Paragraph (1); Law No. 48 of 2009 on Judicial Power explains: "Arbitration" in this provision shall include arbitration of sharia.

Therefore, based on the foregoing reasons, the Defendant believes that the Religious Court of Mataram is not authorized to adjudicate the aquo case and therefore the Defendant requests an opportunity to prove the Defendant's statement so that the Judge of the aquo case can make corrections or cancel the verdict;

4.2.4 Judge Considerations

5888 About the Lawa

Considering, that the purpose and objective of the Plaintiff's lawsuit is as described above;

Considering that prior to examining the subject of the dispute, in the first session the Assembly has advised both the Plaintiff and the Defendant to resolve their dispute in a peaceful and familial manner, but to no avail;

Considering whereas, in order to maximize peace efforts to the parties, in accordance with the provisions of PERMA Number 1 Year 2016 concerning Mediation, the Assembly has also ordered the Plaintiff and the Defendant to resolve their dispute through mediation, since Mediation is a peaceful, effective and effective means of dispute resolution open wider access to the parties to obtain a satisfactory and fair solution; However, based on the Mediator's report dated 01 December 2016, it was stated that the parties failed to reach agreement and peace;

Considering whereas in the hearing has been read the Plaintiff's lawsuit letters which the arguments are kept true and the Plaintiff remains firm in its lawsuit;

Considering that, in the Plaintiff's lawsuit, the Defendant has delivered the answer which the Defendants objected to the Plaintiff's claim;

Considering whereas in the Defendant's reply, in addition to answering the principal issue of the case, the Defendant also submitted an exception or rebuttal;

Considering, that since the Defendant filed an exception, based on the provisions of Articles 160 and 161 RBg. before the Assembly considers and decide upon the principal issue of the case, it is necessary first to consider the Defendant's exception;

Considering that the Defendant's exception essentially consists of two reasons, namely;

23 Absolute Exception (*Exceptie Van Onbeveogheid*), on the grounds that the Religious Court of Mataram is not authorized to examine and adjudicate this lawsuit, since between the Plaintiff and Defendant there has been an arbitration clause that if there is a dispute between the Plaintiff and the Defendant then the parties agree to settle the dispute through BASYARNAS, and;

24 The Exception that the Plaintiff's lawsuit is obscure (*Exceptions Obscuurlibels*) on the grounds that the Plaintiff's lawsuit is confusing between a breach of claim and a lawsuit against the law;

5888 CONCLUSION

Based on the above discussion, it can be concluded that in the authority of the Religious Courts in the Settlement of Sharia Banking Disputes based on cases contained in the Decision of PA Mataram Number 0508 / PDT.G / 016 / PA.MTR concerning Acts Against the Law is a dispute between Mr. Suharyono (customer) with BRI Syariah. In Law no. (2) In the event that parties have agreed, dispute resolution other than as meant in paragraph (1), dispute settlement done in accordance with the contents of the Agreement. Based on the above, if referring to Law no. 3 of 2006 on Religious Peradlan, the Religious Courts have absolute and absolute authority in dispute over syariah economic case coupled with the Decision of the Constitutional Court of Case Number 93 / PUU-X / 2012 which examines the Elucidation of Article 55 Paragraph (2) of Law Number 21 2008 concerning Sharia Banking.

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JUDICIAL REVIEW OF PPAT CALLS ACCORDING TO THE CRIMINAL JUSTICE SYSTEM

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Abstract: *The purpose of this research is to know, understand, and analyze the calling of PPAT according to criminal justice system related to protection aspect and form of legal responsibility.*

This research method uses normative law research type. Normative legal research is a legal research that lays law as a norm system building. The norm system is about principles, norms, and rules, rules of law, court decisions, agreements and doctrines (teachings). Using the approach method: Statutory Approach, Case Approach, and Conceptual Approach. Normative procedure research results in the calling of PPAT as a witness or suspect are imposed by Article 112 of the Criminal Procedure Code while the seizure of the original deed of PPAT (minuta) and warkah can only be done with the special permission of the Chairman of the local District Court under the provisions of Article 43 of the Book Invite Criminal Procedure Law. PPAT as a Public Officer in carrying out his / her position should have special legal protection to keep the honor and dignity of his / her position including when giving testimony and information in examination and trial. Notary and PPAT positions have similarity in carrying out its duty of making an authentic deed based on the wishes of the parties. The calling of a notary in the criminal justice system has a provision which must be followed as the provisions of Article 66 Paragraph (1) of the Law on Notary Call for the interest of the criminal proceeding process shall obtain the approval of the Notary Public Council while the invitation to the PPAT office shall have the legal provisions in general not having legal protection set specifically.

Keywords: *criminal justice, calling PPAT*

23 INTRODUCTION

In carrying out the mandate in Article 19 paragraph (2) of the BAL on Land Registration. The Government has issued Government Regulation No. 10 of 1961 on Land Registration as it has been revoked and amended by Government Regulation No. 24/1997 concerning Land Registration.

The purpose of land registration under Article 3 of Government Regulation Number 24 of 1997 concerning land registration is Land registration aims:

- 23 To provide legal certainty and protection to the right holder of a plot of land, apartment units and other registered rights so as to easily prove himself/herself as the holder of the rights concerned;
- 24 To provide information to interested parties including the Government in order to easily obtain the necessary data in the conduct of legal acts concerning the land parcels and listed apartment units;
- 25 For the implementation of the orderly administration of land.

In Government Regulation 24/1997 regarding the registration in article 5 explicitly states that the government agency that conducts land registration throughout the territory of the Republic of Indonesia is the National Land Agency (hereinafter abbreviated as BPN). Furthermore, in Article 6 paragraph (2), in carrying out land registration. Head of Regency/Municipal Land Office cannot carry out its own, but requires the assistance of other parties namely Land Deed Officer and other officials assigned to carry out certain activities according to the Government Regulation and the relevant Regulation. Officials other than Land Deed Officials (hereinafter abbreviated as PPAT) assisting the implementation of certain activities in land registration are officials from the Auction Office, Officials of Deed of Wakaf Promotion and Adjudication Committee.

Utilization of land In order to be traded or traded, there is a need for legal certainty and protection for the parties. To obtain the certainty and protection of the law, it is necessary to have an officer authorized to transfer, transfer, and impose right on the land and/or property rights of the apartment unit. The official given the authority, namely PPAT.¹

Registration of land transfer rights, carried out by PPAT, in accordance with the provisions on PPAT Office Regulation namely Government Regulation No. 24 of 2016 concerning the amendment to Government Regulation No. 37 of 1998 on the Regulation of Position of Land Deed Authority in Article 2 states:

5888 PPAT has the principal duty to carry out part of the registration of the land by making the deed as evidence of certain legal acts concerning the right to land or property rights of the apartment unit, which shall be the basis for registration of the change of the land registration data caused by the legal act;

5889 The legal act referred to in paragraph (1) shall be as follows:

- 5888 Buy and sell;
- 5889 Exchange;
- 5890 Grant;
- 5891 Inclusion into the company (inbreng);
- 5892 Distribution of collective rights;
- 5893 Provision of Right to Build / Use Right to Land of Property;
- 5894 Giving Deposit Rights;
- 5895 Provision of Authority imposes Deposit Rights.

23 Salim Hs, *Teknik Pembuatan Akta Pejabat Pembuat Akta Tanah*, Rajawali Pers, Jakarta, 2016, p. 1

- According to Boedi Harsono, the nature of the PPAT position as a general official is:²
- 5888 PPAT is a public official who is given a special duty and authority to provide services to the community in the form of making a deed proving that it has been done before him or her legal act of transferring the right to the land, Ownership of Unit of Flats or granting of Land Rights;
- 5889 The deed made is an authentic deed, which only PPAT has the right to make it;
- 5890 PPAT is the Administrative Officer of the State, because of his duty in the field of registration of land registration which is an activity in the field of Executive / State Administration;
- 5891 The PPAT Deed is not a decision of the State Administrative Officer, because the deed of relas, that is, a written report from the certificate holder in the form of a statement concerning the acts already committed by certain parties, a legal act before him at a time referred to in the deed concerned;
- 5892 The decision of the PPAT as the State Administration Officer is the decision to refuse or grant the request of the parties who come to him to be granted a deed of the legal act they will do against him. Deciding to refuse or grant the request is an obligation of PPAT.

In carrying out its duties, PPAT has the authority to make an authentic deed of all legal acts as referred to in Article 2 paragraph (2) of Regulation of the Government of the Republic of Indonesia Number 24 of 2016 concerning Regulation of Officials of Land Deed Officials on Land Rights and Ownership of Housing Units Arrange that is located within its work area.

The PPAT deed is an authentic deed and as an authentic deed there are strict requirements in the procedures of form, form and formality to be performed so that the deed is entitled to be referred to as an authentic deed. This is affirmed by Article 1868 Civil Code:

An authentic deed is a deed made in the form prescribed by law by or in the presence of the competent public authority for which it was made.

Based on its duties and authority, PPAT has an important role in helping to create legal certainty for the public related to the legal status, rights and obligations of a person in law that serves as a valid proof of ownership, so important the task of PPAT so that the required prudence, accuracy, and perfection in any legal proceedings it undertakes to avoid the loss of either party and to ensure that the law proceeds accordingly, so that the PPAT which is the legal consultant on the deed made it avoid the errors in the form of administrative, civil or criminal responsibility.

In the case of criminal liability, in the criminal justice system the invitation to the PPAT office is different from the calling of the Notary's office. Legal protection for the position of PPAT is not regulated normatively, in contrast to the treatment given to the position of Notary where the provisions on its calling there is a special procedure which must be obeyed as intended in the provisions of Article 66 paragraph (1) of Law Number 2 Year 2014 About the amendment of Law Number 30 Year 2004 regarding the position of Notary (hereinafter referred to as UUJN), determines:

- 0 For the purposes of the judicial process, the investigator, the public prosecutor, or the judge with the approval of the honorary board of Notaries is authorized:

² Boedi Harsono, 2003. *Hukum Agraria Indonesia, Sejarah Pembentukan UUPA, Isi dan Pelaksanaanya, First edition. Hukum Tanah Nasional*. Jakarta : Djambatan.

- 0 Take photocopies of minas deeds and/or letters attached to minuta deeds or Notary protocols in Notary's depository; and
- 1 Calling a Notary to be present in the examination relating to a Notary deed or protocol which is in the Notary's depository.

Criminal liability is determined on the basis of a liability based on fault, and not only with the fulfillment of all elements of a criminal offense, so that mistakes are placed as determinants of criminal responsibility and are not only seen as a mental element in criminal acts.

The objectives of this research are to know, understand and analyze the calling of PPAT according to the criminal justice system related to the legal protection aspect, to know, understand, and analyze the responsibility of PPAT in performing their duties.

0 LITERATURE REVIEW

The theory used as an analysis in this study:

2.1 Authority Theory

Philipus M. Hadjono in his writings on the authority states that:

The term authority is aligned with the term "bevoegdheid" in Dutch legal terms. The term "bevoegdheid" is used both in the concept of public law and in the concept of private law, while the term authority or authority is always used in the concept of public law.³

F.P.C.L. Tonner cited by Ridwan HR believes that *overheidsbevoegdheid wordt in verband opgevat als het vermogen om positief recht vast te stellen en Aldus rechtsbetrekkingen tussen burgers onderling en tussen overheid en te scheppen* "(the authority of the government in this regard is regarded as the ability to exercise positive law, and so can be created legal relationship between government and citizens).⁴

2.2 Theory of Legal Protection

According to Philipus M. Hadjon, that the means of legal protection there are two kinds, namely:

0 Means of Preventive Legal Protection

In the protection of this preventive law, legal subjects are given an opportunity to file an objection or opinion before a government decision gets a definitive form. The goal is to prevent the occurrence of disputes. Preventive legal protection is of great significance to government action based on freedom of action because with preventive legal protection the government is driven to be careful in making decisions based on discretion. In Indonesia there is no specific regulation on preventive legal protection.

1 Means of repressive law protection

Repressive legal protection aims to resolve disputes. Handling of legal protection by the general courts and administrative courts in Indonesia includes this category of legal protection. The principle of legal protection of government action rests on the concept of recognition and protection of human rights because historically from the west the birth of concepts of recognition and protection of human rights is directed to the limits and lying

³ Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia Introduction to Indonesian Administrative Law*, Gadjadara University Press, Yogyakarta, 2002, p. 1

⁴ F.P.C.L. Tonner dalam Ridwan HR, *Hukum Administrasi Negara*, Rajawali Pers, Jakarta, 2006, p. 101

of public obligations and government. The second principle that justifies the legal protection of government action is the principle of the rule of law. Associated with the recognition and protection of human rights, recognition and protection of human rights has a central place and can be linked to the objectives of the rule of law.⁵

2.3 Theory of legal responsibility

In Indonesian the word responsibility means the state is obliged to bear everything (if anything happens to be prosecuted, blamed, diperkarakan and so on).⁶

Legal liability is the type of liability charged to legal subjects or perpetrators committing unlawful acts or criminal acts. Type's Legal liability can be categorized into three areas: civil, criminal and administrative.⁷

0 METHOD

Type in this research is normative law research. Normative legal research is a legal research that lays law as a norm system building. The system of norms concerned is about principles, norms, and rules, rules of legislation, court decisions, agreements and doctrines (teachings).⁸ With approach method:

- 0 Statute Approach
- 1 Case Approach
- 2 Conceptual Approach

IV. RESULT AND DISCUSSION

4.1 Calling PPAT According to the Criminal Justice System

0 Procedure Calling PPAT Position

PPAT and Notary positions are different positions when viewed in terms of authority and legal protection, although in practice law can be found a PPAT who concurrently positions as a Notary. Duplicate positions between Notary and PPAT are made possible by legislation because there is no prohibition from the Law. Notary who concurrently positions as PPAT of accountability and legal protection must be separated, calling to the position of Notary under the criminal justice system has a provision that must be followed as stipulated in article 66 paragraph (1) UUUJN where for the purposes of examination, by Investigator, Prosecutor or Judge must with the permission of the Honorary Board of Notary while the calling of the PPAT applies the general rule of law in this case the PPAT which is called as a witness or the suspect is enacted the provision of Article 112 KUHAP while the seizure of the original deed of PPAT (minuta) and warkah can only be done with special permission of the local District Court pursuant to Article 43 KUHAP.⁹

Thus it can be concluded that there is a void of norms associated with special procedures in law enforcement for a PPAT when viewed from the point of legislation related to the position of PPAT. IPPAT which overshadowed all PPAT positions in Indonesia had an

⁰ Philipus M. Hadjon, Op.Cit, p. 30

¹ Departemen Pendidikan Dan Kebudayaan Kamus Besar Bahasa Indonesia Dalam Salim Hs. Dan Erlies Septina Nurbani, 2014. *Penerapan Teori Hukum Pada Penelitian Disertasi Dan Tesis*. Ed1 Cet. 1 Rajagrafindo Persada, Jakarta, p. 207

² *Ibid.* p. 208

³ Mukti Fajar ND dan Yulianto Ahmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, 2013 p, 184.

⁴ Sjaifurrachman, 2011, *Aspek Pertanggungjawaban Notaris Dalam Pembuatan Akta*, Mandar Maju, Bandung, p. 236.

understanding with the Police in the form of MoU but the MoU was not included in the regulation of legislation in Indonesia and did not have a binding force in a special manner. One of the logical consequences of the rule of law is the application of the principle of legality, in other words, in the element of the legal state of Pancasila, the principle of legality becomes particularly important in relation to the legal protection aspect of the PPAT which until now there is no regulatory provision, must be interpreted as protection by means of legal means or protection provided by law, meaning that the regulation of the legal basis must be clearly stated in the positive law.¹⁰

Based on the above description, the Normative Procedure in the case of PPAT called as a witness or suspect is enforced the provisions of Article 112 of the Criminal Procedure Code, while the seizure of the original deed of PPAT (*minuta*) and *warkah* can only be done with the special permission of the Chairman of the local District Court based on the provisions of Article 43 of the Penal Code.

- 0 Article 112 of the Criminal Procedure Code requires that a person summoned by the investigator for the purposes of the examination shall come to the investigator. For witnesses who do not come to the investigator for no valid reason may be punished under the provisions of Article 224 of the Penal Code, with a maximum penalty of 9 months.
- 1 Article 43 of the Criminal Procedure Code states that confiscation of other letters or writings of those duty-bound by law to conceal (in this case the PPAT), to the extent not of the State's secrets, may only be made by their consent or by the special permission of the Chairman The local District Court, unless the law determines otherwise.

Based on the above description, besides pointing out some differences, it also shows that Notary and PPAT positions have an equally important role, i.e. there are similarities of urgency and qualification, among others:

- 0 Authorized to make evidences with perfect proof of authentic deed
- 1 Qualified as Public Official
- 2 It is required to keep the contents of the deeds secret, as determined in the formulation of oath of office.

Based on equal status, qualifications and obligations for Notary and PPAT positions, it is necessary to equate also the treatment form for both. Thereby regulating normatively in a regulation on provisions requiring permission of examination in the judicial process for a PPAT, in the case of being called as a witness or suspect should be equalized, that is arranged in PPAT Regulation of Position.

Some examples of causes related to the execution of duties and positions of a PPAT, among others:

The PPAT filed and summoned as a witness in the Court concerning the deed made as evidence in a case.

The PPAT which is made by the defendant or the defendant in the Court concerning the deed made and considered to be detrimental to the Plaintiff, in relation to the Civil Procedure.

PPAT as defendant in Criminal Case.

Ibid.

0 Confiscation of the bundle of deeds in the PPAT.

3 Legal Protection for PPAT

The institutions authorized to supervise the PPAT in carrying out their positions are the National Land Agency (BPN) and the Association of Land Deed Authority (IPPAT) Officials. The role of BPN in this case is to provide guidance and supervision of the PPAT in order to carry out their positions in accordance with applicable legislation. While the role of IPPAT in this case is to provide guidance and supervision of PPAT in order to carry out their positions in accordance with the Code of Ethics IPPAT.¹¹

Legal protection aspect for PPAT in the field of legislation related to PPAT position is more internal or administrative. The rules violated by a PPAT are standard measures of professionalism that should be obeyed by all PPATs as the bearers of the State's authority in making authentic deeds in the field of land. In this respect the protection of PPAT from administrative decisions, aims to provide assurance for a PPAT to be able to defend itself and defend its right to work as a PPAT.¹²

Supervision by BPN and IPPAT is basically a manifestation of legal protection (internal) to the PPAT itself because in the presence of a supervision, then every PPAT in behaving and acting both in carrying out their position and outside the office always in the corridor of law, carrying out its duties, an PPAT is required to always be grounded in the laws and regulations applicable in Indonesia, and is also obliged to carry out its duties in accordance with an agreed ethic in the form of a Code of Conduct. This Code of Conduct restricts the acts of the PPAT so that in performing its duties of office does not act arbitrarily.

As a State administrative body or officer. (BPN and Assembly of Honor) in imposing sanction on PPAT is obliged to issue or make a decision (KTUN). And if PPAT is not satisfied with the decision, the decision will become a state administrative dispute. Thus, an effort that can be done by PPAT, namely directly filing a lawsuit to the State Administrative Court as Court or first level examination. according to Philipus M. Hadjon, that the existence of means of objection (*Inspraak*) is a means of protection of preventive law. To regulate such administrative sanctions in order to provide a sense of justice and legal protection to the PPAT to propose a defense of the administrative sanctions it receives.¹³

While the legal protection aspect for PPAT which is related to the civil and criminal law institution is more external, it means that PPAT as the Public Official to him attaches the Privileges as a consequence of the predicate of his/her position. The term privilege in the field of law is a special or special right granted to a government or a ruler of a State and granted to a person or group of persons, separate from the rights of the people under applicable law. Privileges owned by PPAT, to differentiate treatment (Treatment) against ordinary people. These forms of treatment relate to a special procedure in law enforcement of PPAT, which is related to the treatment in the case of summoning and examining the investigation and trial process, which must be ignored.¹⁴

⁰ Pande Putu Doron Swardika, 2014, Tanggung Jawab Dan Perlindungan Hukum Pejabat Pembuat Akta Tanah Dalam Pembuatan Akta Jual Beli Tanah Journal Program Magister Kenotariatan Universitas Udayana.

¹ Dewi Kartika, 2015, Perlindungan Hukum Terhadap Ppat Sebagai Tergugat Dalam Pembuatan Akta Jual Beli Tanah (Study Kasus Atas Putusan Pengadilan Negeri Sorong No.73/PDT.G/2014/PN.Son). Journal Program Studi Magister Kenotariatan Falkutas Hukum Universitas Narotama Surabaya

² Hadjon, Philipus M., et.all., *Pengantar Hukum Administrasi Negara Indonesia*, Yuridika, Surabaya, 2002

³ Op.Cit Dewi Kartika, 2015

In addition to the internal legal protection aspect in the form of guidance and supervision as described above, it is also necessary to pay attention to aspects of legal protection externally, namely those that intersect with criminal and civil sphere. PPAT in carrying out its job duties is vulnerable to law enforcement, besides that aspect of law protection to PPAT is balance or balance to tight supervision aspect for PPAT in carrying out their duty, so that aspect of legal protection externally becomes something very important for PPAT office.¹⁵

The concept of legal protection against PPAT cannot be separated from the concept of legal protection in general. Based on the conception as a frame of mind based on Pancasila, Philipus M. Hadjon argues that the principle of legal protection in Indonesia is the recognition and protection of the dignity of human beings which are based on the principle of Law State which is based on Pancasila.¹⁶

4.2 *Legal Liabilities of the Land Deed Officer against the Deed of Establishment*

3 *Civil Accountability*

Accountability PPAT in civil cases as a result of an error due to deliberate or negligence be inadvertent, carelessness and inaccuracy in the implementation of the legal obligations for PPAT in making the deed of sale and purchase of land, leading to the implementation of the rights of person's subjective to be disrupted, if leads to a loss for the parties, the relevant PPAT shall be liable to indemnify the parties in the form of reimbursement of costs, compensation and interest. The determination that the deed is degraded to a deed under the hand or declared null and/or null and void, and becomes a criminal offense that causes harm, must be based on a court decision that has permanent legal force. So if there are parties who accuse or judge, that the deed PPAT is fake or not true because there has been a deviation from the terms of material and formal procedures deed PPAT (formal aspect), then that party must prove the allegations or his own judgment through the legal process civil lawsuit not by way of complaining of PPAT to the police.¹⁷

0 *Criminal Accountability*

The imposition of criminal sanctions on the PPAT may be carried out as long as such limitations are violated, that is, besides fulfilling the formulation of the violations referred to in the PPAT-related legislation, the IPPAT Code of Ethics must also fulfill the formulation contained in the Criminal Code (Criminal Code). According to Habib Adjie, as for criminal cases related to the formal aspects of notarial deed/PPAT in making authentic deeds are as follows:¹⁸

- 0 Making false/falsified letters and using forged/forged letters (Article 263 paragraph (1) and (2) of the Criminal Code);
- 1 Falsifying authentic deeds (Article 264 of the Criminal Code);
- 2 Ordering to include false information in authentic deed (Article 266 of the Criminal Code);

Ibid.

Op.Cit Philipus M. Hadjon

Ibid.

Habib Adjie, 2009, Hukum Notaris Indonesia, Bandung, Refika Aditama, p. 76

Conducting, ordering, participating (Article 55 Jo Article 263 paragraph (1) and (2) of the Criminal Code or Article 264 or Article 266 of the Criminal Code);

Helping to make false / or counterfeit letters and using forged/falsified letters (Article 56 paragraph (1) and (2) Jo Article 263 paragraph (1) and (2) of the Criminal Code or Article 264 or Article 266 of the Criminal Code).

From the above matter PPAT cannot be subject to Article 266 paragraph (1) of the Criminal Code. This is because in Article 266 paragraph (1), there is an element of ordering. PPAT in making the deed of sale and purchase is only a media (tool) for the birth of an authentic deed, while the initiative arises from the tap, so in this case PPAT is the party who ordered and not the party who ordered. However, if a PPAT has been deliberately and consciously or consciously cooperating with the tamper, then PPAT may be subject to Article 263 paragraph (1) of the Criminal Code which is related to Article 55 (1) of the Criminal Code, which is to participate in a crime. In addition, since the products produced by the PPAT are in the form of an authentic deed, the PPAT is subject to a denunciation, as set forth in Article 264 paragraph (1) letter a of KUHP Jo. Article 55 paragraph (1) of the Criminal Code.¹⁹

PPAT as a Public Official in carrying out his / her position should be given legal protection, related to:

To maintain the dignity of the dignity and dignity of his office, including when giving testimony and proceeding in examination and trial.

Conceal the deeds and statements obtained for the deed

Maintain Minuta Deed PPAT and *warkah* supporting deed attached to minuta deed or Protocol PPAT in storage PPAT.²⁰

CONCLUSION

The procedure of summoning the PPAT office refers to the general principle of law, since there is no legal protection that specifically regulates the PPAT office. Legal subject who is a position of notary and PPAT Legal protection of his/her position shall be separated, Normative in the case of PPAT which is called as a witness or a suspect is imposed by the provision of Article 112 of the Criminal Procedure Code while the seizure of the original deed of PPAT (minuta) and *warkah* is only may be made with the special permission of the Chairman of the local District Court under the provisions of Article 43 of the Criminal Procedure Code.

The accountability of the PPAT office against the deeds made which are not in accordance with the procedures or against the rules of the invitation can be prosecuted under civil law, criminal law, and administrative law. In criminal law Accountability is determined on the basis of the mistake of the manufacturer and not only by the fulfillment of all elements of a crime, so that error is placed as a determinant of criminal responsibility.

Op.cit. Pande Putu Doron Swardika, 2014

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LEGAL STRENGTH OF CERTIFICATE OF MORTGAGE RIGHT IS RELATED TO COURT DECISION (CASE STUDY OF DECISION OF RELIGIOUS COURTS OF PRAYA NUMBER 0479 / PDT.G / 2012 / PA.PRA)

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Abstract: *The purpose of this thesis research is to analyze the legal strength of the Certificate of Mortgage right related to the Decision of the Religious Courts of Praya Number 0479 / PDT.G/2012/PA.PRA and to analyze the legal remedy of the Bank in handling the settlement of credit as a result of the Decision of the Religious Courts of Praya Number 0479 / PDT.G / 2012 PA.PRA. The type of research used in this study is normative legal research with field data as supporting data. "Normative legal research is done by researching the literature and also called bibliography legal research" with field data as supporting data, with the approach used in this research are: Statutory Approach, Concept Approach, Approach Analytical (Analytical Approach, Case Approach).*

*The result of research on the strength of mortgages on behalf of PT. BPR Mitra Harmoni Mataram Number 220/2016, already has the power of executorial based on the legal principle of *lex specialis de rogat legi generalis*, with attention to laws that specifically regulate the mortgage namely Law no. 4 of 1996 on the Rights of the Land on Land and Land-related Objects. However, in the verdict of the Religious Courts of Praya No. 0479 / PDT.G/2012/PA.PRA is also very precise based on the considerations of the judge that in essence that the object has not been divided so that after the inheritance of the object is not a part or property of L. Teges debtors) At PT. BPR Mitra Harmoni Mataram, so that anything related to the object or arising on the object before being inherited void by law or not applicable. The Bank's Legal Efforts in resolving the mortgages executed by a priesthood court should the Bank in the event of a dispute to commit an intervention / resistance suit when a plaintiff's case with a defendant is under trial by the judge and has not been ruled. And the *denden verzet* suit which in principle is a lawsuit of a resistance filed by a third party who from the beginning did not become a party in the case that is being disputed by the plaintiff with the defendant before the Court, but then suddenly the concerned feels attacked by his interests and ownership, then the Civil Procedure Law of Indonesia has prepared the rules of its settlement procedure either through the articles of law or practice which have been applied before the Court. While the effort to settle the credit with the guarantee of mortgage through credit restructuring, mediation of kinship and mediation of District Court.*

Keywords: *court decision, legal force, certificate of mortgage*

INTRODUCTION

The Government in providing legal certainty protection for the provision of credit for the community by the financial services agency. Has issued several laws and regulations, one of which is the Law of the Republic of Indonesia Number 4 of 1996 on the Rights of the Count of Land and Materials Related to Land (UUHT). This Mortgage Rights Act is issued to regulate the binding of Mortgage Rights to collateral objects in the form of land as a result of a lending and borrowing. This law was promulgated and enacted in Jakarta on 9 April 1996.

The legal certainty granted by Law No. 4 of 1996 on the Rights of Land Dependence along with the Objects Related to the Land, as stated in Article 1 point 1, reads:

“The mortgage is a security right imposed on the right to land as referred to in Law Number 5 of 1960 concerning Basic Regulation of Agrarian Principles, which gives priority position to certain Creditor to other creditors” Selanjutnya Pasal 3 ayat (1) menyebutkan :

“Debt guaranteed by repayment with a Deposit Insurance may be an existing or agreed upon debt with a certain amount or amount at the time of the request for execution of the Deposit Rights may be determined on the basis of the loan of the receivable or other agreement which creates any other incurring debts or agreements accounts payable”.

In addition, as written in the book Agrarian Law Indonesia essay H. M. Arba mentions: The Deposit Insurance Act states that the Deposit Rights is the Right of Warranty for land for certain debt repayment, which gives priority to certain creditor to another creditor. In a sense, that if the debtor breaches the pledge, the creditor of the Mortgage Right shall be entitled to sell through the public tender of the land which is pledged under the terms of the relevant legislation, with the preceding right of the other creditor.¹

With the establishment of Law No. 4 of 1996 on the Right of Land and Property Relating to Land, considering the main function of the Bank financial services institution is as a collector of funds owned by every level of society either in the form of savings in the form of savings, deposits and subsequently channeling the public funds to communities requiring additional capital in the form of credit.

The inclusion of warranties as one of the prudential principles of credit provision at the Bank's financial services institution, which is deemed necessary to provide legal certainty as well as the certainty of the refund of loan borrowed by the borrower. According to the provisions of Article 8 paragraph (1) of Law Number 7 of 1992 concerning the amendment of Act Number 7 of 1992 concerning Banking (hereinafter abbreviated as Law No. 10 of 1998), determines in the provision of credit or financing, banks are generally required to have confidence based on a thorough analysis of the itikiad and the ability and ability of the debtor's customers to settle their debts or return the financing as agreed.

Banking and non-banking institutions almost every loan disbursed by the creditor always asks for collateral or collateral from the debtor. This is an implication of the principle of prudence, it can be understood because if a credit is released without collateral it has a very big risk, if the debtor is defaulted or unable to pay its credit, the creditors can use the guarantee to withdraw the funds disbursed with putting the execution of the guarantee.²

M. Arba, *Hukum Agraria Indonesia*, Sinar Grafika, Jakarta, 2015, p. 207 - 208

Munirah et al., t.th., “Kedudukan Hukum Kreditor Pemegang Hak Tanggungan Terhadap Objek Jaminan yang Dirampas Oleh Negara Dalam Tindak Pidana Korupsi”, *Jurnal Hukum*, Program Kenotariatan Fakultas Hukum Universitas Hasanuddin Makassar, p. 1

After paying attention to any legal provisions governing financial institutions as well as the existence of regulations concerning Mortgage Rights in the guarantee of repayment certainty, banks that generally have a function as an institution that collects funds from the community in the form of savings and deposits, and re-channel it in the form of credit. Distribution in the form of credit must surely meet the element of return; this is because the Bank is also responsible to other customers (savings and deposits) to ensure the security of security of the funds placed.

The presence of Law No. 4/1996 on the Right of Land and Property Concerned to the Land is felt by the Indonesian banks is good to avoid and overcome various problems in credit, especially nonperforming loans.

Problems that exist today, land and buildings that become collateral (collateral) in PT. Bank Perkreditan Rakyat Mitra Harmoni Mataram, hereinafter referred to as BPR Mitra Harmoni Mataram, which has been carried out binding of guarantee with Mortgage Right by Bank as the lender. The debtor (the Depository) is sued by a third party (third) who claims that they are the legal heirs of the land and buildings that become collateral in the bank and have not been distributed inheritance. In the lawsuit, the third party (third) filed a lawsuit through the Religious Courts of Praya related to the ownership of the land and the building.

Based on the lawsuit, the plaintiff obtained a decision that the land and the building is a joint right of both the plaintiff and the defendant. So that will be the division of land and buildings. This decision was issued by the Religious Courts of Praya namely the Decision of Religious Courts of Praya Number 0479 / Pdt.G / 2012 / PA.PRA.

Based on the above description, the Bank has difficulty in executing the object of the Tangungan Right which currently the debtor has defaulted, based on Article 13 paragraph (I), Article 14 paragraph (1) and (2) of Law number 4 year 1996 regarding The Insured Rights that the granting of the Deposit Rights must be registered with the Land Office, and as evidence of the Deposit Rights, the Land Registry Office shall issue a Certificate of Mortgage Right which contains the "Demil Justice Based on the One God Almighty" affair. The Certificate of Mortgage Right has the same executorial power as the decision of the court which has obtained permanent legal force and if the debtor has defaulted on the executorial title contained in the Deposit Insurance Certificate, the mortgage holder may request the execution of the object (collateral) which has been bound by the Right Dependence. Then the execution will be carried out like the execution of a decision that has been legally binding. However, with the decision of the Religious Courts Praya Number 0479 / PDT.G/2012/PA.PRA the Bank difficult to execute the object of the right of the dependents.

The purpose of this thesis research is to analyze the Legal Strength of Certificate of Mortality Right Attributed to the Decision of Religious Courts of Praya Number 0479 / PDT.G/2012/PA.PRA and to analyze the legal remedy of the Bank in handling the settlement of credit as a result of the Decision of Religious Courts of Praya Number 0479 / PDT.G / 2012 / PA.PRA.

CONCEPTUAL FRAMEWORK

2.1 Theoretical framework

To dissect the problems posed in this thesis used three theories as an analysis material that is:

Theory of Legal Protection

Satjipto Rahardjo, argued that the protection of the law is to provide a guidance on human rights harmed by others and the protection is given to the community in order to enjoy all the rights granted by the law. According to Peter Mahmud Marzuki, the protection of the law is

an attempt made by law in tackling the violation, which consists of two types, namely repressive legal protection from preventive law protection.

Legal protection in the context of legal protection for banks is essentially preventive in relation to the existence of procedures that are administratively preceded by a sequence of records based on data such as the identity of the parties when applying for the mortgage liability obtained from the party receivable. As stipulated in the Deed of Compulsory Rights granting (APHT), as well as Article 15 UUHT relating to Power of Attorney Charging Guarantee Right (SKMHT) made by notary or PPAT. But it does not rule out repressive protection (action) may occur, if it does not meet the obligations as the law governing it.

The Theory of Legal Certainty M.Yahya

Harahap pointed out that:³

“The legal certainty in society is needed for the sake of order and justice. Legal uncertainty will create chaos in people's lives, and every member of society will do what they like and act on their own. Existence like this makes life in an atmosphere of social chaos.”

Further according to Peter Mahmud Marzuki states that:⁴

“Theory of Legal certainty contains 2 (two) meanings that first the existence of a general rule make the individual know what deeds that may or may not be done, and second form of legal security for the individual from the government's authority because of the rule of law that is general that individual can know what the State may charge or do to individuals. Legal certainty is not only the articles of the law but also the consistency in the judge's decision between the judgment of one judge and the judgment of another for a similar case that has been decided.”

2.2 Conceptual framework

Bank

Banks are seen from a large Indonesian dictionary “Bank is a financial entity, which attracts and spends money in the community, primarily providing credit and services in traffic payments and circulation of money”.⁵

Banks according to Law No.7 of 1992 concerning banking as amended by Act No.10 of 1998.

Bank is a business entity that collects funds from the public in the form of savings and distributes it to the community in order to improve the standard of living of many people.

Commercial Bank is a bank conducting business activities conventionally and or based on sharia principles which in its activities provide services in the payment traffic.

Rural Bank is a bank conducting business in a conventional or sharia-based manner which in reality does not provide services in the payment traffic.

Credit

Credit seen from the angle of language means trust, in the sense that if a person obtains credit facilities then the person or business entity is to gain the trust of the lender. The definition of credit under Article 1 paragraph (11) of Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning Banking (Banking Law), is as follows:

M. Yahya Harahap, *Pembahasan, Permasalahan dan Penerapan KUHAP*, Edisi Kedua, Sinar Grafika, Jakarta, 2006, p. 76.

Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana Pranada Media Group, Jakarta, 2008, p. 158.

Zainal Asikin, *Pengantar Hukum Perbankan Indonesia*, PT. Raja Grafindo Persada, Jakarta, 2015, p. 26.

“Credit is the provision of money or equivalent claims, based on a loan agreement or agreement between the bank and another party requiring the party financed to refund the money or the bill after a certain period of time in exchange or profit sharing.”

Guarantee/Collateral

The term Guarantees is a translation of the Dutch, “*Zakerheid*”, while the term “*Zakerheidsrecht*” is used for the law of guarantee or guarantee rights. But the term of the law of guarantee turns out to have a broader meaning and general and regulatory than the rights of collateral as well as material laws that have a broader scope and have the property of measuring than the material rights.

Collateral in this construction is an additional guarantee (*accessoir*). The purpose of collateral is to obtain facilities from the bank. This guarantee is submitted by the debtor to the bank. The elements of collateral, namely:⁶

- Additional warranties;
- Submitted by the debtor to the bank;
- To obtain credit or financing facility.

Mortgage right

According to Article 1 paragraph (1) of Law No. 4 of 1996 on Land and Property Rights related to the land, described in the definition of Mortgage Rights are: “The security rights imposed on the right to land as referred to in the law, of Law No. 5 of 1960 on Basic Regulations on Agrarian Principles, as follows, or any other objects constituting a unity with the land, for the repayment of certain debts, which gives priority to a particular creditor to other creditors “.

Next St. Remy Syahdeni stated that the Deposit Rights is a strong guarantee institution for immovable property in the form of land which is used as collateral, because it gives a higher position (priority) to the creditor holder of the mortgage than the other creditor.⁷

METHOD

The type of research used in this study is normative legal research with field data as supporting data. “Normative legal research conducted by examining the literature and also called legal research literature”⁸ with field data as supporting data, with the approach used in this study are: Statute Approach, Concept Approach, and Case Approach.

IV. RESULT AND DISCUSSION

4.1 Legal Strength of Certificate of Deposit Rights Issued By Decision of Religious Courts of Praya Number 0479 / PDT.G / 2012 / PA.PRA

4.1.1 Legal Strength of Mortgage Rights

In the provisions of article 1238 of the Civil Code, this states that:

“The debtor is negligent if by warrant or by such a deed has been declared negligent or for his own engagement is if it establishes that the debtor should be deemed negligent by the passage of the prescribed time”.

The provisions of the foregoing article are understood as what is said to be a default. Default occurs when a person does not implement what he or she has agreed to in

Salim HS, H, S.H., M.S., 2011, *Perkembangan Hukum Jaminan di Indonesia*, Cet.V, PT.Raja Grafindo Persada, Jakarta, p. 22

Sutan Remy Sjahdeini, *Kebebasan berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank*, Institut Bankir Indonesia, Jakarta, 1993, p. 15

Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Cetakan 4, Graha Indonesia, Jakarta, 1990, p. 9

relation to the object of the agreement or in other words does not meet the achievement. As mentioned in Article 6 of UUHT stating that:

“If the debtor breaches the pledge, the first Depository holder has the right to sell the Insurers' object of his / her own power through a public tender and to take his receivable from the proceeds of sale.”

In the banking world is called bad credit is a situation where a customer is unable to pay off the bank credit in time.⁹

“According to Philipus M. Hadjon, there are two kinds of legal protection for the people of Indonesia that is, the protection of preventive law and repressive law protection. On preventive legal protection, the people are given an opportunity to file an objection (inspraak) or opinion before a government decision gets a definitive form.”¹⁰

The underwriting process with Dependent Rights is of course also contained in the Mortgage Rights Act. This is evident from some of the Articles contained in the Mortgage Rights Act, which are stipulated in Articles 10 to 15. As proof of the granting of the Land Affiliation Rights of Land Office do the following: (Article 14)

To prove the existence of Land Rights of Land Affairs Office issued Certificate of Mortgage right in accordance with the prevailing laws and regulations;

The Certificate of Deposit Rights as referred to in paragraph (1) shall contain an expression in the words “FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD”;

The Certificate of Deposit Rights referred to in paragraph (2) has the same executorial power as the court decision which has obtained permanent legal force and acts as a substitute for *grosse acte hypotheek* insofar as the right to land;

Unless otherwise agreed, certificates of land rights which have been encumbered with the insertion of the Mortgage Rights as referred to in Article 13 paragraph (3) shall be returned to the holder of the landrights concerned;

Certificate of Deposit Rights shall be submitted to the holders of Mortgage Rights.

The Insurer shall be present at the time of the granting of the Deposit Rights, if it cannot be present authorized to another party as set forth in Article 15. At the time of granting the Insurance Rights, the Insurer shall be present before the PPAT, if for any reason unable to attend, he shall be required to appoint another party as his proxy, with a Power of Attorney Charging a Deposit, abbreviated SKMHT in the form of an authentic deed. Making SKMHT in addition to notaries, assigned also to the PPAT whose existence reached the district area, in order to facilitate the provision of services to the parties who require.

In this case, in the case of borrowing (credit) of cash amounting to the object of land in accordance with the right of property No. 1059, area 5,604, Measurement Letter Number 566 / Tanak Awu / 2013 dated January 16, 2013, on behalf of HL Marwan Hakim Deposit as collateral with credit Number Credit Agreement Number 221 / BPR.MHM / KRD / XII / 2015 at PT. BPR Mitra Harmoni Mataram. The process of binding has been done in accordance with the provisions of applicable law, this is evidenced by the issuance of certificate of Mortgage right on behalf of PT. BPR Mitra Harmoni Mataram Number 220/2016.

The Certificate of Mortgage Right issued by the National Land Agency (BPN) of Central Lombok Regency includes several articles that strengthen the position of holders of Mortgage Rights. Article 1 state:

Gatot Suparmo, *Perbankan dan Masalah Kredit Suatu Tinjauan Yuridis*, Djambatan, Jakarta, 1996, p. 131.

Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Peradaban, Surabaya, 1987, p. 1.

“The first party warrants that all objects of the Insured Rights mentioned above, belong to the First Party, are not involved in a dispute, are free of confiscation and are free from any undocumented expenses.”

Article 2 of this Insured Right also mentions the above Deposit Rights granted by the First Party and is accepted by the Second Party with the promises agreed upon by both parties as described below:

“In the event that the object of the Mortgage Rights is subsequently split so that the Deposit Rights impose some rights on the land, the debtor may repay the debt secured by the Deposit Rights by way of installment equal to the value of each of the rights to the land, which will be exempted from the Deposit Rights, so then the Insurers' Rights only burden the rest of the Object of the Deposit Guarantee to guarantee the remaining outstanding debt. The value of each of the land rights will be determined by agreement between the First Party and the Second Party”;

From the description above the mortgage on behalf of PT. BPR Mitra Harmoni Mataram Number 220/2016 is in conformity with the applicable law, namely the Law on Mortgage Rights especially Article 14 paragraph 2 which contains the revelations of Justice by the Almighty God, which has the power of eksekutorial or equal to the decision of the court.

4.1.2 *Legal Strength of Court Decision*

Observing Article 24 of the 1945 Constitution: “Judicial power is exercised by a Supreme Court and other judicial bodies according to law”. Thus, judicial power in performing judicial functions and authorities consists of judicial bodies or judicial bodies under the law. One of the jurisdictions affirmed by Article 24 of the 1945 Constitution is the Supreme Court. While other judicial power bodies will be further determined by law.

In order to comply with the provisions of Article 24 of the 1945 Constitution, Law Number 4 Year 2004 is enacted as the Law regulating the Basic Provisions of Judicial Power. Substituted by Law no. 48 Year 2009 on Judicial Power. In Chapter II entitled The Principle of the Implementation of Judicial Power, set out in Article 2:

The judiciary is conducted “By Justice by the One Godhead”.

The State Courts apply and enforce law and justice based on Pancasila.

All courts in the territory of the Republic of Indonesia are the State Courts regulated by law.

Trial is done quickly and cost is light.

Chapter III in the Judicial Power Law relating to the perpetrators of the judicial power of Article 18 mentions “Judicial power shall be exercised by a Supreme Court and its subordinate courts within the general courts, the jurisdiction of the judiciary, the military court environment, the administrative court of the State, and by a Constitutional Court “. It is these four judicial circumstances that act and are authorized to exercise judicial powers. Above all four jurisdictions stands the Supreme Court as the culmination in the position of the highest State Court. All court bodies contained in every jurisdiction are State courts established by law (State Court).

The entire court has equal status, the religious court itself with the Law on Judicial Power and to regulate more fully the religious court, the Law of the Republic of Indonesia Number 50 of 2009 on the second Amendment of Law No. 7 of 1989 About the Religious Courts, which had also been first changed with Law No. 3 of 2006. In Chapter I, Article 2 Jo. Chapter III Article 49 stipulated the duty and authority, namely:

“The religious courts shall have the duty and authority to examine, decide upon and settle cases in the first instance between the persons of the religion in the field of: Marriage; Inheritance; Will; Grant; Waqf; Zakat; Infaq; Shadaqah; Ekonimi sharia.

From the provisions of the Religious Courts Act above, it can be concluded that the Religious Courts have the authority to decide cases of people who embrace Islam. In the case of the cases handled are marriage, inheritance, will, grant, endowment, zakat, infaq, shadaqah, sharia economy.

4.1.3 Strength of Certificate of Mortality Right Associated with Decision of Religious Courts of Praya Number 0479 / Pdt.G / 2012 / Pa.Pra

In this case the debtor has given the object in the form of land for the installing of Deposit Rights as collateral with the credit number Credit Agreement Number 221 / BPR.MHM KRD / XII / 2015 at PT. BPR Mitra Harmoni Mataram. The process of binding has been done in accordance with the provisions of applicable law, this is evidenced by the issuance of certificate of Mortgage right on behalf of PT. BPR Mitra Harmoni Mataram Number 220/2016. The Certificate of Mortgage Right issued by the National Land Agency (BPN) of Central Lombok Regency includes several articles that strengthen the position of holders of Mortgage Rights. Article 1 stipulates that “The first Party guarantees that all objects of the Insured Right above, rightly belong to the First Party, are not involved in a dispute, are free of confiscation and are free from any undocumented expenses.”

Based on the legal principle that in the matter of Guaranteed Rights then, used the legal principle of *lex specialis de rogat legi generalis*. In this case must pay attention to the law which specifies the right of dependence that is Law no. 4 of 1996 on the Rights of the Land on Land and Land-related Objects. According to the author of mortgages on behalf of PT. BPR Partners Harmony Mataram Number 220/2016 already has executive power.

However, in the Decision of Religious Courts Praya No. 0479 / PDT.G / 2012 / PA.PRA is also very appropriate based on judges' considerations such as:¹¹

Considering that based on that fact, the Panel of Judges is of the opinion that it must be declared to have proven the relics of the late Mamiq Nursasih in posita number 11.1 up to posita number 11.6 as it has never been shared inheritance to the heirs of the late Mamiq Nursasih in accordance with the provisions of Article 283 R. Bg. jo. Article 1865 of the Civil Code;

Considering that since the treasures of the late Mamiq Nursasih in posita number 11.1 to posita number 11.6 as such have been proven to have never been distributed inheritance to the heirs of the late Mamiq Nursasih and in accordance with the provisions of Article 283 R.Bg. jo. Article 1865 of the Civil Code, the Panel of Judges is of the opinion that the number 6 petition of the Plaintiff's claim should be granted.”

So that after the inheritance divided object is not part or property of L. Teges (debtor) At PT. BPR Partners Harmoni Mataram which are pledged or mortgaged. Therefore, the Religious Courts of Praya have the authority to try and decide the case based on the Law of the Republic of Indonesia Number 50 of 2009 concerning the Second Amendment of Law No. 7 of 1989 on Religious Courts, which had previously also been changed first with Law Number 3 of 2006. In Chapter I, Article 2 Jo. Chapter III Article 49 stipulated the duty and authority, namely:

“The religious courts shall have the duty and authority to examine, decide upon and settle cases in the first instance between the persons of the religion in the field of: Marriage; Inheritance; Will; Grant; Waqf; Zakat; Infaq; Shadaqah; Ekonimi shari'ah.

Putusan Pengadilan Agama Praya Nomor 0479/PDT.G/2012/PA.PRA, p. 101

From the above exposure each has a strong legal basis then, the authors argue analogium that the object has not been divided inheritance, so everything related to the object either the correspondence before the inheritance divided null by law or not applicable. As stated in the Decision of the Religious Courts of Praya Number 0479/PDT.G/2012/PA.PRA:¹²

“Considering whereas in their petitem, the Plaintiffs requested that the Religious Courts of Praya declare the law that: the actions and actions of the Defendants who defend the disputed land by controlling the disputed land are unlawful acts and acts (petitem number 7), acts and actions of the Defendants does not want to give the rights to the heirs or the successor heirs of the late Mamiq Nursasih is unlawful acts and acts (petitem number 8), all forms of transactions on land disputes are for the sake of law and / or any form of letter, deed or certificate arise upon the land of the dispute (petitem number 9) is not having the force of law “.

4.2 Legal Efforts of Banks in Handling the Settlement of Credit as a Result of Decision of Religious Courts of Praya Number 0479/PDT.G/2012/PA.PRA

4.2.1 Bank's Legal Efforts

Intervention Lawsuit (Resistance Claim)

An intervention / resistance lawsuit is filed when the plaintiff's case with the defendant is under trial by the judge and has not been ruled. Third party resistance is two kinds of resistance against confiscation saga (*conservatoir beslag*), and resistance to seizure execution (*eksekutorial beslag*). Resistance to execution seizures R.Bg., or Rv. but there is in practice, whereas the seizure resistance execution there is arranged in HIR, R.Bg. as well as in Rv; Confiscation of confiscation, settlement through *tussenkomst* intervention (opposed dealing with Plaintiff and Defendant) this is because the proceeding process still has not been decided by the panel of judges; Meanwhile, there are also Resistance seizure execution, settlement through *denden verzet*, this is because the case has been terminated and the case will be executed then automatically confiscated confiscation sita becomes confiscated execution, that's where the difference way of filing a lawsuit intervention resistance with *denden verzet* suit.¹³

When viewed from its objectives it is usually a purely objective intervention suit to fight for its rights. While the claim *denden verzet* the purpose there is purely to retain the right will but not least just to delay the execution delay.

Denden Verzet

In practice before the court we often get the case of the 3rd party resistance suit (*denden verzet*). The *denden verzet* lawsuit is in principle a claim of resistance brought by a third party who, from the very beginning, did not become a party in the case that was being contested by the plaintiff with the defendant before the Court, but then suddenly the concerned felt attacked his interests and ownership, then the law of the Civil Code of Indonesia has prepared its rules of procedure of completion either through the articles of legislation or practice already imposed before the Court.¹⁴

The legal basis on which *denden verzet* liability laid down was Article 206 R.Bg/195 H.I.R:

Ibid, p. 120

Sarwohadi, *Penyelesaian Perkara Gugatan Pihak Ketiga/Derden Verzet*, Jurnal Hukum, Universitas Mataram, p. 1
Sarwohadi, *Ibid*, p. 1

Paragraph (6) Against the verdict also from another person claiming that the confiscated goods belong to him and be tried like all disputes concerning the forced attempts ordered by the District Court whose jurisdiction the execution of the decision took place.

Paragraph (7) The dispute arising and the decision of the dispute shall be promptly notified by letter by the Chairman of the District Court to the Chief Justice who initially examined the case.

Article 378 Rv:

"If the rights of a third party are impaired by a decision, then he can challenge the decision".

Article 379 Rv:

This resistance is submitted to the judge who handed down the offending decision by suing the parties in the normal manner".

Article 382 Rv:

"A third party seeking to challenge a decision is not sufficient to be of interest only, but it must have been substantially impaired in its right, if the resistance is granted, the awarded judgment shall be corrected to the extent that it harms the third party."

With the exposure of the legal foundations of this *denden verzet*, there are also some notions about this lawsuit. Sudikno Mertokusumo, provides a definition related to this *denden verzet* "the resistance carried out by a third party whose rights are impaired to the judge who handed down the opposing decision by suing the parties in the normal way."¹⁵

In the book of Badilag the Supreme Court also explains the notion of *denden verzet*, "In the opposition of the third party, the opponent must be able to prove that the seized possession belongs to him, and if he succeeds in proving it, he will be declared the right fighter and the confiscation will be ordered to lift. If the cloud cannot prove that he is the owner of the confiscated goods then the opponent will be declared a false opponent or a dishonest comrade, and the confiscation will be preserved."¹⁶

The filing of the *denden verzet* suit must also fulfill some requirements, such conditions as among others:

Resistance must be filed before the execution takes place, if the resistance is submitted after execution, then the only way to cancel the execution must be by filing a new lawsuit;

Resistance is filed for reasons of property (Article 195 (6) HIR / 206 (6) R.Bg;

Goods to be executed have been pledged to the opposite, or goods to be executed in warranty to a third party, because the principle of execution is to prohibit the execution of goods that have been secured to a third party.

4.2.2 Loan Settlement Efforts with Deposit Insurance

Bank efforts to save credit according to the leadership of PT. BPR Mitra Harmoni Mataram is:

The bank's efforts to save the funds that have been channeled to the community in the form of loans. With the settlement effort, credit is disbursed to a problem, which in banking terms for credit category is divided into four parts, namely credit lancer (collectibility 1), non-performing loans (collectibility 2), doubtful credit (collectibility 3) and bad credit (collectibility 3).¹⁷

The steps taken by the bank usually:

Credit Restructuring

Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Universitas Atmajaya Yogyakarta, Yogyakarta, 2010, p. 109-111.

Mahkamah Agung, *Buku II Badilag Mahkamah Agung*, Jakarta, 2013, p. 131.

Wawancara dengan Pimpinan PT. BPR Mitra Harmoni Mataram di Mataram, on May 12, 2018.

Credit Restructuring is an improvement effort performed by a bank in lending activities against a debtor experiencing difficulties to fulfill its obligations, which are, among others, through:¹⁸

Decrease in lending rates;
Extension of credit term;
Reduced loan interest arrears;
Reduced arrears of loan principal;
Additional credit facilities; and or
Convert credit into Temporary Equity Participation.

Banks may only perform Credit Restructuring of debtors who meet the following criteria:
The debtor has difficulty paying principal and / or interest on credit; and
The debtor has a good business prospect and is able to fulfill the obligations after the Credit is restructured.

If, in the bank's opinion, a problem loan is unlikely to be rescued to be returned via rescue efforts as described above and finally a bad credit, the bank will carry out settlement or collection actions against the credit.

If there is a debtor who performs a breach of contract and also a case such as the issuance of the Decision of the Religious Courts of Praya on the object of credit collateral at PT. BPR Mitra Hamoni Mataram, the Bank will act in accordance with what is stated in the credit agreement that has been agreed by both parties.

Material rights in the settlement of non-performing loans at PT. BPR Mitra Harmoni Mataram in Mataram have been in accordance with the provisions contained in the Mortgage Act, which states:

"If the debtor breaches the pledge, the first Depository holder has the right to sell the Insurers' object of his own power through a public tender and to take out his receivable from the proceeds of sale."

Basically the creditor's right to the object of collateral in the credit agreement in the event of bad credit has got legal protection in accordance with the provisions in the credit agreement made between PT. BPR Mitra Harmoni Mataram in Mataram and customers.

Family Mediation

With regard to the execution of the object of the Insurance Rights for the credit in trouble, in the Mortgage Act there is still another effort, that is through sales under the hand. The sales process under this hand without going through the auction.

This legal means is stipulated in Article 20 paragraph (2) of UUHT stating "by agreement of the giver and the holder of the Mortgage Right, the sale of the Mortgage object can be done under the control, if so it will be the highest price that benefits all parties."

In relation to the sale of Mortgage object without auction (under the hand), there are several requirements that must be fulfilled, Article 20 of the Statutory Rights Act states as follows:

There should be agreement between the creditor holder of the Deposit Rights and the debtor giving the Deposit Rights;
The sale may produce the highest price that benefits all parties;

Bank Indonesia Regulation Number 7/2 / PBI / 2005 concerning Asset Quality Rating for Commercial Banks.

Prior to be notified in writing by the Giver or the holder of the Mortgage to the parties concerned;

The sale is announced in advance in at least 2 newspapers circulating in the relevant area or local mass media;

No party has objected.

Determination of the position of the power of attorney to sell in the Mortgage Act, an assessment which cannot be separated between Article 6 and Article 11 paragraph (2) sub e. the execution referred to in Article 6, cannot proceed without the promise as provided for in Article 11 paragraph (2) sub e.

Implementation in practice according to Circular Letter Number BUPLN. 23 of 2000, that the power of attorney to sell the object of Mortgage Rights by the creditor, KPKNL will reject the auction of the object of the Rights of Insurance filed before him. The power to sell is of paramount importance in the guidance of the dependent and indispensable right in relation to the execution of the object of Mortgage Right by the holder of the Mortgage right when the debtor breaches the pledge.

The execution of the object of the Insurers' Rights is also in accordance with Article 14 of the Mortgage Rights Act which states

As proof of the existence of the Deposit Rights, the Land Office shall issue a Certificate of Mortgage right in accordance with applicable laws and regulations;

Certificate of Deposit Rights as referred to in paragraph (1) shall contain the words "By Justice by the One Godhead";

The Certificate of Mortgage Right as referred to in paragraph (2) has the same executorial power as the court decision which has obtained permanent legal authority and acts as a substitute for *grosse acte hypotheek* insofar as the right to land;

Unless otherwise agreed, certificates of rights to land which have been embedded with the record of the imposition of a Deposit Rights as referred to in Article 13 paragraph (3) shall be returned to the holder of the land rights concerned;

The Certificate of Deposit Rights shall be deposited with the Depository.

In the elucidation of Article 14 paragraph (2) and (3) of this Mortgage Law also explains: The signature contained in the Certificate of Mortgage Rights and in the provisions of this paragraph, is intended to affirm the existence of an executive power on the License Certificate, so that if the debtor breaches the pledge, it is ready to be executed as a court decision which has obtained permanent legal powers, way and by using parate executive institution in accordance with the rules of Civil Procedure Code.

Submission of Head of Development and Supervision of Credit (P2K) PT. BPR Mitra Harmoni Mataram, an effort other than those mentioned above, there are also other efforts undertaken by the Bank to be able to resolve this problematic credit, including:¹⁹

Over Credit

Take Over the credit to another party (Other Bank) with agreement through buying and selling medium between the debtor and the debtor.

Asset Settlement

Wawancara dengan Kepala Bidang Pembinaan dan Pengawasan Kredit PT. BPR Mitra Harmoni Mataram di Mataram, on May 12, 2018.

Takeover of collateral owned by the debtor by the bank after the calculated value of the loan debt.

Material rights in the settlement of non-performing loans at PT. BPR Mitra Harmoni Mataram is always in accordance with Article 6 of the Mortgage Rights Act which states that "if the debtor breaches the pledge of the First Depository holder has the right to sell the object of Mortgage right to his / her own power through a public tender."

c. Mediation of the District Court

The settlement of non-performing loans through the Court (legal lane) or third party assistance is done if the debtor is uncooperative and does not get the settlement point by way of kinship in solving the credit problems. The settlement of problem loans will be done by taking the court route. This may occur in the execution of the Mortgage due to a rebuttal by the debtor.

The existence of proof of credit receipt in this case Credit Agreement, is sufficient to prove that the credit has been disbursed to the debtor, this shows that there is strong evidence supporting the creditor if the denial of the credit.

Although there are alternative settlements of problem loans as regulated in Article 20 paragraph (1) sub-paragraph b of the Mortgage Rights Act, it can be utilized by all creditors holding Mortgage Rights. Because this is the only option of auction execution provided by the Mortgage Act. For the creditor who holds the first Mortgage Right, this alternative effort may be elected, if the debtor makes a denial and opposition to the credit already granted.

In Article 20 Paragraph (1) Sub-Paragraph b of the Mortgage Rights Act is explained in relation to the Executorial title contained in the Certificate of Mortgage Right and as stipulated in Article 14 of the Mortgage Rights Act may be used as the basis for the sale of the object of Mortgage Rights. This sale is through auction in general according to the procedures specified in the legislation.

Based on Article 20 paragraph (1) letter a of Jo Article 11 paragraph (2) letter e of the Mortgage Act, if the debtor breaches the creditor then the creditor holding the Guarantee under such provision basically does not require the consent of the Court, considering the sale under Article 6 This insolvent property is an act of execution of the agreement. So if the debtor breaches the pledge, the creditor holder of the Mortgage Right can directly execute the auction of the object of the Mortgage Rights.

This privilege is owned only by the first creditor of the Mortgage, the second, third, and second Holder of the Concession Rights, unable to utilize the facilities provided by this Mortgage Act. The requirement for the execution of this auction may be made if in APHT the promises are made in accordance with Article 11 paragraph (2) letter e of the Mortgage Act, namely the first Depository holder has the right to sell the object of the Insured's right if the debtor breaches the pledge.

The execution of the auction of the object of Insurance Rights under Article 20 paragraph letter a of Jo Article 6 and Article 11 paragraph (2) letter e of the Mortgage Law which states that:

"If the debtor breaches the pledge, the first lender of the Mortgage Holders shall have the right to sell the object of the Deposit Rights on his own power through a public tender."

This is due to the persistence of the view that the execution implementation under Article 6 Jo Article 11 paragraph (2) letter c still requires a court execution permit.

CONCLUSION

The power of dependents on behalf of PT. BPR Mitra Harmoni Mataram Number 220/2016 already has the executive power based on the legal principle of *lex specialis de rogat legi generalis*, with respect to the law specifically regulating the right of dependents is Law no. 4 of 1996 on the Rights of the Land on Land and Land-related Objects. However, in the verdict of the Religious Courts of Praya No. 0479 / PDT.G / 2012 / PA.PRA is also very precise based on the considerations of the judge that in essence that the object has not been divided so that after the inheritance of the object is not a part or property of L. Teges debtors) At PT. BPR Mitra Harmoni Mataram, so that all related to the object before being inherited void by law or not applicable.

The Bank's Legal Efforts in resolving the mortgages executed by a priesthood court should the Bank in the event of a dispute to commit an intervention / resistance suit when a plaintiff's case with a defendant is under trial by the judge and has not been ruled. And the *denden verzet* suit which in principle is a lawsuit of a resistance filed by a third party who from the beginning did not become a party in the case that is being disputed by the plaintiff with the defendant before the Court, but then suddenly the concerned feels attacked by his interests and ownership, then the Civil Procedure Law of Indonesia has prepared the rules of its settlement procedure either through the articles of law or practice which have been applied before the Court. While the effort to settle the credit with the guarantee of mortgage through credit restructuring, mediation of kinship and mediation of District Court.

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THE POSITION OF DEED OF OFFICIAL OFFICER OF THE DEED OF LAND (PPAT) IN THE BANKING CREDIT GUARANTEE (STUDY OF PT BANK BPR PESISIR AKBAR BIMA)

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Abstract: *The purpose of this study is to understand and analyze the position of the deed of the land deed making official in the binding of credit guarantee to the banking system. This study is qualified as a normative-empirical legal research that departs from the conflict of norms. The method used is the approach of legislation-invitation, conceptual and sociological. The source of legal material of this research is obtained from primary, secondary and tertiary law materials, with the technique of collecting legal materials by interview and library study, collecting data of analysis result to get information that must be concluded, by analysis of its legal material with qualitative analysis. The results of this study indicate that First: the position of the deed of the official of the land deed (PPAT) in the banking credit guarantee binding, is very important in the process of credit disbursement, because it helps the position of the parties to obtain legal certainty. Second: the responsibility of the land certificate official (PPAT) against the credit guarantee of banking by using SKMHT, if the creditor is disadvantaged if the debtor is defaulted, then most of the responsibility of the land deed is only limited to the official deed for the credit guarantee only.*

Keywords: *the deed of the land, authority officer (PPAT), credit guarantee*

INTRODUCTION

The officials of the land deed actors have a very important position and role in the life of the nation and state, because this official is authorized by the state, to make deeds of transfer of land rights and other deeds in the Republic of Indonesia and abroad.¹

According to Article 1 number (4) of Law No. 4/1996 on the Right to Insurance of Land and Land-Related Materials, the Officer of the Land Deed Authority is "Public official

H. Salim HS, *Teknik Pembuatan Akta Pejabat Pembuat Akta Tanah (PPAT)*, PT Raja Grafindo Persada, Jakarta, 2016, p. 85

authorized to make deeds of transfer of land rights, deed of assignment of rights on land, and the deeds of authorization impose mortgages under applicable laws and regulations".²

Article 1 number (1) of Government Regulation Number 37 Year 1998 regarding the Regulation of Officials of the Land Deed Authority stating that the Land Deed Officer is "Public official authorized to make an authentic deed of certain legal acts concerning the right to land or Ownership of the Housing Unit".³

The description of the definition of Land Deed Official or PPAT is as follows:

"A person who is appointed and authorized by law to make a deed, in which the deed is made, contains a clause or rule governing the legal relationship between the parties, relating to the right to land and / or property rights to the home unit stacking".⁴

Based on the above description, can be synthesized PPAT authority at this time, which is making:

Deed of transfer of land rights.

Deed of transfer of property rights over apartment units.

Deed of assignment of land rights, and

Power of attorney imposes a mortgage.

The authorized official appoints the PPAT, the Minister. The official of the land deed (PPAT) is appointed for a particular work area. Meanwhile, the authorized official appoints a Provisional PPAT (Head of Sub-district or Village Head) and Special PPAT (Head of Land Office) is the minister.⁵

The official of the land deed (PPAT), as the Public Official and the official of the land deed is urgently needed in the banking business activities, one of which is in the making of the credit bank guarantee covenant involving the customers and the bank, to ensure the truth of the contents of the agreement set forth in the credit agreement banking, so publicly the truth is unquestionable.

The binding of bank credit collateral by the official of the land certificate (PPAT) is in the form of Deed of Power of Attorney Charging of Dependency Right (SKMHT) and Deed of Burden of Mortgage (APHT). The two types of binding of these guarantees are usually distinguished in the size of the credit ceiling provided by the creditor (Bank) to the debtor. However, in the process of confiscation of the guarantee by the creditor (Bank) to the debtor performing the default, the binding of the guarantee by a notary concurrently as PPAT in the bank having the legal force used is the binding of Deed of Burden of Mortgage (APHT). While in the binding of many guarantees made by Rural Banks (BPR), especially PT. BPR Pesisir Akbar Bima is a guarantee bond by using a Power of Attorney for Assigning Mortgage (SKMHT).

In Government Regulation Number 24 of 2016 The amendment to Government Regulation Number 37 of 1998 on the Regulation of Officials of the Land Deed Authority, described in Article 2 paragraph (1) on the main duties and authority of the Land Acquisition Authority (PPAT) are:

Article 1 Sub-Article 4 of Law No. 4/1996 concerning the Right to Insurance of Land and Land-Related Items.

Pasal 1 angka 1 Peraturan Pemerintah Nomor 37 Tahun 1998 Tentang Peraturan Pejabat Pembuat Akta Tanah.

H. Salim HS, *op. Cit.* p. 90.

ibid

"The PPAT has the main duty to carry out part of the land registration activity by making the deed as evidence of a certain legal act concerning the right to land or the Property Right of the Housing Unit, which shall be the basis for registration of the change of registration data of the land resulting from the legal act."⁶

In Government Regulation Number 24 of 2016 on Amendment to Government Regulation Number 37 of 1998 on the Regulation of Officials of Land Deed Authority, explained in Article 2 paragraph (2) on the main duty and authority of the official of the land deed (PPAT) certificate that legal acts as referred to in sub-article (1) shall be as follows:

Buy and sell;
Exchanges;
Grants;
Entry into the company (inbreng);
The sharing of common rights;
Provision of Right to Build / Use Right to Land of Property;
Granting the Deposit Rights;
Provision of Authorization to Load Deposit Rights.

Furthermore, in Law Number 2 Year 2014 Amendment to Law Number 30 Year 2004 concerning Notary Publicity in Article 15 paragraph (2) letter "F", it is stated that, Notary has authority also make deed related to land. But in practice that often binds the imposition of credit guarantee at PT. BPR Pesisir Akbar Bima, is a Notary who doubles as Land Deed Officer, meaning not only Notary or Land Acquisition Authority or Land Deed Official Officer from District Office.

Based on Article 1868 of the Civil Code, it is stated that the authentic deed is a deed made in the form prescribed by the Act, by / or in the presence of the authorized General Officer, since the notary is the position referred to as the general official authorized to make an authentic deed, agreement in the field of Civil.

The provisions in Article 15 paragraph (2) letter "F" Law Number 2 Year 2014 Amendment to Law Number 30 Year 2004 regarding Notary Position attracts the attention of researchers, because the article only determines that the notary also has authority to make deed related to land. According to the authors, the provisions stipulated in Article 2 Paragraphs (1) and (2) in Government Regulation Number 24 of 2016 Amendment to Government Regulation Number 37 Year 1998 on the Regulation of Officials of Land Deed Authority, and Insurance Rights Law Article 15 Paragraph (1) stipulates that the power of attorney to impose mortgages must be made by notarial deed or PPAT deed, there is a conflict of norms.

In practice, which is often done by the PT. BPR Pesisir Akbar Bima, in the binding of credit guarantees mostly using Power of Attorney Charging Rights Dependent (SKMHT) by using the services of PPAT, never even PT. BPR Pesisir Akbar Bima undertakes the binding of credit guarantees, using the Power of Attorney for Assigning Liability (SKMHT) using a notary or notary service which doubles as PPAT.

In practice also, which leads to default by the debtor due to ignorance or lack of understanding of the debtor about the deed made by the PPAT in the binding of its guarantee.

Article 2 paragraph (1) of Government Regulation Number 24 of 2016 concerning Amendment to Government Regulation Number 37 Year 1998 concerning Regulation of Official of Land Deed Maker.

Because most of the debtors habits in credit realization, more focus on the disbursement of credit let me quickly receive the loan money. With the circumstances and habits of such debtors, the PPAT rarely read and explain the contents of the deed for the reason of the debtor in a hurry. There are also most debtors assume already understood at the time of reading the credit agreement by an authorized bank official.

Based on the background presented above, the researcher is interested to conduct further research with the title: "Position of Deed of Official Officer of Deed (PPAT) in Accreditation of Bank Credit Guarantee (Study of PT Bank BPR Pesisir Akbar Bima)"

METHOD

Method is the process, the principles and procedures solve a problem, while the research is careful, diligent and thorough examination of a symptom to increase human knowledge, then the research method can be interpreted as a process of principles and procedures to solve problems in doing research.⁷ According Soerjono Soekanto, that:

"Legal research is a scientific activity based on certain methods, systematics and thoughts aimed at studying a particular legal phenomenon, by analyzing and examining deeply the legal facts, to then solve the problems that arise in the symptoms concerned."⁸ Legal studies by H. Salim HS and Erlies Septiana Nurbani are:

"Research that examines and analyzes the legal norms and workings of laws in society based on particular methods, systems and thinking, in-depth examination, problem-solving and objectives".

The research method used by researchers in conducting this study and research is a qualitative legal research method that is:

2.1 Types of research

In this study the type of research used is empirical normative legal research. Normative legal research involves researching a process to discover a rule of law, legal principles, and legal doctrines to address the legal issues faced. Research on legal systematics, research on the level of legal synchronization and comparative law in relation to legal issues under investigation, while empirical legal research is a study that examines and analyzes the workings of law in society. This research includes research on the legal identification and effectiveness of the Law in relation to the legal issues studied.

2.2 Approach Method

There are several kinds of approach used by the author in doing this research are: Statutory Approach (Statute Approach), an approach done by reviewing all laws and regulations related to legal issues being addressed. For the researcher for practical activities, this Law Approach will open the opportunity for researchers to study whether there is consistency and conformity between a law with other laws or between laws with the Constitution or between the regulations and the Act.¹⁰ especially the regulation relating to

⁷Soerjono Soekanto, *Pengantar Penelitian hukum*, UI Press, Jakarta, 1986, p. 4.
Ibid p.11

Peter Mahmud Marzuki, *Penelitian Hukum, Edisi Pertama Cetakan ke-2*. Kencana Prenada Media Group, Jakarta, 2006, p. 93

the legal issues under investigation in this matter the Law on Notary Law and Government Regulation Number 24 of 2016 on the amendment of Government Regulation Number 37 Year 1998 regarding the Regulation of Official Position of Land Deed Authority.

Conceptual Approach, the approach that moves from the views and doctrines that develop in the science of law. By studying the views and doctrines in law science, researchers can find ideas that give rise to legal notions, legal concepts and legal principles relevant to the issue of law being dealt with.¹¹

The sociological approach is a field study in which the researcher analyzes how the reactions and interactions that occur when the norm system works in the life of the community, especially those related to the legal issues that the researcher does.¹²

2.3 *Types and Data Sources*

Types and data sources used in this study are primary data and secondary data are as follows:

Primary data is data obtained from interviews in the field. The information or interviews are conducted with related parties such as: Bank staff PT. BPR Pesisir Akbar Bima, Acting Officer of the land deed (PPAT), and respondents or related parties who are relevant to the research problem.

Secondary data is data that includes documents of tangible reports and so forth which complement the primary data in this research.

The types and sources of legal materials used in this study are:¹³

Primary legal material, namely binding legal materials, and consists of:

- ⁰ Norms or basic rules, namely the Preamble of the 1945 Constitution
- ¹ Basic rules.

⁰ of Law Number 30 Year 2004 regarding Notary Office Regulation.

¹ Law Number 10 Year 2010 concerning Banking.

² Law Number 2 Year 2014 Amendment to Law Number 30 Year 2004 regarding the Regulation of Notary Position.

³ Government Regulation No. 37 of 1998 on Officials of Land Deed Authorities.

⁴ Government Regulation No. 24 of 2016 Amendment to Government Regulation Number 37 of 1998 on Officials of Land Deed Authority.

Secondary law material in this research is library material containing information about primary material, secondary material originating from institution where Researcher do research, and which is general in which writer get from government institution and writings of Experts, scholars, results of seminars and other relevant scientific journals in this study.

Tertiary legal materials are other sources or reference materials for complementary primary and secondary legal materials, such as on the Site or online BlogSpot, articles, magazines, journals, discussing this research.

¹¹ *Ibid*, p. 95.

¹² Mukti Fajar ND & Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris Cetakan Ke-II*, Pustaka Belajar, Yogyakarta, p. 47-49.

¹³ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Cetakan ketiga, Bayu Media Publisng, Malang, 2007, p.302-306.

2.4 *Research sites*

The place that became the location selected by researchers in this study is in Kabupaten Bima.

2.5 *Data collection technique*

Data collection is done by interview and library study, as follows: For primary data is done by way of interviews with some informants (informants) such as the leadership of Bank PT. BPR Pesisir Akbar Bima, respondents and other concerned parties concerned.

For secondary data is done by library study in get from library of University of Mataram, especially library of Faculty of Law University of Mataram.

2.6 *Data Analysis and Legal Material*

Analysis of data can be interpreted as the process of organizing and sorting legal materials into the patterns, categories, and units of basic descriptions so that the theme can be found and formulated working hypothesis as suggested by the material law.

Because this research is Normative empirical, then the usual analysis used in research that is qualitative analysis, meaning data bibliography and interview results analyzed in depth and comprehensive. The use of qualitative analysis methods is based on consideration: first, the data analyzed is obtained from various sources. Secondly, the nature of the data analyzed is comprehensive and requires in-depth information.

The way of data deduction is done by using deductive method, meaning that the researcher collects and reviews various references both legislation and literature books, then reviewed more specifically and deeply, and then combined with the results of field analysis of existing relevancy with problems which is lifted (from general to special).

RESULT AND DISCUSSION

3.1 *Position of Deed of Official Officer of Deed (PPAT) in Implementation of Credit Guarantee Credit Guarantee*

3.1.1 *Perjanjian Kredit*

Judging from its form, the banking credit agreement generally uses standard contract form. In connection with that is in practice the form of the agreement has been provided by the bank as a creditor whiles the debtor only learn and understand it well. Such agreement is commonly referred to as standard agreement, in which the debtor is only in a position to accept or reject without any possibility of negotiation or bargaining.

a. Relationship of the Parties in Credit Agreement At PT. BPR Pesisir Akbar Bima

Legal relationship of the parties in the credit agreement is the master agreement governing the rights and obligations of the parties between the creditor and the debtor. Agreement made between the creditor and the debtor, where the creditor is obliged to give money or credit to the debtor, and the debtor is obliged to pay the principal and interest, as well as other expenses in accordance with the agreed time between the two.¹⁴

Mr Ahmad Muslim, SH said that the relationship of the parties in the credit agreement at PT. BPR Pesisir Akbar namely:¹⁵

H. Salim HS, *Op. Cit.* p.185.

Interview with Mr. Ahmad Muslim. SH, Head of Credit Division of PT. Bank BPR Pesisir Akbar Bima is on February 20, 2018.

A credit agreement is a principal agreement made by a bank that is already in default and the debtor only agrees or disagrees with the credit agreement.

If mutually agreed in the contents of the credit agreement, then both parties or parties either the debtor or the bank official representing as the creditor will sign the credit agreement.

The credit agreement is to bind the parties to submit to the rules or applicable laws.

If one of the parties is default, then the credit agreement signed and agreed shall be the standard for conducting legal process.

⁰ Rights and Responsibilities of the Parties

According to Mr. Ahmad Muslim, SH as Head of Credit Section Mention that the rights and obligations of the parties are fully regulated in the agreed credit agreement, namely: ¹⁶

The debtor is entitled to receive credit in accordance with the amount of ceiling granted and deducted with specified fees.

The Borrower is obliged to pay the principal and interest on the credit received every month, in accordance with the agreed period of time.

3. The Borrower is obliged to submit its guarantee to the bank as creditor at the time of loan disbursement.

The bank as a creditor shall be entitled to receive a guarantee guaranteed by the debtor to grant credit facilities.

The parties, ie the debtor and the creditor, agree to bind the guarantee in the imposition of the guarantee to the officer or officer authorized to legally bind the collateral with the fee charged to the debtor.

If the debtor is negligent in the obligation of fulfillment of his achievement for three consecutive times, then the bank as the creditor shall have the right to control the guarantee goods for the auction process at the public tender office.

c. Types of Credit

In practice today, in general, 2 (two) types of loans are provided by the bank to its customers, ie credit is reviewed in terms of its intended use and credit and credit in terms of terms of time.

Types of credit in terms of its intended use may be: ¹⁷

1) Productive credit

Productive credit, i.e. credit given to businesses that produce goods and services as a contribution of its business. For this type of credit there are 2 (two) possibilities, namely:

⁰ Working capital credit, i.e. credit that is provided to finance the needs of businesses, including to cover production costs in order to increase production or sales.

¹ Investment credit, i.e. credit provided for the procurement of capital goods or services intended to produce a good or service for the business concerned.

Krediiit Konsumtif

Consumptive Credit, ie credit given to individuals to meet the needs of the general public consumptive (source of return from fixed income debtors).

Interview with Mr. Ahmad Muslim. SH, Head of Credit Division of PT. Bank BPR Pesisir Akbar Bima is on April 10, 2018.

H.R. Daeng Naja, *Hukum Kredit Dan Bank Garansi The Bankers Hand Book*, PT. Citra Aditya Bakti, Bandung, 2005, p.125.

The types of credit based on the term and the use of credit can be classified into 3 (three) types, namely:¹⁸

Investment credit, medium or long term loans extended to debtors to finance capital goods in the context of rehabilitation, modernization, expansion or establishment of new projects, such as the purchase of land and buildings for expansion of the factory, whose repayment from business proceeds with capital goods which is in charge. Thus, investment credit is a medium or long term credit for the purpose of purchasing capital goods and services necessary for the rehabilitation, modernization, expansion, project re-placement and / or creation of new projects.

Working capital credit, i.e. working capital loan that is provided in both rupiah and foreign currency to meet the working capital expenditure in one business cycle with a maximum period of 1 (one) year and can be extended according to agreement between the parties concerned. It can also be said that this credit is given to finance working capital is the type of financing required by the company for daily company operations.

Consumption Credit is a short-term or long-term credit that is given to debtors to finance goods or consumption needs in the scale of household needs that pay off the monthly income of the debtor customers concerned. In other words, consumption loans are individual loans for non-business purposes, including mortgage loans. Consumer loans are typically used to finance the purchase of cars or other durable consumer goods.

3.1.2 *Functions, Duties and Authorities of the Land Deed Authority*

The PPAT Act has a very important role in legal traffic, both in private and public law. With the deed, it will become the basis of the Regency / City land agency in making the transfer, transfer and imposition of land rights from the first party, to the second party.¹⁹

Government Regulation Number 37 Year 1998 Official Regulation of Officials of Land Deed Authority is a special regulation on PPAT. There are six matters governed by Government Regulation Number 37 of 1998, which includes:²⁰

- The main task and authority of PPAT;
- Appointment and dismissal of PPAT;
- Working area of PPAT;
- Appointment of PPAT office;
- Implementation of PPAT Office; and
- Guidance and supervision

From the explanation that set specially about PPAT above, then I will explain one by one, that is:

The main task of the authority of PPAT is the obligation or the main job that must be done by PPAT. The main task of PPAT is to run part of land registration activities. The authority of PPAT is related to the making of deed related to the land.

Hermansyah, *Hukum Perbankan Nasional Indonesia*, Kencana Prenada Media Group, Jakarta, 2005, p.60-61.

H. Salim HS, *Teknik Pembuatan Akta Pejabat Pembuat Akta Tanah (PPAT)*, PT Raja Grafindo Persada, Jakarta, 2016, p.67.

H. Salim HS, *op. Cit*, p.91.

The appointment and termination of PPAT is a person entitled to appoint for PPAT or PPAT while the minister, and who is entitled to dismiss an PPAT is a minister, but limited to other events. Such disrespectful dismissal and dismissal are as follows: 65 years old or dead.

The working area of the PPAT is the working area in accordance with the decree of appointment of its working area, which covers the regency / municipality area where the PPAT office is concerned.

Appointment of PPAT office is still a minister entitled to appoint a PPAT, but must follow PPAT education and training and must pass the test of PPAT exam.

Implementation of PPAT position is after taking the oath of office, and then someone must carry out his duties and positions in real.

Guidance and supervision is the guidance and supervision of PPAT conducted by the minister for the purpose of becoming a PPAT with high integrity.

PPAT is a public official authorized to make deeds of transfer of land rights and other deeds in the framework of the imposition of land rights, whose forms of act are stipulated, as evidence of certain legal acts concerning land located within their respective working areas. In the above-mentioned positions, the deeds made by the PPAT constitute an authentic deed. The definition of legal act of imposition of land rights which the making of the act is the authority of PPAT, including the making of the deed of land use rights for the land of property rights as referred to in Article 37 of the Basic Agrarian Law and the making of deed within the framework of imposition of mortgages provided for in this law.²¹

3.1.3 Position of PPAT In Implementation of Banking Credit Guarantee

The position of PPAT as a public official, the PPAT is prohibited to concurrently occupy a position or profession as a lawyer or advocate, civil servant or an employee of State-Owned Enterprise (vide Article paragraph (2) PP No. 37 year 1998). In carrying out certain tasks of land registration, especially certain legal acts, PPAT has the authority to make an authentic deed of all the above mentioned legal acts which lie within its working area. As for the Special PPAT it is only authorized to make a deed of legal deed mentioned specifically in its appointment. Thus, the position of PPAT as a public official, then the deed made by the PPAT given the position as an authentic deed.

The PPAT Deed has a very important position and role in legal traffic, both in private and public law. With the deed, it will become the basis of the Land Affairs Board of the Regency / Municipality in making the transfer, transfer and imposition of land rights from the first party, to the second party.²²

In carrying out agrarian duties or related to land as stipulated in RI Government Regulation no. 24 year 1997, the position of PPAT is very important, especially as a general official who has a role in performing part of the land registration activity by making deed as evidence of certain legal acts concerning the right to land because any agreement intended to transfer or transfer the right to land, pawn the land or borrowing money with land rights as dependents must be proven by a deed made by and in the presence of PPAT.

The position of PPAT deed in the implementation of credit guarantee binding at PT. BPR Pesisir Akbar Bima, is very important indeed. Because it ensures legal certainty for the guarantee

H. Salim HS, *op. Cit*, p.86.

H. Salim HS, *op. Cit*, p.67.

deposited to us in the form of certificate of land or land and building. Guaranteed binding using PPAT deed, for us the bank is required because in accordance with SOP (Standard Operational Procedure) bank PT. BPR Pesisir Akbar Bima. In SOP we also determine the PPAT deeds that we use, there are 2 (two) types in accordance with nominal credit ceiling given.²³

3.2 *PPAT Responsibility in the Guarantee Binding of Using SKMHT When an Default Debtor*

The legal basis for the responsibility of the PPAT has been regulated in Government Regulation No. 24 of 1997 which grants the attribution authority to the land certificate official to issue the certificate. In accordance with article 1 point 24 PP. 24, 1997, that the Land Deed Authority, hereinafter referred to as PPAT is the General Official authorized to make certain deeds of land.

According to Article 1 point 1 of PP. 37 of 1998 declared: "Land Acting Deed Officer, hereinafter referred to as PPAT, is a public official authorized to make an authentic deed of certain legal acts concerning the right to land or Ownership of the Flats Unit". This provision is actually listed in PP no. 10 of 1961, namely as general officials authorized to make deeds of transfer of rights to land, imposition of rights to land.

The responsibility of PPAT in the binding of the guarantee using Power of Attorney Charging the Guarantee Right (SKMHT), so far only limited to make deed with attended by debtor or third party as owner of guarantee to sign deed. After that the acknowledgment is handed over to us by the bank for a copy. If the debtor breaches our bank account fully, even if we consult the PPAT concerning the debtor whose credit is categorized, the PPAT only advises to increase the status of the binding of the Power of Attorney Charging Mortgage Right (SKMHT) to the Dealing Deed of Mortgage (APHT). It also, from PPAT must bring back the parties or Debtors to sign the deed of APHT. So, our constraints as the bank or creditor the average debtor no one wants to come office PPAT. Because with the reason they do not want the guarantee in confiscation or at auction by the bank, so this is our obstacle from the bank who do bind credit guarantee by using Power of Attorney Loan Rights (SKMHT). The role of PPAT in the event of non-performing loans no longer exists, because the PPAT only plays a role when the guarantee binding at the beginning of credit disbursement only.²⁴

The result of interview with mother of Hartati as customer whose collectability status is less smoothly stated that they are facing notary office / PPAT only to carry file from bank which has been entered into envelope folder by bank officer and sign what is provided by notary / PPAT employee. Because it is a procedure for liquefying our credit. For the responsibility of notary / PPAT to us as bank customers who submit the guarantee, we never know, and even no more let alone us as customers who have been in arrears obligation to pay our credit.²⁵

Mr Ahmad Muslim, SH as Head of Credit Section mentioned the role of Notary / PPAT as a partner of the bank, only limited binding of collateral in the form of guarantee of land certificate that the object of guarantee is land and land and building. The binding of collateral made by notary / PPAT there are two types, namely Power of Attorney Charging Guarantee

Interview with Mr. H. Zas'ari H. Zainuddin, SE. CRBD, President Director of PT. BPR Pesisir Akbar Bima on February 18, 2018.

Interview with Mr. Ir. Syamsuddin. HP, Head of Troubled Loan Handling Division PT. BPR Pesisir Akbar Bima on February 20, 2018.

Interview with Mrs. Hartati as Customer of PT. BPR Pesisir Akbar Bima on February 21, 2018

Right (SKMHT) and Deed of Burden of Mortgage (APHT). However, our frequent bank bonding is done to a notary / PPAT ie binding of guarantee with Power of Attorney Charging Mortgage Right (SKMHT). Because, most of the credit we throw to the debtor is only credit whose average ceiling is below Rp. 50.000.000, (fifty million), only a few debtors whose criteria deserve that we throw credits that the ceiling is above Rp. 50.000.000, (fifty million) until the ceiling of Rp. 300.000.000, (three hundredths of a million). However, the debtors we give credit ceiling below Rp. 50,000,000, (fifty million), the range with bad credit, and if the debtor ceases or has defaulted in its payment. Thus, the roles and responsibilities of notary / PPAT no longer exists, so the risk of loss of range against the creditors or us the bank.²⁶

The responsibility of PPAT in the binding of the guarantee using Power of Attorney Charging the Guarantee Right (SKMHT), so far only limited to make deed with attended by debtor or third party as owner of guarantee to sign deed. After that the deed is submitted to the bank for a copy. If the debtor is fully liable for the debtor is the bank, the PPAT only recommends increasing the status of the binding of the Power of Attorney Charging the Guarantee Right (SKMHT) to the Dealing Deed of Mortgage (APHT). It also, from PPAT must bring back the parties or Debtors to sign the deed of APHT.²⁷

Thus, the roles and responsibilities of a notary / PPAT in the credit guarantee binding, only limited to creditors and debtor partners to make the bond binding deed as one of the conditions for credit disbursement. Because, notarized deed / PPAT is not the protection of the parties, but the risk of loss in the respective responsibility of the parties. In fact, in this case the risk of loss of the range against the creditor as the bank.

IV. CONCLUSION

From the description of the results of the discussion of the problem at number one and the problem on number two as the authors conveyed in this writing, it can be drawn conclusion that is:

- ⁰ The position of PPAT deed in binding of credit guarantee is very important at the beginning of credit disbursement, because basically to help the bank PT. BPR Pesisir Akbar Bima entrusts the process of foreclosure if the debtor is defaulted.
- ¹ The responsibility of the PPAT in the binding of collateral using SKMHT if the debtor is defaulted, only as a deed for credit binding only.

RECOMMENDATION

- ⁰ The credit guarantee binding deed using SKMHT made by PPAT is in fact the same position with the SKMHT binding deed made by a notary. Even a notarial deed is stronger because the authority is a notary who has the right to make the act.
- ¹ Responsibility of PPAT in binding of credit guarantee in case of default, PPAT should have an active role to assist the bank. Such as re-facing the parties namely creditor and debtor to be given a legal understanding of the importance of the deed of PPAT, when a creditor is stuck like this.

Interview with Mr. Ahmad Muslim, SH, Head of Credit Division of PT. BPR Pesisir Akbar Bima on February 20, 2018.

Interview with Mr. Ir. Syamsuddin. HP, Head of Troubled Loan Handling Division PT. BPR Pesisir Akbar Bima on February 20, 2018.

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PROVISION OF RIGHT TO BUILD OVER RIGHT OF MANAGEMENT CONTROLLED BY LOCAL GOVERNMENT

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Abstract: *The granting of land rights is one of the activities of a series of land registration activities, especially in the context of the issuance of a land titling certificate with the status of state land. This means that the application of land rights with the status of state land, the issuance of rights is processed through the granting of rights.*

One of the tenure rights that can be controlled by the Regional Government is the Right of Management, whose authority is to design land use and use, to use the land for the purpose of carrying out its duties, and to transfer the Part of Rights of Management to third parties and/or cooperate with third parties. Right of Management is an entrainment of the right of controlling the state whose authority of implementation is partially delegated to the right holder. The management rights as regulated in implementing regulations are explicitly not regulated in the Basic Agrarian Law but the right of management mentioned in the general explanation II item 2 of the Basic Agrarian Law contained the term Manager.

On top of the Right Management, land rights (HGBs), use rights (HGU) and use rights are still practicable, but in practice the HGB is more often placed on the HPL granted to third parties, namely legal entities or an individual, on an agreement between the HPL holder and the third party.

The problem that is taken in this research is how the regulation and legal implication to the giving of building rights over the management rights controlled by Local Government. This type of research is legal juridical normative research. The approach used is statutory approach and conceptual approach.

The results of this study indicate that the legal arrangement of the provision of building rights over the management rights controlled by the local government to the applicant who has met the requirements according to the prevailing laws and regulations and registers the land rights to the Land Agency in its territory marks the birth of the land that has been recorded in a land book and issued a certificate of title to the land to be submitted to the applicant or his proxy.

Legal implications for the granting of rights to buildings over management rights controlled by local governments are the emergence of the fulfillment of the rights and obligations for parties to comply with the agreement as a condition of obtaining rights to buildings over management rights.

Keywords: *granting of rights, building use rights, management rights, and local government*

INTRODUCTION

The granting of land rights is one of the activities of a series of land registration activities, especially in the context of the issuance of a land titling certificate with the status of state land. This means that the application of land rights with the status of state land, the issuance of rights is processed through the granting of rights.

To direct the land policy, on September 24, 1960, Law No. 5 of 1960 on Basic Agrarian Law or Basic Agrarian Law (UUPA) was established. The implementation of this BAL has a very important constitutional meaning. Because this Law is a direct description of Article 33 paragraph (3) of the 1945 Constitution, which states that the earth, water, natural resources contained therein, controlled by the state and used for the greatest prosperity of the people.¹

Rights to Management of land that existed prior to the coming into effect of BAL and known as the tenure rights regulated by Government Regulation no. 8 of 1953 on the Control of State Land. This Concession Rights is then converted into management rights through the enactment of Regulation of the Minister of Agrarian Affairs no. 9 of 1965 on the Implementation of Conversion of the Right to Control the State and the Provisions of Further Policy. Basically, the right of management is not the Right of Land as intended by Article 4 jo Article 16 of the BAL, but the granting of some authority to exercise the right of control of the State as mentioned in Article 2 of the BAL to the holder of the management rights concerned.²

Current management rights have a very significant role in the dynamics of development. Local Government as the owner of land assets is not always able to manage his property to the fullest. In practice land or land is found abandoned without being properly used. The condition of the land that is not managed well raises a good idea from some developers who feel capable to manage the land or land to be settled or for other social purposes, for example used as a market, shop blocks, residential land, and other public facilities considered necessary by society.

Land controlled by a local government in the case of a management entitlement shall have the authority to transfer portions of management rights to a third party. The portions of the land of management rights submitted by the holder of their rights to a third party must already have a certificate of management rights. Having been certified with management rights, the holder of management rights has the authority to enter into legal relations with third parties.³

On top of the management rights, land rights are still possible, such as Building rightsan (HGB), Hak Guna Usaha (HGU) and Right to Use, but in practice the right to use the building is more often placed on the management rights granted to third parties, legal entities or individuals, on the basis of an agreement between the holder of the management rights and the third party. For example, building rights above management rights are designated as residential apartments, such third parties are required to seek approval from management rights holders and as long as there is no change to the use of management rights land there is no reason to disagree. It is

Muchsin dan Imam Koeswahyono, *Aspek Kebijaksanaan Hukum Penatagunaan Tanah dan Penataan ruang*, Sinar Grafika, Jakarta, 2008, p. 10.

Olivia Yanuari Huslan, "Tinjauan Yuridis Terhadap Perpanjangan Building rightsan (HGB) di atas Hak Pengelolaan", Skripsi, Universitas Hasanudin Makasar, 2016, p. 2-3.

Urip Santoso, "Kewenangan Pemerintah Daerah Terhadap Hak Penguasaan Atas Tanah," *Jurnal Dinamika Hukum* Vol. 12 No. 1 Januari 2012, p. 105-106.

therefore clear that the approval function is controlled and not "absolute" from the management rights holder.⁴

Maria S.W. Sumardjono states that in order to obtain the right to use the building over management rights, a third party must obtain approval from the management rights holder contained in the agreement on the handover, use and management of land rights, since the agreement is the basis of the right to grant the right to build over the right of management.⁵

To obtain rights to the portions of land management rights as well as to obtain rights to land directly controlled by the state is through the application of rights submitted to the competent authority as stipulated in the Minister of Home Affairs Regulation no. 6 of 1972 on the Delegation of Authority of Land Rights. Based on Minister of Home Affairs Regulation no. 1 In 1977, the rights that can be granted to third parties over management rights are property rights, building rights and use rights, in accordance with land use plans and land use prepared by management rights holders.⁶

Said by Budi Santoso, the limited ability of local government in the realization of infrastructure development projects caused by the very limited budget of Revenue and Expenditure Budget (APBD). One possible alternative project financing is to invite private parties to participate in local government procurement projects by entering into an agreement commonly known as build, operate, and transfer (bot) agreements.⁷ Under the agreement, the local government shall hand over its management rights land to a third party for the rights to be issued. Third parties bear all costs for building construction. Third parties are entitled to operate the building for a certain period agreed by both parties and take all or part of the profits. At the end of the third party land use agreement, the building and its infrastructure facilities to the local government are granted. Land use agreements are made by notarial deeds in which contain rights, obligations and restrictions on local government and third parties.

Commonly used building rights are the right to establish and own buildings on land which is not his own with a maximum period of 30 years. It may therefore be granted to land directly controlled by the State or the land of a person owned by an Indonesian citizen and a legal entity established under Indonesian law and domiciled in Indonesia.⁸

The non-synchronization of legislation indicates the existence of management rights which raises the opinion that there has been a shift in the nature of management rights tending to civilian direction.⁹ Where a third party wishing to manage the management rights land must make an agreement in advance as a condition for the application for the right to use the building.

To obtain protection and legal certainty over the granting of building rights over management rights controlled by local government, the certificate must be issued as a strong

<https://www.hukumproperti.com/hak-pengelolaan-lahan/status-hukum-suatu-properti-di-atas-hak-pengelolaan-lahan/> accessed on December 15, 2017.

Maria S.W. Sumardjono, "*Hak Pengelolaan, Perkembangan, Regulasi dan Implementasinya*", Jurnal Mimbar Hukum, Fakultas Hukum Universitas Gajah Mada, Yogyakarta, Edisi Khusus September 2007, p. 34.

Lovelly Dwina Dahan, "*Analisis Yuridis Terhadap Hak-Hak atas Tanah Yang Berada di Atas Hak Pengelolaan Pelabuhan*" (Pekanbaru : Jurnal Ilmu Hukum Volume 3 No 1,) 2011, p. 15.

Budi Santoso dalam Urip Santoso, *Op. Cit.*, p. 106.

Harry Nugroho, "*Perlindungan Hukum Pemegang Building rightsan di Atas Hak Pengelolaan (Studi Kasus Building rightsan di Atas Hak Pengelolaan No.1/Bandarjo, Kecamatan Unggaran Barat, Kabupaten Semarang)*". (Tesis, Magister Kenotariatan, Universitas Diponegoro, 2012), p. 8-9.

Elita Rahmi, "*Eksistensi Hak Pengelolaan Atas Tanah (HPL) dan Realitas Pembangunan Indonesia*", Jurnal Ilmu Hukum, Universitas Jambi. 2012, p. 346.

evidence of physical data and juridical data contained in it, as long as the physical data and juridical data in accordance with the data which is in the relevant land title and book.

The granting of building rights over management rights is a means of exploiting the land and developing its potential if local governments cannot develop or utilize it, so as to have a positive impact on the growth of local government and welfare improvement for the community.

DISCUSSION

2.1 *Legal Arrangement of Right of Building Use over Right of Management Controlled by Local Government*

Land controlled by the regional government is an Asset of the Regional Government; the legal basis has actually been regulated in the LoGA. BAL is effective from September 24, 1960 and since then the National Land Law has been enacted.¹⁰ However, the problem of land and / or buildings belonging to the regions is not specifically regulated in this law. Land referred to her does not govern the land in all its aspects but is regulated only in the juridical aspect, which is also called land tenure. One of the tenure of land rights is the right to control the land over the State. The exercise of the State's control over the land may be authorized or transferred to the local government as long as it is not contrary to the national under the provisions of government regulations.¹¹

In the Act it is said that in the management of regional assets the Head of Region is the holder of the power of regional financial management and in exercising its power, the regional head may delegate some or all of his power to the officials of the regional apparatus based on the basic principle of authority.¹²

Based on the Law, the Government Regulation, Regional Regulation, Regent Regulation and so on regulate further about local government. Regulations governing the related management of regional assets are listed in Government Regulation no. 6 of 2006, Government Regulation no. 38 of 2008 and refined through Government Regulation no. 27 of 2014. Government Regulation no. 27 Year 2014 is intended to regulate the management of state assets in the control of the Minister of Finance as state treasurer, while the leadership of ministries / state institutions is the users of state property, and officials of the work unit as the authorized user of the State property.

Article 16 Paragraph (1) of BAL and Article 53 of the BAL mention the right to land which can be controlled by local government is the right to use. Usage rights are regulated in Articles 41 to 43 of the LoGA. More about usage rights as regulated in Article 39 through Article 58 of Government Regulation no. 40 of 1996 concerning Right to Use of Business, Right to Build and Land Use Right. The definition of use rights is mentioned in Article 41 Paragraph (1) of the LoGA, which is the right to use and or to collect the proceeds of land directly controlled by the State or the property of another person, giving the authority and duties specified in the decision of the award by the competent authority to give it or by agreement with the owner of the land, which is not a lease agreement or land-processing agreement, everything as long as it is not contrary to the spirit and provisions of this Act.

M. Tahir Azhary, *Negara Hukum*, Bulan Bintang, Jakarta, 1992, p. 73-74.

Supriyadi, *Aspek Hukum Tanah Aset Daerah*, Prestasi Pustaka, Jakarta, 2010, p. 99.

Kartini, "*Legalitas Hukum Pengalihan Aset Daerah Berupa Tanah Kepada Pihak Lain*," (Thesis, Fakultas Hukum Universitas Hasanuddin Makassar, 2016), p. 36.

In addition to land use rights, the right to control land that can be controlled by the local government is the right of management. The LoGA explicitly does not mention management rights, but only mentions management in general elucidation of number II 2 of the BAL, that is, the State may grant such land to a person or legal entity with a right in accordance with its designation and purposes, such as property rights, use rights business, use rights, or use rights, or grant them in management to a governing body (department, agency, or private area) to be used for the performance of their respective duties.¹³

Prior to the enactment of the LoGA there was Government Regulation no. 8 of 1953 on the Control of State Land. In this government regulation it is stipulated that the control over state land can be handed over to the self-governing region to organize its regional interests. The right of control over State land given to the self-government area by the enactment of Regulation of the Minister of Agrarian Affairs no. 9 of 1965 can be converted into management rights. The term of management rights appears in Article 2 of Regulation of the Minister of Agrarian Affairs No. 9 of 1965, that is, if the State land as referred to in Article 1, in addition to being used for the interests of the agencies themselves, is also intended to be granted with a right to a third party, then the above-mentioned rights of ownership are converted into Management Rights as intended in Article 5 and 6, which take place as long as the land is used for that purpose by the agency concerned.¹⁴

Based on Minister of Agrarian Regulation no. 9 Year 1965 created a new type of rights called management rights. The management rights stem from the conversion of state land rights. The term of management rights is not contained in BAL. Nevertheless, the Right of Management actually comes from the Dutch translation, derived from *Beheersrecht*, meaning the right of mastery.¹⁵ Tenure is regulated in Government Regulation no. 8 of 1953 Article 1 Regulation of the Minister of Agrarian Affairs no. 1 of 1966 requires the Regions to register their management rights to the Land Registry Office through the mechanism of affirmation of conversion. In its development, Article 9 of Government Regulation no. 24 of 1997 on Land Registration stipulates that the right of management is one of the objects of land registration.

Furthermore, the definition of management rights is regulated in Article 1 point 2 of Government Regulation no. 40 of 1996 jo Article 1 Sub-Article 4 of Government Regulation no. 24 of 1997, that is the right of management is the right to control the state whose authority of the implementation is partially delegated to the holder. A more complete understanding of management rights is stated in Article 2 paragraph (3) of Law no. 20 of 2000 on Amendment to Law no. 21 of 1997 concerning Acquisition of Land and Building Rights jo Article 1 of Government Regulation no. 112 of 2000 on the Imposition of Acquisition of Land and Building Rights Due to the Provision of Right of Management, namely the right of management is the right of control of the state on the land whose exercise authority is partly delegated to the right holder to plan the land use and use, use the land for the purpose of carrying out its duties, portions of management rights to third parties and / or cooperating with third parties.

Broadly speaking, the acquisition of the right to use or the right of management by local government through the grant of right, that is the local government applying for the right of use or the right of management to the Head of National Land Agency of Republic Indonesia through Head of Land Office of Regency / If all the requirements set forth in the application for granting the right are fulfilled by the local government then the Head of the National Land Agency of the

Urip Santoso, *Op., Cit.*, p. 189

Ibid.,

Supriadi, *Hukum Agraria*, Sinar Grafika, Jakarta, 2007, p. 148.

Republic of Indonesia shall issue a Decree on the Granting of Right to Use or the Right of Management. The Decree on the Use of Right or Right of Management shall be registered by the Regional Government to the Head of the local Regency Land Office for the issuance of the Right Certificate or the right of management as a proof of its right. Registration of a decree giving the right of use or rights of management by the local government to the head of the local district/municipal land office marks the birth of Right to Use or Right of Management.

The purpose of the issuance of a certificate is that the right holder can easily prove that he/she owns his / her rights, obtains legal certainty and legal protection. Certificates are issued for the benefit of the rights holders in accordance with the physical data and juridical data already registered in the land books.¹⁶

The authority delegated to the Regional Government as one of the subjects holding the Right of Management shall be the greatest authority to plan the use of land and appoint a Person or Legal Entity to be entitled to land on the Land of Management Rights controlled by the local government.

The authority of the holder of Right to Management is also governed by Government Regulation no. 36 of 1997 and the Regulation of the Minister of Home Affairs Number 5 Year 1974. In Article 1 of Government Regulation no. 36 of 1997, it is stated that the right of management rights holder is to:

Planning land use and use;

Using the land for the purpose of carrying out its duties;

Submit the parts of the land to a third party and / or cooperate with a third party.

Article 3 of the Minister of Home Affairs Regulation no. 5 of 1974 concerning Provisions on the Provision and Granting of Land for the purposes of the Company it is stated that the right of management authorizes to:

Plan the designation and use of the land concerned;

Using the land for the purpose of conducting its business;

Submit sections of the land to a third party under the terms specified by the holder of the right, which includes its terms of use, use, duration and finances, provided that the granting of land rights to the third party concerned is exercised by the relevant authorities, authorized official according to the Minister of Home Affairs Regulation No. 6 of 1972 concerning the Delegation of Authority to Grant Land Rights "(has been replaced by the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 3 of 1999 concerning the Delegation of Authority for the Granting and Revocation of Land Rights) .

From both regulations it can be concluded that the authority of Regional Government as holder of Management Right is:¹⁷ First, plan land use and use. The local government as the holder of the management right shall have the authority to plan the designation and use of land for the purpose of housing, industry, trade, shops or offices. Land use and land use planned by local government shall be based on district / city spatial plan (RTRW) determined by regulation of regency / municipality.

Urip Santoso, "Sertipikat Sebagai Tanda Bukti Hak Atas Tanah", Jurnal Era Hukum Fakultas Hukum Universitas Tarumanagara Jakarta, 15 (1) September 2007, p. 682.
Urip Santoso, *Op.Cit.*, p. 195.

Second, using the land for the purpose of carrying out its duties. The local government as the holder of the management right shall have the authority to use the land of management rights for the purpose of performing its duties, such as housing, industry, trade, shops or offices.

Third, transfer the portion of management rights to third parties and / or cooperate with third parties. The local government as the holder of the Right of Management is not authorized to lease portions of management rights to a third party. The holder of the management rights, when leasing the portion of the land of management rights to a third party, is contrary to the provision of Article 44 of BAL, that is land which can be leased to another party only land with ownership rights. The authority possessed by the local government as the holder of the management right is to transfer the portion of the land of management rights to a third party in the form of rights to building, use rights, or proprietary rights. The portions of the management rights land submitted by the holder of their rights to a third party must have been certified of management rights. Having been certified with management rights, the holder of management rights has the authority to enter into legal relations with third parties.

Procedure for Provision of Right to Build Building on Right of Management controlled by Local Government

The Right Holder of Management is authorized to deliver the portion of the management rights to a third party. Officials authorized to make decisions regarding the granting of rights to buildings under the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency No. 9 of 1999 is the Head of the Regency / City Land Office.

In the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency No. 9 of 1999 stipulated on the procedures and requirements for obtaining land rights for third parties. A requirement that must be fulfilled by the applicant is the identity of the applicant, for an individual with a National Identity Card (KTP) and for Legal Entity by using the applicant's Identity Card or his proxy following the Deed of Establishment. The juridical requirement that must be fulfilled is the Letter of Statement of the Submission of Land Use from the Holder of the right of management to a third party. After the requirements are met, then at the proposal of the management rights holder is requested building rights to the Head of the local Land Office. After the research conducted by the Head of Land Office then issued a Decree of Granting Rights.

Fees that must be fulfilled by the applicant are 1). The examination cost of Committee A, Transportation Cost and Entry Cost in the State refers to Government Regulation no. 46 of 2002, 2). Land Acquisition Tax / BPHTB refer to Act No. 21 of 1997 in conjunction with Act No. 20 of 2000. Once paid then the recipient of the right to file a land certificate issuance. Upon the request was issued certificate (proof of rights) Rights of Building Use over Rights Management.

According Urip Santoso Submission of parts of land Rights Management gave birth to several rights namely the right to use the building, use rights, or property rights. Of course, by giving birth to some of the rights of the part of the Right Management through several procedures. Procedures for the acquisition of Hak Guna Bangnan or Hak Pakai by individuals or legal entities derived from the Management Right, namely:

Land use agreement (PPT) or Build, Operate and Transfer (BOT) agreements, or Bangun Serah (BGS) agreements between holders of Right to Management and prospective holders of Right to Build or Use Rights. Land use agreement is an agreement made by the right holder of management with a third party, containing a third party is granted the right to use the land of Management Rights for the purpose of establishing the building within a certain

- period of time by paying a sum of money as compensation from a third party to the holder of Right of Management agreed upon by both sides;
- ⁰ The Rights holder of Management shall issue a letter of recommendation (letter of approval) to the prospective holder of Right to Use or Use Right to be used to apply for the granting of Right of Use or Right to Use on Right of Management land;
 - ¹ Prospective holders of Right to build or Use Rights shall file a Right to Use Application or Use Right Application on the Right to Management Land to the Head of the Regency / Municipal Affairs Office whose working area covers the location of the land concerned. In the application for the grant of Right to Use or Use Rights is included a letter of recommendation (letter of Approval) made by the holder of Right to Management;
 - ² If all the requirements specified in the application for the grant of Building rightsan or Hak Pakai on the land of the Management Rights are fulfilled by the applicant, the Head of the Regency / Municipal Land Office whose working area includes the location of the land concerned shall issue a Decree on the granting of the Right to Use or the Right to Use;
 - ³ Decree giving of Right of Use or Right to Use shall be submitted to the applicant to the applicant of Building Use Right or Right to Use;
 - ⁴ The applicant registers the decree giving the Right to Build or Use Right to the Head of the Regency / City Land Office whose working area includes the location of the land concerned to be recorded in the land book and issued as a title of Right to Build or Use Right as a proof of its right;
 - ⁵ Certificate of Right of Use or Right to Use is conveyed to the applicant of Building Use Right or Right to Use.¹⁸

The process of Registration of Right to Build on the Right of Management controlled by the Regional Government

In applying for land registration can be done with the first land registration and registration of sustainable land which means the land can be transferred to another party which will then be registered again to the authorized official. Land registration is a series of activities undertaken by the government continuously, continuously and regularly includes collection, processing, bookkeeping and presentation and maintenance of physical data and juridical data in the form of maps and data on the plots of land and apartment units, including the granting of a certificate of title to the right of the land and the property rights of the apartment units and the certain rights which are burdensome.

Through articles 5 and 6 of Government Regulation No. 24 of 1997 it is affirmed that the land registration organizer is the National Land Agency and the land registration executive is conducted by the Head of Land Office in each Regency and City, Exceptions for certain activities are assigned to other officers stipulated by legislation.

Registration of Land rights above Right of Management ie Right to Build Buildings registration is done by holders of Right of Management in this case the right of Parent. It is the Management Right that registers the Land Rights thereon if there is a request. Certainly to register Building rightsan over Rights Management have procedures that have been described in the previous explanation which cannot be separated from the existence of the agreement or the BOT to use the Right to the land above the Right of Management.

Urip Santoso, *Op.Cit*, p. 108

2.2 *Legal Implication of the Right to Use Building on Right of Management Controlled by Local Government*

The relationships between the right-holders and the right-holders over the management rights create a legal effect. The consequences of a law are the consequences of an action taken to obtain an effect desired by the perpetrator and which is governed by law. This action is called a legal action, so in other words, the legal effect is the result of a legal action. Ujud from legal consequences it is:¹⁹

The birth, the change or disappearance of a legal state;

The birth, the change or disappearance of a legal relationship, between two or more legal subjects, in which the rights and obligations of the other party confront the rights and obligations of the other;

The birth of sanctions if the action is against the law.

Therefore the legal consequences of land rights over management rights are seen from the legal relationship of both the holder of the management rights with the third party holders of land rights. In some legal consequences arising from the right to land above the Right to Management shall entitle rights and obligations, namely:

Third parties or holders of land rights arise an agreement with the holder of the Right of Management which creates an obligation to the holder of the management right to surrender some of the rights to the management land and the third party hands over the amount of money/compensation based on the agreement with the holder of the management right under the agreement;

The birth of a new land right over the management right that the authority of the use or allotment of the land must be in accordance with the agreement or permission of the holder of the Right of Management as well as if the right over the land above the right of management is committing a legal act;

If a third party commits a legal act without notice to the holder of the right of management, the holder of land rights by a third party may be revoked at any time if it is no longer compatible with the use and designation of the land.

CONCLUSION

The legal arrangement of the provision of Building rights an over the management rights controlled by the local government to the applicant who has fulfilled the requirements under applicable laws and regulations and registers the land rights to the Land Agency in its territory marks the birth of the land that has been recorded in the land books and issued certificate of title to the land to be submitted to the applicant or his proxy.

The legal implication of the provision of Building rights over the management rights controlled by the local government is the emergence of the fulfillment of the rights and obligations for parties to comply with the agreement as a condition of obtaining Building rights an above the right of management.

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THE POSITION OF THE CORRUPTION ERADICATION COMMISSION AS THE STATE INSTITUTION IN THE STATE SYSTEM OF ADMINISTRATION IN INDONESIA

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Abstract: *One of the new state institutions established during the reform era in Indonesia is the Corruption Eradication Commission (KPK). This institution was formed as part of the agenda of corruption eradication which is one of the most important agenda in improving governance in Indonesia. The position of KPK has several points of vagueness (gray norm), resulting in a debate related to the current condition of the KPK. Among them is the debate over the position of KPK which theoretically does not belong to one of the groups/clusters of State institutions, whether included in the realm of the Executive, Legislative, or Judiciary. The position of the KPK in the Indonesian constitutional structure is more appropriately categorized in the position of the State institution whose source of establishment is based on the Act. This concept is also in line with the classification of independent State institutions in the study of the theory of the new separation of power, in which independent state institutions such as these are equal to the executive, legislative and judicial institutions. The position of KPK is like the existence of the Federal Reserve Board in the United States, as one of the independent State institutions in the United States.*

Keywords: *corruption eradication commission, position, institution*

INTRODUCTION

Indonesia is a legal state (*rechstaat*) it is expressly stipulated in the constitution in Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia. The growing society apparently wants the State to have an organizational structure that is more responsive to their demands. The realization of effectiveness and efficiency both in the implementation of public services and in achieving the goal of governance is also a hope of the community charged to the state. These developments have an influence on the organizational structure of the state, including the form and function of state institutions. In response to the demands of these

developments, new state institutions that can be established are councils, commissions, committees, bodies, or authorities.¹

One of the new state institutions established during the reform era in Indonesia is the Corruption Eradication Commission (KPK). This institution was formed as part of the agenda of corruption eradication which is one of the most important agenda in improving governance in Indonesia.² Based on the hierarchy of legislation, the juridical foundation of the formation and granting of authority is a provision of Article 43 of Law Number 31 Year 1999 concerning the Eradication of Corruption, and through Law Number 30 Year 2002 concerning the Corruption Eradication Commission, this commission legitimately established and legitimate to carry out its duties.³

As the concept of the establishment of the State Institution in general, the legal legislation of KPK establishment cannot be separated from the legal politics of state supporting institutions in general. The basis of the establishment of the Commission is the occurrence of delegitimize existing state institutions. This is due to the assumption that there is corruption rooted and difficult to eradicate. Police and prosecutors have lost confidence in the eradication of corruption. Police and prosecutors are seen as failing to combat corruption. In order to restore public confidence in law enforcement, the government established KPK as a new state institution that is expected to restore the image of law enforcement in Indonesia. The high burden of existing institutions that require new institutions as a complement. For the sake of achieving optimal public services for the community, the government considers it necessary to establish a new institution, in this case the workload of police and prosecutors is considered too much so that many arrears a rise case. As a state adjustment to the development of the state administration system and the changing demands of the state administration system, Indonesia has forced the state to reform in various lines, including institutional reform. Some non-structural institutions were formed to accommodate this, including enforcement of the rule of law, the improvement of court image. The development of certain governmental authorities held by the increasingly complex governmental organization, so it is not possible to be regularly managed in the organization concerned. In order to implement good governance (good governance). The idea arises that with the establishment of additional institutions that are non-structural will be more open opportunities in an effort to apply the principles of good governance. It is important to realize that the establishment of the KPK stems from the assumption that corruption in Indonesia is considered an extraordinary crime so it needs an extraordinary institution with extraordinary powers.

However, in his journey that has not stepped on the fourth year since its establishment, the existence and position of the KPK in the structure of the Indonesian state began to be questioned by various parties. The duties, authorities and obligations legitimized by Law Number 30 Year 2002 on the Corruption Eradication Commission indeed make this commission seem to resemble a super body. As a state organ whose name is not listed in the 1945 Constitution of the Republic of Indonesia, KPK is considered by some to be an extra constitutional institution. Some people as petitioners filed a judicial review to the Constitutional Court⁴ by questioning the existence of the Corruption Eradication Commission by confronting

Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, 2006, p. vi-viii.
Mahmuddin Muslim, *Jalan Panjang Menuju KPTPK*, Gerakan Rakyat Anti Korupsi (GeRAK) Indonesia, Jakarta, 2004, p. 33
Tjokorda Gde Indraputra, I Nyoman Bagiastra, *Kedudukan Komisi Pemberantasan Korupsi Sebagai Lembaga Negara Bantu (State Auxiliary Institutions)*, jurnal hukum Universitas Udayana, Volume 3, Nomor 3, 2011, p. 2
Indonesia, Putusan Mahkamah Konstitusi Nomor 012-016-019/PUU-IV/2006, p. 33

Article 2, Article 3, and Article 20 of the Corruption Eradication Commission Act (KPK) with Article 1 Paragraph (3) of the 1945 Constitution on State of Law. They argue that the three articles of the KPK Law are contradictory to the concept of the state in the 1945 Constitution which has established eight organs of the state having the same or equal status which directly gets the constitutional function of the 1945 Constitution namely MPR, President, DPR, DPD, BPK, MA, MK and KY. In addition, the reaction arose because the Corruption Eradication Commission, which in fact is a state auxiliary institution, was given extraordinary authority in terms of eradicating corruption. Many say that this commission is incarnate as an institution with extra constitutional authority.

At least the position of the Corruption Eradication Commission, has several points of blur (gray norm) resulting in a debate on the relevance of the KPK currently. Among them is, the debate over the position of KPK which theoretically does not belong to one of the groups/clusters of State institutions, whether included in the realm of the Executive, Legislative, or Judiciary. This later will give its own consequences to its position in the institutional system of the State in Indonesia.

RESULT AND DISCUSSION

2.1 *Initial Idea The emergence of State Institutions Help / Support in Indonesia*

The emergence of a State institution which in the performance of its function is not positioned itself as one of the three trias politica institutions has developed in the last three decades of the 20th century in established democracies, such as the United States and France. Many terms to refer to the terms of the new state institutions, such as state auxiliary institutions, or state auxiliary organs which, when translated in Indonesian means institution or organ of the State of support.⁵

The positions of these institutions are not within the realm of executive, legislative, or judicial branches of power. Nor can they be treated as private or non-governmental organizations often called NGOs (non-governmental organizations) or NGOs (non-governmental organizations).⁶

The auxiliary State Institutions at a glance do resemble NGOs because they are outside government structures. However, its existence is very public, the source of funding comes from the public, and aims for the public interest, making it cannot be called as an NGO in the true sense.⁷ Some scholars still group such independent institutions within the scope of executive power, but there are also some scholars who place them independently as the fourth branch of governmental power, as Yves Meny and Andrew Knapp have stated:⁸

“Regulatory and monitoring bodies are a new type autonomous administration which has been most widely developed in the United States (where it is sometimes referred to has the handless fourth branch of the government). It takes the form of what are generally known as independent Regulatory Commissions”.

Theoretically, auxiliary State institutions originate from the will of the State to create a new State institution whose members are filling out of non-state elements, authorized by the

Jimly Asshiddiqe, *Pengantar Ilmu Hukum Tata Negara Jilid II*, Konstitusi Press, Jakarta, 2006, p. 08

Naufal El Ramadhian, *Kedudukan Ombudsman sebagai Lembaga Pengawas Pelayanan Publik dalam struktur Ketatanegaraan Indonesia*, Jurnal pada Fakultas Syariah dan Hukum, Universitas Islam Negeri Syarif Hidayatullah, Jakarta, 2014, p. 22

Jimly Asshiddiqe, *Perkembangan.....*, *Op. Cit.*, p. 08-09

Yves Meny dan Andrew Knapp, *Government and Politics in Western Europ : Britanian, France, Italy, Germany*, Third Edition, Oxford University Press, Oxford, 198, p. 281

State, and financed by the State without having to become State employees. The idea of auxiliary State institutions actually originated from the wishes of the previously powerful State when dealing with the public, willingly giving the public the opportunity to supervise. Thus, although the State remains strong, it is overseen by society to create vertical and horizontal accountability. The emergence of auxiliary state institutions is also intended to answer the demands of the community for the creation of democratic principles in every governance through an accountable, independent and credible institution.

In addition, the factor that triggers the establishment of auxiliary State institutions is the presence of a tendency in contemporary administrative theory to divert tasks that are regulative and administrative into part of the task of independent institutions. In relation to its nature, John Alder classifies this type of institution into two, namely:⁹

- Regulatory, which functions to create rules and conduct supervision on the activities of relationships that are private, and
- Advisory, which serves to provide input or advice to the government.

Jennings, as quoted by Alder in "Constitutional And Administrative Law", mentions five main reasons behind the establishment of auxiliary state institutions in a government, as follows:¹⁰

- There is a need to provide a personalized service culture and service that is expected to be free from the risk of political interference;
- There is a desire to regulate the market with non-political regulation;
- The need for regulation of independent professions, such as medical and legal professions;
- The need for procurement of rules regarding services that are technical; and
- The emergence of various institutions that are semi-judicial and function to resolve the dispute outside the court (alternative dispute resolution / alternative dispute resolution).

In this paper the author also uses the theory approach The New Separation of Power (Separation of New Power) that developed in the United States.

Bruce Ackerman (2000: 728) states: "...The Americans system contains (at least) five branches: House, senate, President, Court, and independent agencies uch as the Federal Reserve Board. Complexity is compounded by the wildering institutional dynamics of the American federal system. The crucial system is not complexity, but whether we American are separating power for the right reason (...the separation of powers in the US state system consists of at least five branches; The House of Representatives, the Senate, the President, the Supreme Court, and the Independent Institution such as the Federal Reserve Board. This complexity is deepened with the dynamics of expanding the institutional system of the State at the federal level. The crucial question is not on complexity, but does we the United States separate power for the right reasons?)".¹¹

According to the author, after analyzing The Shap of New Separation in The New Separation of Power article in Harvard Law Review 633 (2000), Bruce Ackerman idealized that the latest form of modern separation of powers is no longer limited by the separation of the three function only, as desired by Montesquieu and Medison, but has manifested itself into institutions

John Alder, *Constitutional and Aministrative Law*, The Macmillan Press RTD, London, 1989, p. 232-233

Ibid. p. 225

Gunawan A. Tahuda, *Kedudukan Komisi Negara Independen dalam Struktur Ketatanegaraan RI*, *Jurnal Pranata Hukum*, Volume 6, Nomor 2, Juli 2011, p. 175

that are on the institutional system of the State itself. Based on this understanding, Ackerman says that branches of state power should be firmly seen on the basis of its institutional model, which in the context of the United States consists of, the branch of the house of representative power, the Senate, the President, the Supreme Court, and the independent agency (independent state).

Based on these expositions, it is clear that independent state commissions in Indonesia can be equalized with independent state commissions in the United States, being outside the realm of the three original power axes, and institutionally can be reorganized into branches of power by institutional type, the power of the People's Legislative Assembly, the President, the Supreme Court, the Constitutional Court, and the independence branch of the independent state commission. So that the independent agencies referred to in the theory also take the form or can be interpreted as an independent state commission in the context of the constitutional Republic of Indonesia.

In addition, and for theoretical enrichment, in addition to the theory of the new separation of power, it is also known as the "fourth branch of the government" theory expressed by Yves Meny and Andrew Knapp (1998: 281)¹², as follows: "regulatory and monitoring bodies are a new type autonomous administration which has been most widely developed in the United States (where it is sometimes referred to has the headless fourth branch of the government). It takes the form of what are generally known as independent Regulatory Commissions (regulatory and regulatory agencies are a new type of autonomous administration that has grown rapidly in the United States, sometimes referred to as the fourth headless branch of the federal government)".

The latter institution is widely known as the Independent State Commission), based on this theory Yves Meny and Andrew Knapp, then in a State there is a fourth power which is called as an independent state commission. In the context of the Indonesian state administration there is a tendency in administrative theory to divert tasks of a regulatory and administrative nature into part of the duties of an independent State commission. For example, the powers of prosecution (investigation, investigation, prosecution and seizure) and the prevention of corruption are also carried out by the KPK, whose institutions are independent. In addition, the authority to hold elections that were under the control of the Minister of Home Affairs is now fully implemented by the General Election Commission (KPU), which is institutionally independent as well.¹³

The establishment of the auxiliary state institutions must also have a strong footing ground and a clear paradigm. Thus, its existence can bring benefits to the public interest in general as well as for structuring the state system in particular.¹⁴ Ni'matul Huda, quotes Firmansyah Arifin, et al. in his State Institution and the Inter-Authority Dispute of State Institutions, said that the quantity aspect of such institutions is not a problem as long as its existence and formation reflect the following principles:

Principles of constitutionalism. Constitutionalism is the idea that the power of existing leaders and government bodies can

Restricted. Such restrictions can be strengthened to become a fixed mechanism.

The principle of checks and balances. The absence of checks and balances mechanisms in the state system is one of the causes of many distortions in the past. The supremacy of the MPR and the dominance of executive power in the practice of government during the pre-

Gunawan A. Tahuda, *Op. Cit.*, p. 177

Ibid.

Fariz Pradipta, *Kedudukan Lembaga Negara Bantu dalam Sistem Hukum Ketatanegaraan Indonesia*, <http://farizpradiptalaw.blogspot.com/2009/12/kedudukan-lembaga-negara-bantu-di-dalam.html>, accessed on March 15, 2018

reformation period have hampered the democratic process in a healthy way. The absence of a mechanism of mutual control between branches of power leads to totalitarian government and the emergence of abuse of power.

The principle of integration. In addition must have a clear function and authority, the institutional concept of the state must also form a unity that processed in carrying out its functions. The establishment of a state institution cannot be done partially, but must be linked to its existence with other institutions that have existed.

Principles of benefit for the community. Basically, the establishment of state institutions is aimed at fulfilling the welfare of its citizens as well as guaranteeing the basic rights of citizens arranged in the constitution. Therefore, the administration of government and the establishment of political and legal institutions must refer to the principle of government, which must be run for the public good and the good of society as a whole and keep the rights of individual citizens.¹⁵

2.2 *The position of the Corruption Eradication Commission (KPK) in the State Administration System in Indonesia*

The Corruption Eradication Commission (KPK) was established based on Law Number 30 Year 2002 on the Corruption Eradication Commission (Komisi Pemberantasan Korupsi). Article 1 of this Law determines that the eradication of corruption is a series of actions to prevent and combat corruption through coordination, supervision, monitoring, investigation, investigation, prosecution and examination in court, with community participation based on laws and regulations applicable. The criminal act of corruption itself is a crime as referred to in Law Number 31 Year 1999 concerning the Eradication of Corruption as amended by Law Number 20 Year 2001 regarding the amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption. Any administration of a State that is clean and free from Corruption, Collusion and Nepotism, is expected to be freed from all forms of this commendable act, thereby establishing the apparatus and apparatus of the state administration which is completely clean and free from Corruption, Collusion and Nepotism. By Law Number 30 Year 2002, the name of the Corruption Eradication Commission is hereinafter referred to as the Corruption Eradication Commission (KPK). The legal status of this commission is expressly defined as a state institution which in carrying out its duties and authorities is independent and free from any influence of power. The formation of this commission aims to improve the efficiency and results of efforts to eradicate corruption crimes that have been running since before. In carrying out these duties and authorities, the commission works on the basis of (a) legal certainty, (b) openness, (c) accountability, (d) public interest, (e) proportionality.¹⁶

The Corruption Eradication Commission (KPK) is an independent state institution that deals with judicial power but is not under the jurisdiction of the judiciary. The existence of an independent Corruption Eradication Commission (KPK) in Indonesia is still often debated because of the lack of clarity on the existence of the institution. This is very worrying many circles related to the less than perfect institutional arrangement in the constitutional system. In addition, the meaning of the constitutional system is the management of a country. With the existence of such problems, the management of a country is still very less and has not reached a

Ibid.

Yugo Asmoro, *Analisis Status Dan Kedudukan Komisi Pemberantasan Korupsi Dalam Sistem Ketatanegaraan Indonesia*, (Skripsi pada Fakultas Hukum Universitas Sebelas Maret, Surakarta, 2009), p. 54

good governance system. So that the arrangement of the state system should be optimized in the presence of many new state institutions such as the Corruption Eradication Commission.¹⁷

In this case was ever interpreted by the Constitutional Court in considering the law of Constitutional Court Decision No.005 / PUUI / 2003 on the case of petition for judicial review of Law no. 32 of 2002 on the Indonesian Broadcasting Commission (UU KPI) against the 1945 Constitution of the State of the Republic of Indonesia has mentioned that there are two significant differences of meaning from the mention of state institutions by using capital letters and capital letters to L and N. "Institution State "is not the same as" state institution ". The mention of an institution as a "state institution (in lowercase)" does not provide the status of "State Institution" to the institution concerned.¹⁸ In the subsequent explanation the Constitutional Court explained about the birth of democratic institutions and "state institutions" in various forms of which the most in Indonesia is in the form of commissions. In the explanation of the Constitutional Court stated that:

"This independent Commission is indeed a logical consequence of a modern democratic country that wants to more fully implement the principle of checks and balances for the greater good".¹⁹

As in the Constitutional Court ruling on this case, the Constitutional Court states that in the Indonesian state system, the term "state institution" is not always included as a state institution only mentioned in the 1945 Constitution of the Republic of Indonesia alone, or which is formed by order constitution, but there are also other state institutions established on the basis of the order of the rules under the constitution, such as the Law and even the Presidential Decree (Keppres).

Thus, some argue that the existence of the Corruption Eradication Commission is extra constitutional is wrong. Because, the existence of the Corruption Eradication Commission (KPK) is explicitly regulated in Law No. 30 of 2002 on Corruption Eradication Commission (KPK) as a form of political law to eradicate corruption in the country. In line with the Constitutional Court's decision to examine the Indonesian Broadcasting Commission Law, the existence of state institutions is legal as long as it has been regulated in legislation, including when stipulated in the Law.

A concept which states that the existence of the Corruption Eradication Commission (KPK), which is regulated by law to disrupt the state administration system is not appropriate. Because theoretically, when formulating how a state institution is outside the executive, judicative, and legislative, there are 3 theories offered. First, the characterized separation of power does not accept the presence of such auxiliary institutions, so it can be concluded as an extra constitutional. Second, the characterized separation of function can still accept its presence as long as it relates to executive, legislative, and judicial functions. Third, checks and balances are characterized by full acceptance of the presence of other supporting institutions as part of the 4th or 5th power principle of the legislative, judicial, and executive branch of power.²⁰

The opinion that the existence of KPK in the Indonesian state administration system is extra constitutional because this institution is not mentioned and regulated in the 1945 Constitution as the constitution of Indonesia, is wrong. The existence or establishment of the

Ibid.

Roy Saphely, *Keberadaan Komisi Pemberantasan Korupsi Dalam Sistem Ketatanegaraan Dan Implikasinya Terhadap Kewenangan Kejaksaan Dan Kepolisian Republik Indonesia*, Jurnal Mimbar Hukum, Volume 12, Nomor 3, 2013, p. 12

Ibid.

Yugo Asmoro, *Op. Cit.*, p. 57

KPK, although not mentioned in the 1945 Constitution, but the existence of the KPK is explicitly regulated in Law no. 30 Year 2002 on KPK.

The opinion should be taken into consideration that Indonesia as a state law acknowledges the existence of the KPK as one of the constitutional state institutions. The above explanation gives the meaning that KPK as one of the state institutions in the constitutional system is constitutional and formed because of the reality that happened now corruption problem in Indonesia is a very important problem to be eradicated and prioritized its handling so that needed an auxiliary institution like KPK for handle and combat corruption issues.

KPK in carrying out its duties have clarity that is the prosecutor is a functional prosecutor of the Attorney General, the judge is appointed by the Supreme Court, even his appeal also to the Supreme Court. KPK and other institutions in the judicial process are woven into a general and special relationship.²¹ There are three principles that can be used to explain the existence of KPK. That is:

First, the proposition which reads the *salus populi supreme lex*, which means the salvation of the people (nation and state), is the supreme law. If the safety of the people, the nation, and the state is threatened by exceptional circumstances then any emergency or special action can be done to save it. In this case, the presence of the KPK is seen as an emergency to solve the extraordinary corruption.²²

Secondly, the law is known as a general law (*lex generalis*) and a special (*lex specialis*).²³ The law is known as *lex specialis derogate legi generali principle*, which means special law takes precedence over general law.¹³ Such publicity and specificity may be determined by the legislator in accordance with the needs, unless the Constitution clearly determines which ones public and what is special. In this context, the KPK is a special law whose authorities are granted by law other than the general authorities granted to the Prosecutor and the Police.

Thirdly, the legislative body (legislative body) can regulate further the state administration system which is not or has not been contained in the Constitution insofar as it does not violate the principles and restrictions clearly contained in the Constitution itself. In this regard, it is seen that the presence of the KPK is a manifestation of the legislative rights of the DPR and the government after seeing the reality demanding the necessity.

It is difficult to accept the argument that the existence of KPK outside the judicial authority is considered to disrupt the state administration system, since all this time the Attorney and Police are outside the judiciary. Because the law has regulated the things that are not prohibited or ordered, the existence of KPK did not cause problems in the constitutional system. On the issue of causing abuse of power, it is not relevant if it is linked to the existence of the KPK, because the abuse of power can happen anywhere. KPK actually presented to fight abuse of power that has been chronic.

Whereas the existence of the KPK is constitutional, it can also be based on a written constitution which according to the theory includes the Constitution (as a scattered document) concerning the organization of the state. From the scope of this understanding, the presence of

²¹ Moh. Mahfud MD, *Demokrasi dan Konstitusi Di Indonesia: Studi Tentang Interaksi Poitik dan Anggaran Kehidupan Ketatanegaraan*, Jakarta: Rineka Cipta, 2003, p. 197.
Ibid.
Ibid.

the KPK is constitutional because it originates from one of the scattered documents as part of the constitution which is not at all contrary to the specific document.²⁴

The KPK was formed as a state aid agency because of the incidental content of corruption in Indonesia after the New Order era. KPK is an application of legal political form that is given authority by the 1945 Constitution to the legislature as the legislator.²⁵

It is simpler to refer to the institutional concept of the State according to Jimly Asshiddiqie by following the development of the Indonesian state administration structure, grouping each State institution into four groups. This grouping is based on the source of the formation and authority of each State institution, namely:²⁶

Institutions established under the Constitution which are regulated and determined further in or with the Laws, Government Regulations, Presidential Regulations, and Presidential Decrees.

Institutions established under laws regulated and determined further in or by Government Regulations, Presidential Regulations, and Presidential Decrees.

Institutions established under a Government Regulation or a Presidential Regulation which is regulated and determined further in or by a Presidential Decree.

Institutions established under a Ministerial Regulation governed and further determined in or by a Ministerial Decree or a Decision of an official under the Minister.

Therefore, when analyzed the position of the KPK in the Indonesian state administration structure based on the above concept, it is more appropriate that the KPK will be classified in the position of the second State institution, namely the State institution whose source of its formation by the Act. This concept is also in line with the classification of independent state institutions in the study of the theory of the new separation of power as the authors explain in the above chapter, in which independent state institutions such as these are equal to the executive, legislative and judicial institutions. According to the author of this KPK as the existence of the Federal Reserve Board in the United States, as one of the independent state institutions in the United States.

So come to a conclusion that in different sources, Jimly Asshiddiqie clearly placed the KPK in the cluster of Judicial Authority institutions (Judiciary). According to Jimly Asshiddiqie:²⁷

State institutions and state commissions those are independent of constitutional or other constitutional importance, such as:

Judicial Commission (KY);

Bank Indonesia (BI) as the Central Bank;

The Indonesian National Army (TNI);

Police of the Republic of Indonesia (POLRI);

General Election Commission (KPU);

The Attorney General's Office which although not yet determined by its authority in the 1945 Constitution but only in the Law, but in carrying out its duties as law enforcement officer in the field of pro justice, also has the same constitutional importance with the police;

Jimly Asshiddiqie, *Menuju Negara Hukum yang Demokratis*, Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, Cetakan Pertama, 2008, p. 197-198

Firmansyah Arifin dkk., *Lembaga Negara dan Sengketa Kewenangan Antarlembaga Negara*, Konsorsium Reformasi Hukum Nasional (KRHN), Jakarta, 2005, p. 105

Jimly Asshiddiqie, *Perkembangan dan.....*, *Op. Cit*, p. 43-44
Ibid. hlm. 22-23

The Corruption Eradication Commission (KPK) is also established under the law but has the nature of constitutional importance based on Article 24 Paragraph (3) of the 1945 Constitution, which explains that, "Other bodies whose functions relate to the judicial authority are governed by Law".

The National Commission on Human Rights (Komnas HAM) established under the law but also has the character of constitutional importance.

According to the author of the establishment of a State institution such as the KPK, it is obviously very important that its position or as the language of Jimly Asshiddiqie above is referred to as a constitutional importance institution whose meaning, that institutions in the class of constitutional importance are as important to their positions as institutions which are constitutionally arranged in Of the 1945 Constitution.

CONCLUSION

Theoretically, the emergence of auxiliary state institutions stems from the will of the State to create a new State institution whose members are filling out of non-state elements, authorized by the State, and financed by the State without having to become State employees. The idea of auxiliary State institutions actually originated from the wishes of the previously powerful State when dealing with the public, willingly giving the public the opportunity to supervise. Thus, although the State remains strong, it is overseen by society to create vertical and horizontal accountability. The emergence of auxiliary state institutions is also intended to answer the demands of the community for the creation of democratic principles in every governance through an accountable, independent and credible institution.

There are three principles that can be used to explain the existence of KPK. Namely: First, the argument that reads *salus populi supreme lex*, which means the safety of the people (nation and state), is the highest law. If the safety of the people, the nation, and the state is threatened by exceptional circumstances then any emergency or special action can be done to save it. In this case, the presence of the KPK is seen as an emergency to solve the extraordinary corruption. Secondly, the law is known as a general law (*lex generalis*) and a special (*lex specialis*). The law is known as *lex specialis derogate legi generali* principle, which means special law takes precedence over general law.¹³ Such publicity and specificity may be determined by the legislator in accordance with the needs, unless the Constitution clearly determines which ones public and what is special. In this context, the KPK is a special law whose authorities are granted by law other than the general authorities granted to the Prosecutor and the Police. Thirdly, the legislative body (legislative body) can regulate further the state administration system which is not or has not been contained in the Constitution insofar as it does not violate the principles and restrictions clearly contained in the Constitution itself. In this regard, it is seen that the presence of the KPK is a manifestation of the legislative rights of the DPR and the government after seeing the reality demanding the necessity.

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**DISPUTE RESOLUTION OF THE AUTHORITY OF STATE
INSTITUTION WHOSE AUTHORITY IS REGULATED OUTSIDE THE
CONSTITUTION OF THE REPUBLIC OF INDONESIA YEAR 1995**

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Abstract: *The relationship between state institutions is based on the principle of check and balances. In the implementation of the authority of state institutions there can be differences in interpretation of the Constitution, so that there is a dispute over the authority of state institutions. If a dispute over the authority of a state institution whose authority is granted by the 1945 Constitution, then there is a judicial institution to solve it, namely the Constitutional Court. But what if the dispute over the authority of state institutions whose authority is not granted by the 1945 Constitution of the Republic of Indonesia, there is a legal vacuum. In the constitutional practice, the dispute over the authority of state institutions whose authorities are not regulated in the 1945 Constitution of the Republic of Indonesia is resolved by the President by bringing together the leaders of the disputed state institutions, such as the case of the KPK and Polri regarding alleged corruption of the SIM Traffic Corps simulator. If it is analyzed that the South Korean Constitutional Court may settle any dispute of state institutions, irrespective of whether or not the state institution is authorized by the Constitution. In the case of resolving the dispute over the authority of state institutions, the South Korean Constitutional Court is different from the Indonesian Constitutional Court. Indonesia's Constitutional Court in solving the dispute over the authority of state institutions is limited to state institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia.*

Keywords: *dispute authority, state institution, settlement*

INTRODUCTION

As a State of Law,¹ Indonesia places the 1945 Constitution of the State of the Republic of Indonesia, hereinafter referred to as UUDN RI 1945, as the highest provision in the hierarchy of laws and regulations in Indonesia. UUDN RI 1945 as the constitution, in principle must contain three main points,² that is:

The guarantee of human rights and citizens;

The establishment of a constitutional structure of a state that is fundamental; and that

Indonesia, Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia
Sri Soemantri M., *Prosedur dan Sistem Perubahan Konstitusi*, Alumni, Bandung, 1987, p. 51.

c. The division and restriction of constitutional duties which are also fundamental.

The basic content of the Constitution which is similar to the above opinion is presented by Miriam Budiardjo. According to Miriam Budiardjo, each constitution contains provisions on the following matters:³

State organizations, such as power sharing between the legislature, the executive and the judiciary: within the federal state, the division of powers between the federal government and state governments; procedure to resolve the issue of violation of jurisdiction by one of the government agencies and so on.

Human rights (usually referred to as Bill of Rights in the form of a separate manuscript).

Procedure to amend the constitution.

Sometimes it contains a prohibition to change certain properties of the constitution.

The structure of state administration or organization is an important aspect of constitutional life. Therefore there are state institutions mentioned in the 1945 Constitution and state institutions not mentioned in the 1945 Constitution. State institutions mentioned in the 1945 Constitution after the amendments are:⁴

People's Consultative Assembly (Articles 2 and 3);

President (Article 4, Article 5, Article 7, Article 7A, Article 7B, Article 7C, Article 8, Article 9, Article 10, Article 11, Article 12, Article 13, Article 14, Article 15 and Article 16);

Regional Government (Articles 18, 18A and 18B);

House of Representatives (Article 19, Article 20, Article 20A and Article 21);

Regional Representative Council (Article 22C and Article 22D);

Election Commission (Article 22E);

Central Bank (Article 23D);

Supreme Audit Board (Article 23E and Article 23F);

Supreme Court (Articles 24 and 24A);

The Judicial Commission (Article 24B);

Constitutional Court (Articles 24 and 24C);

The Indonesian National Army (Article 20);

The Police Force of the Republic of Indonesia (Article 30).

Outside the state institutions mentioned by UUDN RI 1945 above, there are still other state institutions in the Indonesian state administration system. Institutional state if grouped shaped as follows:⁵

State institutions and state commissions that are independent of the constitution;

Other independent institutions established by law;

Other governmental (and other relevant) institutions and committees, such as Institutions, Bodies, Centers, Commissions or Councils of a special nature within the government;

Other executive (government) institutions and commissions;

Institutions, Corporations and State-Owned Legal Entities or Legal Entities established for the benefit of the state or other public interest.

Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, PT Gramedia Pustaka Utama, Jakarta, 2002, hlm. 101.

Abdul Mukthie Fadjar, *Hukum Konstitusi dan Mahkamah Konstitusi*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2006, p. 184-191

Lukman Hakim, *Eksistensi Komisi-Komisi Negara dalam Sistem Ketatanegaraan Republik Indonesia*, Disertasi, Program Doktor Ilmu Hukum Fakultas Hukum Universitas Brawijaya, Malang, 2009, p. 220-222.

Of the above mentioned state institutions, in the exercise of their competence there is the possibility of a dispute⁶ between state institutions. In the event of a dispute of a state institution whose authority is granted by the 1945 Constitution, then there is a judicial institution to resolve the dispute. The judicial institution in question is the Constitutional Court of the Republic of Indonesia.⁷

The organic provisions of Article 24C of the 1945 Constitution of the Republic of Indonesia are Law Number 24 Year 2003 regarding the Constitutional Court as amended by Act 8 of 2011 on Amendment to Law Number 24 Year 2003 regarding the Constitutional Court. The provisions of Article 10 paragraph (1) and paragraph (2) of Law Number 24 Year 2003 regarding the Constitutional Court are the provisions of Article 24C Paragraph (1) and Paragraph (2) of the 1945 Constitution.

Article 2 paragraph (1) of the Constitutional Court Regulation Number 08 / PMK / 2006 concerning the Guidelines for Procedure in the Conflict of Constitutional Authority of State Institutions, hereinafter referred to as PMK 08, states that state institutions that may become applicants or petitioners in cases of constitutional authority disputes are:

- House of Representatives (DPR);
- Regional Representative Council (DPD);
- People's Consultative Assembly (MPR);
- President;
- Supreme Audit Board (BPK);
- Local Government;
- Institutions of other States whose authorities are granted by the 1945 Constitution.

In the case of disputes of state institutions whose authorities are not regulated in the constitution, there is no single norm governing them. Two disputes between the Corruption Eradication Commission, hereinafter referred to as KPK, with the Police of the Republic of Indonesia, hereinafter referred to as Police are not settled judicially. In the first dispute between the KPK and the Police, many people considered that the process of establishing Bibit-Chandra as a suspect in a criminal case that is suspected Police Headquarters full of irregularities. The legal process against Bibit-Chandra seems very forced.⁸ In fact, President Susilo Bambang Yudhoyono argues that the dispute over the authority of state institutions is not the authority of the president, but the authority of the Constitutional Court to resolve it.⁹

The KPK dispute with the next Police is the handling of alleged corruption in the procurement of simulation tools for driving two-wheeled and four-wheeled vehicles for the driver's license exam. KPK has appointed Inspector General Djoko Susilo to become a suspect in the alleged corruption.¹⁰ The top point of the dispute between the KPK and the Police is the

Indriyanto Seno Adji, *Rivalitas atau Penegakan Hukum*, Harian Kompas Tuesday 7 August 2012.

Article 24C Paragraph (1) of the 1945 Constitution states that the Constitutional Court has the authority to hear at the first and final level the decision is final to examine the law against the Constitution, to decide upon the dispute over the authority of state institutions whose authorities are granted by the Constitution, dissolution of political parties, and decide disputes over election results. While Article 24 C Paragraph (2) of the 1945 Constitution states that the Constitutional Court is obliged to give a decision on the opinion of the People's Legislative Assembly regarding alleged violation by the President and / or Vice President according to the Constitution.

SeeSuara Karya Online, *Konflik KPK-POLRI Campur Tangan Presiden Sangat Diperlukan*, Saturday 14 November 2009 downloaded on March 15, 2018.

Detik News, *Bibit & Chandra Ditahan Singgung Rivalitas KPK – Polri, SBY Hanya Bisa Menengahi*, Jumat 30 Oktober 2009, dalam <http://news.detik.com/read/2009/10/30/165355/1232007/10/singgung-rivalitas-kpk-polri-sby-hanya-bisa-menengahi>, accessed on March 15, 2018.

Harian Kompas, *KPK Tidak Boleh Dihambat Inspektur Jenderal Djoko Susilo Jadi Tersangka*, Wednesday 1 August 2012.

arrival of police officers to capture Novel Baswedan at the KPK building On Friday night October 5, 2012. According to Brigadier (Pol) Boy Rafli Amar said there was indeed an attempt to arrest the Commissioner Novel Police investigators stationed at the KPK. The arrest was related to the old case, which was in 2004. The novel is suspected of carrying out a severe maltreatment against a bird's nest thief. When asked why the old case is being handled now, Boy said the victim only reported a month ago.¹¹

President Susilo Bambang Yudhoyono took a firm stance in resolving the KPK dispute with the Police, stipulating four policies:¹²

SIM simulator case handled by KPK;

The legal proceedings of the investigator Novel Baswedan are not exact in terms of time and manner;

The time of assignment of Police investigators in the KPK will be regulated in government regulations;

The revision of the Corruption Eradication Commission Law is not appropriate at this time.

Disputes between state institutions whose authorities are not regulated by the 1945 Constitution, not just the KPK with the Police. Indriyanto Seno Adji noted KPK several times disputes with other state institutions: KPK with Supreme Court (MA), KPK with financial auditing body (BPK), KPK with KPK with KPK and BPKP, and KPK with DPR.¹³

Thus, there is a legal vacuum in the event of a dispute over the authority of a state institution whose authorities are not regulated in the constitution. So far, such disputes can be resolved by the President by bringing together the leaders of the disputing state institutions. Furthermore, the president gives instructions that must be obeyed by the state agency in dispute. The problem is that a settlement with such a model is not a judicial solution, which certainly has no legal force and cannot be obeyed.

Finally, in the perspective of state life disputes the authority of state institutions whose authorities are not granted by the 1945 Constitution of the Republic of Indonesia need to find a model of its judicial settlement. This is necessary in order to achieve the state's goal of community welfare.

RESULT AND DISCUSSION

2.1 Settlement of Dispute over the Authority of State Institutions in the State System of Indonesia

In the context of governance the emergence of disputes can be caused by several possibilities, among which inadequate systems that regulate and accommodate the existing inter organizational relationships that lead to different interpretations. Differences in interpretation of a provision that becomes a framework for the administration of the state often ignite the dispute. There are many interpretations that are often used to assess or understand a context of issues, among them the interpretation by the judiciary and the constitutional interpretation. With respect

Harian Kompas, *Masyarakat Bela KPK Tidak Ada Perintah Kepala Polri*, Saturday October 6, 2012.

Teten Masduki, *SBY Akhirnya Memimpin*, Hariian Kompas Wednesday October 10, 2012.

President Susilo Bambang Yudhoyono in his speech on October 8 stated that "I mediated and sought solutions, when there were disputes, among others, the KPK with the Supreme Court, it was around 2006. The Supreme Court with the Supreme Court in 2007, the KPK with the Police and Attorney General's Office in 2009".

See the President's Complete Address to the KPK-Polri, in <http://nasional.kompas.com/read/2012/10/09/16035782/Ini.Pidato.Lengkap.Presiden.soalKPK-Polri> accessed on March 15, 2018.

to authority disputes, one of the interpretations that may be used is constitutional interpretation.¹⁴ Constitutional interpretation is one of the methods often used by experts that every process of legal decision and state policy must be made in accordance with the provisions of the constitution. Basically the principle of constitutional interpretation is equal to the interpretation made by the judiciary.

According to Jimly, in the constitutional system adopted in the provisions of the 1945 Constitution after the amendment, the mechanism of relationship between state institutions is horizontal, no longer vertical. If before the change became known the highest institution of state and state high institution, then now there is no longer the highest state institution. The relationship between one institution and another is bound by the principle of checks and balances, in which the institutions are recognized equally but are in control of one another. As a result of such an equal relationship mechanism, the possibility of exercising their respective powers is disputed in interpreting the mandate of the Constitution. If such a dispute arises, a separate organ is required which is entitled to decide upon the final. In the constitutional system which has been adopted in the 1945 Constitution, the mechanism of dispute resolution of such authority is done through the process of constitutional court, namely through an institution formed separately by the name of the Constitutional Court.¹⁵

2.1.1 The authority of the Constitutional Court in Resolving the Dispute over the Authority of the State Institution

On August 13, 2003 was issued Law no. 24 of 2003 on the Constitutional Court. This Law is the implementation of the mandate of Article 24C Paragraph (6) of the 1945 Constitution of the Republic of Indonesia. One of the constitutional mandates delegated by the 1945 Constitution of the Republic of Indonesia to the Constitutional Court is the authority to resolve the dispute over the authority of state institutions (SKLN), which then the implementation is regulated in Article 10 Paragraph (1) Sub-Paragraph b of Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 Year 2011 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law), which reads: “to decide the dispute over the authority of the State Institution (SKLN) whose authority is granted by the 1945 Constitution of the State of the Republic of Indonesia “, which is subsequently regulated in Regulation of the Tribunal No. 08 / PMK / 2006 concerning the Guidelines for Procedure in Dispute over the Constitutional Authority of the State Institution.

The applicant in the SKLN is determined in Article 61 paragraph (1) of the Constitutional Court Law is a state institution whose authority is granted by the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) which has a direct interest in the disputed authority.

The dispute over the authority between state institutions clearly has the limitation that the state institution is only a state institution which obtains its authority according to the 1945 Constitution of the Republic of Indonesia, so it is clear that although there can be multiple interpretations can be seen in the Constitution of the State of the Republic of Indonesia in 1945 which state institutions obtain their authority directly from the Constitution NRI Year 1945. Since the Constitution is also regulates the organization of the state and its respective authorities, the criterion which can be stated that the state institution must be constitutional organs which are

¹⁴ Muarrar Siahaan, *Undang-Undang Dasar 1945 Konstitusi Yang Hidup*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2008, p. 22-23
Jimly Asshiddiqie, *Sengketa Kewenangan Antarlembaga Negara*, Konpress, Jakarta, 2005, p. 3

either constituted based on the constitution or those directly authorized to be regulated and derived from the Constitution.¹⁶

Referring to the differentiation of state institutions as constitutional organs which have their authority from the 1945 Constitution and which are not, it is important to remember that the source of authority is a benchmark or measure to determine the style of the state institution in dispute concerning its authority. But what is clear in such a measure that one state institution which obtains its authority from the Constitution is unlikely to have a dispute with a state institution which is authorized by law, and if it becomes a reality then such a matter is outside the jurisdiction of the Constitutional Court? Certainly it cannot be said, because one state institution determined in the 1945 Constitution with the main authority mentioned in the constitution, but further stipulated in the law. Whether such regulatory matters in the law causes the direct source of authority of the state institution from the law or of the Constitution, is still a debate that will obtain certainty in the cases faced and obtain a final decision of the Constitutional Court.¹⁷

In Article 1 number (6) of PMK No. 8/2006, the Constitutional Court provides understanding on the constitutional authority of state institutions is the authority which can be in the form of authority / rights and duties / obligations of state institutions granted by the 1945 Constitution. Article 1 number (7) of PMK No. 8/2006 is a dispute or disagreement related to the exercise of authority between two or more state institutions. In accordance with Article 2 paragraphs (1) of PMK No. 8/2006 states that "The state institution which may be the Petitioner or the Respondent in a dispute over the constitutional authority of a state institution is the DPR; DPD; MPR; President; CPC; Local Government; or other state institutions whose authorities are granted by the 1945 Constitution ". Then in Article 2 paragraph (2) affirmed, the disputed authority is the authority granted or determined by the 1945 Constitution.

In the case of dispute the authority of the state institution must clearly be mentioned in the petitioner's petition concerning the direct interest of the applicant and which institution to be the defendant that harms his authority derived from the 1945 Constitution of the Republic of Indonesia. This case is closely related to the duplication or overlapping of authority between one state institution and institutions of other countries. But it can also happen that the authority of one state institution as obtained from the 1945 Constitution has been ignored by other state institutions either in one state decision or policy.¹⁸

In accordance with the PMK No. 8/2006 the state institution which can file the dispute on authority has been expanded not only the main state institutions but has been expanded to other state institutions whose authority is granted by the 1945 Constitution. This means that the state institutions which obtain the authority of the 1945 Constitution is something that is still open ended, and open the interpretation space according to the context and dynamics experienced in the life of the nation and state, before obtaining the final form.¹⁹

In Article 3 of PMK No. 08/2006 it is determined that the Petitioner is a state institution that considers its constitutional authorities to be taken, mitigated, impeded, and / or impaired by other state institutions; The Petitioner has a direct interest in the disputed authority; and the Respondent is a state institution deemed to have taken, reduced, obstructed, ignored and / or harmed the Applicant.

Muarrar Siahaan, *Hukum Acara Mahkamah Konstitusi RI*, Konpress, Jakarta, 2005, p. 36-37.

Muarrar Siahaan, *Undang-Undang Dasar 1945...*, *Op. Cit.*, p. 423

Muarrar Siahaan, *Hukum Acara...*, *Op. Cit.*, p. 162-163.

Lukman Hakim, *Kedudukan Komisi Negara Di Indonesia: Eksistensi Komisi-komisi Negara (State Auxiliary Agency) Sebagai Organ Negara yang Mandiri Dalam Sistem Ketatanegaraan*, Program Pasca Universitas Brawijaya, Malang, 2010, p. 166

As for the object of dispute between state institutions is a dispute about constitutional authority between state institutions. The main issue lies not in the institutional institutions of the country, but on the matter of constitutional authority, if there a rise dispute of interpretation between each other. Thus, the understanding of state institutions relating to the authority of the Constitutional Court is so numerous and so wide in scope and scope.²⁰

Therefore, the terms and terminology and interpretation of state institutions should be studied in more depth in terms of philosophical, sociological, and juridical. First, philosophically the institutional state should be framed from the nature of the organization of the Republic of Indonesia, namely through 2 (two) criteria: (1) criteria of state destination of RI as mandated by the founders of the state; (2) criterion of the objectives of modern state organization with effective, efficient and equitable benchmarks. Second, sociologically the state institutions must follow and simultaneously observe the environmental developments that influence it. Third, the juridical framework of thinking that the state institution is a manifestation of the substantive aspects of the law formulated in the legislation.²¹

2.1.2 Problematic of the Authority of the Constitutional Court in Settling the Dispute over the Authority of the State Institution

Based on the provisions of Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 10 Paragraph (1) of the Constitutional Court Law, the petition for dispute over the authority of state institutions can only be done if met 2 (two) cumulative conditions. The two requirements are 1) the applicant is a state institution mentioned in the 1945 Constitution of the Republic of Indonesia; and 2) the disputed authority is the authority granted by the 1945 Constitution of the Republic of Indonesia. This is in line with the provisions of Article 61 paragraph (1) of the Constitutional Court Law which stipulates that “the Petitioner is a State institution whose authorities are granted by the Constitution of the Republic of Indonesia Year 1945 which has a direct interest in the disputed authority “(italics by Author). According to Jimly Asshidiqie, in the dispute of authority between state institutions whose authorities are granted by the constitution, there are two conditions that must be fulfilled, namely the existence of constitutional authority determined by the Constitution and the dispute of authority arising from differences in interpretation between two or more related state institutions.²²

The first requirement is *subjectum litis* or who has the legal standing to file an application to the Constitutional Court. For *subjectum litis*, it is required that the state institution should be a state institution referred directly to the 1945 Constitution of the Republic of Indonesia or the so-called constitutional organ. So if you look at it, there are 28 (twenty eight) state institutions that can submit a request for dispute resolution to the Constitutional Court. State institutions established under the laws or other laws and regulations, cannot be classified as *objectum litis* in the dispute resolution of the authority of the state institution to the Constitutional Court. However, if it is related to the second condition of *objectum litis* which requires that “the authority of the State institution shall be the authority granted by the 1945 Constitution of the Republic of Indonesia”, then not all of the state institutions of which 28 (twenty eight) state institutions can be categorized as applicants in settlement of disputes of state institutions. Therefore, in order to become an applicant in a state institution dispute, both conditions must be absolute cumulative. In the 1945 Constitution, there are some state institutions that are called but

Jimly Asshiddiqie, *Sengketa ...*, Op. Cit., p. 49-58

Lukman Hakim, *Kedudukan Hukum ...*, Op. Cit., p. 167-168.

Jimly Asshidiqie dalam Abdul Latif, *Fungsi Mahkamah Konstitusi*, Total Media, Yogyakarta, 2009, p. 152

not accompanied by the formulation of their authority, and there are also state institutions that formulated its authority, but the institution is not mentioned explicitly in the 1945 Constitution of the Republic of Indonesia.²³

Based on Article 2 paragraph (1) of Regulation of the Constitutional Court Number 08 / PMK / 2006 it is determined that the applicants and applicants in the dispute over the authority of state institutions shall be 1) the People's Legislative Assembly (DPR)); 2) Regional Representative Council (DPD); 3) People's Consultative Assembly (MPR); 4) President; 5) Financial Examination Agency (BPK); 6) Local Government (Pemda); or 7) other State Institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia. Even under the provisions of Article 65 of the Constitutional Court Law, the Supreme Court cannot be a party to inter-agency authority disputes. Against these provisions, it is necessary to think that the Supreme Court in the 1945 Constitution of the Republic of Indonesia is not only given the judicial technical authority as set forth in Article 24A Paragraph (1) of the 1945 Constitution. However, the Supreme Court also has the authority granted by the 1945 Constitution of the Republic of Indonesia the authority to give consideration to the President in the granting of pardon and rehabilitation as defined in Article 14 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Thus, in the judicial technical matter, the Supreme Court should not be the party having the legal standing, but in the exercise of authority otherwise, the Supreme Court shall be given the same legal standing as any other state institution determined in the 1945 Constitution of the Republic of Indonesia whose authority is also granted by the 1945 Constitution of the Republic of Indonesia.

So far, the decision of the Constitutional Court is very consistent in determining state institutions that can be applicants or requested in the dispute resolution of the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia. Constitutional Court always uses 2 (two) terms which have been stated above *subjectum litis* must be State institutions established under the 1945 Constitution of NRI and *objectum litis* shall be the authority granted by the 1945 Constitution of the Republic of Indonesia. Both of these conditions by the Constitutional Court are applied in absolute cumulative, not option. So, even if the *subjectum litis* is fulfilled, *objectum litis* the request is always “unacceptable”.

Example in Decision Number 003 / SKLN-XI / 2011. In the decision, the Constitutional Court declares that the Petitioner (Regent of East Kutai) is a State institution as referred to in Article 18 paragraph (3) of the 1945 Constitution of the Republic of Indonesia and the Respondent (Minister of Energy of Mineral Resources) is a state institution pursuant to Article 17 paragraph (3) of the Constitution NRI 1945. However, the *objectum litis* (authority of mining sector) is not an authority granted by the 1945 Constitution, but the authority is granted based on the provisions contained in Law No. 4 of 2009 on Mineral and Coal Mining. On the basis of this, it states that the Petitioner's petition “is unacceptable”. From the legal considerations can be seen that the terms *subjectum litis* and *objectum litis* is cumulative absolute.²⁴

In formal jurisdiction, the Constitutional Court is only given the authority to resolve the dispute over authority among state institutions granted by the Constitution, but what about the dispute over authority among state institutions which is only given by law. This becomes necessary, because it is not impossible there will be a dispute of authority in performing the functions of the state institutions. It is also necessary to get attention, because with the

²³ Sulistyani Eka Lestari, *Penyelesaian Sengketa Kewenangan Antar Lembaga oleh Mahkamah Konstitusi*, DIH Jurnal Ilmu Hukum, Volume 10, Nomor 14, Februari 2014, p. 45
Ibid. p. 46

development of the task of the state to prosper the people will go straight with the birth of independent state institutions that one with the other has a functional relationship. Given the functional relationship, it is not likely to appear disputes dispute the authority between state institutions. On the basis of the modern legal state, the disputes over the authority of state institutions established under the law need to be provided with the canalization of the settlement so that it remains grounded in due process of law.²⁵

2.2 Settlement of State Authority Dispute Authority whose authority is regulated outside the 1945 Constitution of the Republic of Indonesia

In the exercise of the authority of state institutions, there may be different interpretations of authority. The dispute between the KPK and the Police is a concrete example of the disputes of state institutions whose authorities are not regulated in the 1945 Constitution. The source of KPK's authority is the KPK Law, while the authority of the Police is the Police Law. This means that the two institutions cannot become applicants in the dispute of the state institution which is the authority of the Constitutional Court.²⁶

In the constitutional practice, the dispute over the authority of state institutions whose authorities are not regulated in the 1945 Constitution of the Republic of Indonesia is resolved by the President by bringing together the leaders of the disputed state institutions. In a dispute between the KPK and Police regarding alleged corruption of the SIM Traffic Corps simulator, the President met with KPK leaders and Chief of Police. After the meeting with the two institutions, the President made a judicial handling of alleged corruption SIM simulator involving (former head of Korlantas) Inspector General Djoko Susilo to be handled KPK.²⁷

The settlement of the President is not a legal settlement; therefore it has no binding power. The parties to the dispute may disobey the President's decision above. The fact is then; the Police sued the KPK because the Commission seized various documents belonging to the Police, which according to the Police have nothing to do with cases of alleged corruption in the Police Korlantas.

When we look at the philosophical arguments in the formation of KPK and Polri, the dispute between KPK and Police should not occur. The Consideration considers the letter a of the Corruption Eradication Commission Law and the Consideration of Considering the Letter a of the Police Law, both of which are intended to create a just, prosperous and prosperous society based on Pancasila and UUDN 1945. Thus there is similarity of purpose of establishment of KPK and Police, namely in the framework of realizing a just society, prosperous and prosperous.

What then is wrong, resulting in a dispute between the KPK and the Police. The authors argue that the dispute over the authority is due to the KPK's sectoral ego and the Police. This condition is supported by the presence of suspects from the Police environment. Corps' defense effort is very strong, so all efforts are made to handle cases of alleged corruption SIM simulator.²⁸

Formulation of dispute resolution of state institutions whose authorities are not regulated in the 1945 Constitution need to use a wider interpretation. Police, although the authority is not regulated in the 1945 Constitution, but the Police institution is mentioned in the 1945

Ibid.

Winasis Yulianto, *Rekonseptualisasi Penyelesaian Sengketa Lembaga Negara*, Jurnal Ilmiah Fenomena, Volume XII, Nomor 1, May 2014, p. 1128

Ibid. p. 1129

One of the police cultures that is universally applicable for not reporting the bad actions of police officers. This is known as "the blue silence". See Eddy OS Hiarij, *The Silent Blue Wall*, Daily Kompas Tuesday 16 October 2012.

Constitution. Thus, the authors argue that the Police have the legal standing to become a petitioner in the dispute over the authority of state institutions in the Constitutional Court.²⁹

What about state institutions whose authorities are not granted by UUDN RI 1945. The authors argue that it is necessary to amend the 1945 Constitution, particularly in relation to the authority of the Constitutional Court. The Constitutional Court has so far had limited authority to decide the dispute over the authority of state institutions whose authorities are granted by the Constitution. The authority to be expanded becomes a dispute over the authority of state institutions. Thus the Constitutional Court has the authority to decide all disputes of state institutions without exception.

Where it is not possible to amend the 1945 Constitution of the Republic of Indonesia, the Supreme Court may be appointed to decide upon the dispute over the authority of the state institution. The purpose of the appointment of the Supreme Court is as a judicial institution to break the dispute over the authority of state institutions. With the existence of such judicial institution, there will be legal certainty in case of dispute of authority of state institution whose authority is not granted by UUDN RI 1945.

Nevertheless the authors would agree if the dispute over the authority of the state institution is granted to the Constitutional Court. This is due to the existence of the Constitutional Court as part of efforts to realize the mechanism of checks and balances between branches of state power based on the principles of democracy.³⁰ By granting authority to the Constitutional Court to decide the dispute over the authority of state institutions whose authorities are not granted by the 1945 Constitution, the necessary legal forums will be fulfilled. Through the judicial institution concerned, the disputing state institution shall comply with the decision made by the Constitutional Court.

2.3 Model of State Authority Dispute Settlement in South Korea

When examined from a comparative perspective, the Constitutional Court in various countries is also given the authority to resolve the dispute over authority among state institutions. For example, in Article 111 of the Constitution of the Republic of Korea it is determined that “the constitutional court shall have jurisdiction over the matter ... 4.” *Competence disputes between states agencies, between states agencies and local government and between local governments*” (bold by Author).

From the provisions of Article 111 paragraph (1) of the Constitution of South Korea, it can be concluded that the South Korean Constitutional Court has the authority to resolve the dispute of authority between:³¹

State institutions;
State institutions with local governments;
Local government with local government.

Thus, the South Korean Constitutional Court may settle any dispute of state institutions, irrespective of whether or not the state institution is authorized by the constitution. In the case of resolving the dispute over the authority of state institutions, the South Korean Constitutional Court is different from the Indonesian Constitutional Court. Indonesia's Constitutional Court in

Winasis Yulianto, *Op. Cit.*, p. 1130

Muchammad Ali Safa'at, *Peran MK mewujudkan Prinsip Check and Balances*, *Majalah Konstitusi* No. 54 – July 2011, p. 24-

Winasis Yulianto, *Op. Cit.*, p. 1131

solving the dispute over the authority of state institutions is limited to state institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia.

The South Korean Constitutional Court is of the opinion that when conflicts between state, local government and state institutions on duties and individual institutions, not only endanger the principle of checks and balances between public powers, it is also at risk of paralyzing important government functions. This can pose a threat to the basic rights of citizens, calling for a systematic coordination mechanism. The South Korean Constitution has awarded the Constitutional Court the authority to adjudicate a dispute over authority as part of its constitutional safeguard function.³²

South Korea's Constitutional Court adjudges disputes of authority in the classification:³³
 Judge the dispute of authority between state institutions, in this case the dispute of authority between the National Assembly, the Excercise, the ordinary courts and the General Election Commission;

Prosecute authority disputes between state institutions and local governments, in this case:

- ⁰ A dispute over authority between the Executive and the Special Metropolitan City, the Metropolitan City or the province;
- ¹ Authority dispute between executive and City/District.

Prosecute dispute over authority among local governments, in this case:

- ⁰ Disputes authority between the Special Metropolitan City, Metropolitan City or province;
- ¹ Authority dispute between autonomous city / county or Sub District;
- ² A dispute of authority between a Special Metropolitan City, a Metropolitan City or a province and an autonomous city or district.

When examined from constitutional theory, the authors argue that the constitution of South Korea is closer to the content of the constitution when compared with the content of the 1945 Constitution. The principle of check and balances is regulated in the constitution of South Korea not only state institutions whose authorities are regulated in the constitution, but also other state institutions its authority is not regulated in the constitution, including local government.³⁴

The principle adopted in the South Korean constitution also meets the concept of state institutions, without exception. This means that, the state institutions referred to in the South Korean constitution do not distinguish between state institutions established under the constitution, legislation or other laws.³⁵ Thus, the dispute resolution model authority of state institutions in South Korea more fulfills the sense of legal certainty. This is considering in South Korea there are judicial institutions that judge the dispute the authority of state institutions without looking at the source of authority, namely the Constitutional Court.

Indonesia's Constitutional Court in the case of adjudicating the dispute over the authority of state institutions is limited to state institutions whose authority comes from the 1945 Constitution. Outside the state institutions whose authorities are granted attribution by the 1945 Constitution, the Indonesian Constitutional Court has no authority to hear. Therefore, the authors

Jimly Asshiddiqie, Ahmad Syahrizal, *Peradilan Konstitusi di 10 Negara*, Sinar Grafika, Jakarta, 2012, p. 45

Ibid.

Ibid. p. 50

Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, Sinar Grafika, Jakarta, 2010, p. 66.

argue that lessons from the South Korean Constitutional Court can be adopted by the Indonesian Constitutional Court.³⁶

CONCLUSION AND RECOMMENDATIONS

3.1 Conclusion

Based on the above discussion, it can be concluded that the model of dispute resolution of the authority of state institutions which is the authority of the Constitutional Court is limited to state institutions whose authorities are granted by attribution by the 1945 Constitution. In Indonesian state administration practice, in the case of a dispute over the authority of state institutions outside of which becomes authority of the Constitutional Court, resolved by the President. The settlement of disputes of state institutions does not guarantee legal certainty and tend to be disobeyed by the parties to the dispute.

Second, the dispute resolution model of state institutions in South Korea by the South Korean Constitutional Court does not distinguish between state institutions whose powers are granted by the constitution and other laws. The model of dispute resolution of state institutions will ensure legal certainty and implementation of checks and balances among state institutions.

Based on the lessons learned from the authority of the South Korean Constitutional Court above, it is necessary that the authority of the Indonesian Constitutional Court be given wider authority in resolving the dispute over the authority of state institutions. The state institutions in dispute in the Constitutional Court are no longer limited by the authority derived from the attribution of UUDN RI 1945, but also the authority derived from other laws.

In order to support the expanded authority of the Constitutional Court of Indonesia in resolving the dispute over the authority of the State institution, it is necessary to amend Article 24 C Paragraph (1) of the 1945 Constitution. The phrase “whose authority is granted by the 1945 Constitution of the Republic of Indonesia” C paragraph (1) of the 1945 Constitution states “to decide the dispute over the authority of state institutions”.

3.2 Recommendations

The concept of dispute resolution of the authority of State institutions whose authorities are regulated outside the 1945 Constitution of the Republic of Indonesia need to have constitutional guarantees in order not to present multiple interpretations in the enforcement process, so that the interpretation of the Constitutional Court's authority in settling the dispute over the authority of the State institution does not become narrow. Therefore, the extension of interpretation by the Constitutional Court in determining the *subjectum litis* and *objectum litis* in the dispute of State institution becomes very important to be able to accommodate the development of constitutional life in Indonesia.

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CRIMINAL DISPARITY IN JUDGE'S DECISION ON CHILD CASES REVIEWED FROM THE PERSPECTIVE OF CHILD RIGHTS PROTECTION (CASE STUDY IN MATARAM DISTRICT COURT)

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Abstract: *This study aims to determine and understand the occurrence of Criminal Disparity Judges Decisions in Child Crimes Viewed from the Perspective Protection of the rights of the child and to know and analyze the Criminal Disparity Settings Judge's Decision in the Case of Children. The research method used is empirical law research method, with approach of Legislation, Conceptual Approach, and Case Approach. The results showed that: First, the occurrence of Criminal Disparity In Judge's Decisions About Child Cases Viewed From Perspective Protection of the Rights of the Child caused by factors include: (a) Internal factors, i.e. factors Sourced from the judge itself because it is fixated as a person attribute referred to as judicial personnel; (b) External Factors are factors that affect the decision of a judge who comes from outside the judge. Second, the Criminal Disparity Arrangement in Judge's Decisions on Child Cases has not been regulated in the laws and regulations due to the absence of punishment guidance, especially in the crime of children, but the judges use discretion or their freedom to impose criminal punishment on children.*

Keywords: *criminal disparity, judge verdict*

INTRODUCTION

Children are a gift and a gift of God Almighty; even children are regarded as the most valuable treasure than the wealth of other property. Philosophically Children as God's mandate should always be guarded and protected because in the child attaches the dignity, dignity, and rights as human beings who must be upheld. Children have a very strategic position in the life of the nation and the state and child rights are part of human rights contained in the 1945 Constitution and the United Nations Convention on the Rights of the Child.

Child mischievousness every year is always increasing. The phenomenon of increased behavior of crime committed by children as if not directly proportional to the age of the

perpetrator.¹ Especially the crimes against property, murder, torture, fights and crime of decency. Increasing the growth of information technology today also greatly affect and shape the growth of the soul of children, so that children do all the actions that want to do or out of control.

Children need legal protection different from adults. Physical and mental children are not mature and mature underlying the need for different treatment of children. Children need to obtain a protection that is contained in legislation. The judge's immense authority in deciding cases leads to disparities in decisions in similar cases.² This is marked by a substantial sharp distinction between one judge's verdict and the other judges on the same case, whereas all refer to the same rules.³ The disparity of the judge's decision in the Criminal case occurs against a child actor who is one with another child actor or the punishment for a child offender is a lighter punishment than the other.

Criminal disparity brings its own problems in law enforcement. On the one hand, different punishments / criminal disparities are a form of judge discretion in judgment, but on the other hand different criminal/criminal disparities also bring discontent to convicts even the public at large. There is also social jealousy as well as a negative view by society on the judicial institution, which is then manifested in the form of indifference to law enforcement in society.

The existing criminal law legislation does not provide explicit criminal guidance guidelines which will serve as the basis for judges in imposing criminal sanction on the child Abuser so that a void of norms arises, this Code should be explicitly stated in Law Number 11 of 2012 on the System Child criminal justice, to avoid the arbitrariness that will be done by the judge in dropping his verdict. The need for a policy that can be used as guidance in the imposition of criminal so that the emergence of criminal disparity can be minimized its application by the judge. Differences of considerations used by judges who caused Disparity to the imposition of crime for children as perpetrators In the Court of Mataram became very interesting to investigate more deeply.

Based on the background of the problem as described above, then the problem in this research is formulated as follows: 1. Why Occurred Criminal Disparity Judge's Decision in Child Case Reviewed from Perspective Protection of the Rights of the Child 2. How Is The Criminal Disparity Setting Judge's Decision In The Case Of Children?

This type of research uses normative juridical research methods. As a supporter used unstructured interview techniques. as well as an interview with a child judge who has handled child cases concerning Criminal Disparity. Because the research method used is normative juridical, then one thing is certain is the use of statute approach, conceptual approach and case approach. Normative law research, generally using the type of data directed at secondary data research. In legal research, secondary data includes: a. Primary legal materials, secondary law materials, and tertiary legal Material. Analysis of legal materials in this study using the method of Legal Discovery (*Rechtsvinding*). The discovery of the law is the process of legal formation by judges or other legal officers who are given the task of enforcing the law or apply common

Nandang Sambas, 2010. *Pembaharuan Sistem Pemidanaan Anak di Indonesia*, Yogyakarta: Graha Ilmu. p. 213

The shift of criminal philosophy from retaliation to rehabilitation effort by considering a number of individual factors of perpetrators often creates problems of criminal disparity which has not been determined the standard or the size of criminal imposition in terms of the severity of the criminal. H. Eddy Djunaidi Karnasudirdja, 2013, *Beberapa Pedoman Pemidanaan dan Pengamatan Narapidana*, Jakarta, p.7-8.

Bambang Sutiyoso. 2012. *Metode Penemuan Hukum Upaya Mewujudkan Hukum yang Pasti dan Berkeadilan*, Yogyakarta: UII Press. p.38

law rules for concrete legal events⁴ As in the Decisions of the Mataram District Court on Child Cases, which became the object of this study

RESULT AND DISCUSSION

2.1 Criminal Disparity in Judge's Decision on Child Cases Reviewed From a Perspective on the Protection of the Rights of the Child

Judges in carrying out their duties in solving a case, especially a criminal case is not uncommon found that dropped the Decision There is a Criminal Disparity. Criminal disparity arises because of different penalties against similar crimes. This criminal detention is certainly a punishment imposed by the judge on the offender so that it can be said that the judge figure in the case of the emergence of the disparity of punishment is crucial. More specifically from that understanding, according to Harkristuti Harkrisnowo criminal disparity can occur in several categories:⁵

Disparity between the same crime;

Disparity between criminal acts that have the same degree of seriousness;

Criminal disparity imposed by a panel of judges;

Disparity between criminal sanctions imposed by different judges for the same offense.

Based on the opinion Harkristuti Harkrisnowo that can be found container where the growing disparity and historic in law enforcement in Indonesia. Disparity does not only occur in the same criminal acts, but also on the seriousness of a crime, as well as from the judge's verdict, either a panel of judges or by a different panel of judges for the same case.

A fair ruling can be achieved especially if the Judge constantly sharpens his or her conscience and is strongly grounded in his religious teachings and beliefs. It should be done in order to enforce the law and justice. The expected impact of any just judgment of Judges is not merely to obtain a positive image, but rather to re-establish public trust in the judiciary and its instruments, especially in handling cases with children as perpetrators of criminal acts. Public confidence in the judiciary can be seen from the number of cases of criminal offenses with children as perpetrators who have permanent legal force in the District Court of Mataram in the last 3 years as follows.

Table 1. Decisions on Criminal Cases of Children Year 2015 – 2017

No	Years	Total
1	2015	3
2	2016	32
3	2017	46

Source: Documentation of Criminal Registry Section of PN Mataram

Sudikno Mertokusumo, 2011. *Penemuan Hukum Sebuah Pengantar*, Yogyakarta: Liberty. p. 37

Harkristuti Harkrisnowo, 2013, *Rekonstruksi Konsep Pemidanaan: Suatu Gugatan terhadap Proses Legislasi dan Pemidanaan di Indonesia*, Jakarta: KHN, p. 28

The number of criminal cases with children as perpetrators in the District Court of Mataram from year to year has increased very Drastic, of course this can be a concern for all parties, especially the family environment. Family status Very fundamental and has a vital role in educating children, if education in the family fails, then children tend to do mischief in society and often lead to crime or criminal acts.⁶

Crime with children as the perpetrator, has many who decided by the court. Especially the Mataram District Court. The judges' judgment handed down in the criminal case consisted of theft, narcotics, intercourse, obscenity, embezzlement and other criminal cases. The judgment between judges with each other has its own assessment of the same criminal case. In every Judge's verdict it is certain that there is a criminal disparity in a criminal case with a child as the perpetrator. The increasing number of cases of criminal cases increased every year indicating that the criminal disparity in each judge's ruling tended to negatively affect public trust to the judiciary.

To explain the occurrence of different decisions in the imposition of crime in the General Court of Mataram which is especially for criminal disparity in Child Crime can be seen in the Table as follows:

Table 2. Judge's Decision in Narcotics Case Cases

No	No. Case	The Indictment	Decision
	4/Pid.Sus-Anak/2016/PN.Mtr 13/Pid.Sus-Anak/2016/PN.Mtr	Narcotics	Granting a Successful Diverse or Agreement
1	2/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Coaching in a Social Institution For 10 Months and Job Training For 2 Months
2	23/Pid.Sus-Anak/2017/PN.Mtr 27/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Prison Penalty for 9 Months
3	32/Pid.Sus-Anak/2017/PN.Mtr 33/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Institutional Coaching For 7 months
4	37/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Coaching outside the institution in the form of therapy for 6 months

Source: Register Criminal Case Child court Mataram District

Based on the above table, the decision of a judge in a narcotic criminal case committed by a child occurs Criminal Disparity through various criminal imprisonments such as prisons, institutional guidance, outside coaching, job training and diversion. When looking at the various impositions of criminal sanctions against children above the judge should be able to apply the diversion for children committing criminal acts of narcotics abuse in the best interests of the child so that children do not experience trauma to stage the trial and to avoid negative stigma in society.

Maidin Gultom, *Op.Cit.* p. 57

Table 3. Judge's Decision in Criminal Cases of Child Protection

No	No. Case	The Indictment	Decision
	2/Pid.Sus-Anak/2015/PN.Mtr	Intercourse	Coaching in a Social Institution For 2 years and a fine of Rp.500.000.000 (five hundred million Rupiah) subsidiary with a 3 month job training
1	1/Pid.Sus-Anak/2016/PN.Mtr	Intercourse	3 years imprisonment and a fine of Rp.500.000.000 (five hundred million Rupiah)
2	5/Pid.Sus-Anak/2017/PN.Mtr	Intercourse	Prison Penalty for 1 year 6 Months and Criminal training for 3 months
3	45/Pid.Sus-Anak/2017/PN.Mtr	Intercourse	Institutional Coaching for 6 months Criminal training for 3 months
4	2/Pid.Sus-Anak/2016/PN.Mtr	Fornication	Treatment Actions in LPSK
5	17/Pid.Sus-Anak/2016/PN.Mtr	Fornication	2 years imprisonment and a fine of Rp.500.000.000 (five hundred million Rupiah) replaced with a 3 month training in a social institution
	32/Pid.Sus-Anak/2016/PN.Mtr	Fornication	Criminal Prison For 2 years 6 Months

Source: Register Criminal Case Child court Mataram District

Based on the above table, the Crime of Child Protection, especially the sexual abuse and intercourse by the child in the Mataram District Court, shows the difference of the judge's decision. The verdict was even more striking for the same case. Criminal allegations in cases of sexual intercourse and child abuse do not have the same decision in one case, of course it is interesting to be observed because the crime of child protection is one of the criminal acts that the most severe punishment penalty, but the application occurs disparity either in the form of sanctions such as criminal in the form of imprisonment, coaching, vocational training and fines or in the form of acts such as care in LPSK or length of time to undergo crime such as criminal disparity in the provision of punishment in the form of imprisonment.

According to Muladi and Barda Nawawi, the cause of the criminal disparity (judge's verdict) starts from its own law. In Indonesia's positive criminal law, the judge has the greatest freedom to choose the desired type of crime (strafsoort), in connection with the use of alternative systems in criminal penalties within the law.⁷

The second causative factor of the existence of criminal disparity is sourced to the judge, both internal and external.⁸ According to Hood and Sparks which are also adapted by Muladi and Barda Nawawi, the internal and external nature of judges is sometimes difficult to separate,

Muladi dan Barda Nawawi Arief, 2012, *Pidana dan Pemidanaan*, Semarang: FH Unissula Semarang, p.143

In Indonesia many people are less or even less likely to pay attention to the inherent characteristics of the judge, such as his individual background, his education and the concrete circumstances he faces at the time of making a decision. See Satjipto Rahardjo, 2015, *Hukum dan Masyarakat*, Bandung: Angkasa, p. 57

because it is integrated as an attribute of someone called “human equation” or “personality of the judge” in the broad sense concerning the influences of social background, education, religion, experience, temperament and social behavior.⁹

The existence of the decision difference may be caused by the different actions that are presented to the judge. In addition, there is also a judge's inequality in assessing a similar or equivalent case. The difference in determining the criminal in practice is the result of the fact that the acts before the criminal judge indicate a difference. It also shows that among judges there is a different view of the assessment of data in the same or similar cases.

Thus, the factors that resulted in the disparity of the judge's decision in the criminal case with the child as the perpetrator are internal factors and external factors.

Internal Factors, Factors that come from within the judge itself that cannot be separated, because it is fixated as an attribute of a person who is called a human justice (human equation). External factors, namely factors that affect the decision of a judge who comes from outside the judge, among others: a. Factor law or legislation itself, b. Factor situation in the perpetrator / defendant.

2.2 *Arrangement of Criminal Disparity In Judge's Decisions on Child Cases*

The regulation on the disparity of the judge's decision on criminal cases has not been regulated in legislation. Criminal disparity occurs because there is no criminal guidance, but the criminal justice disparity is closely related to the freedom of judges contained in the provisions of Article 24 paragraph (1) of the 1945 Constitution which provides the legal basis for the judicial power of judicial power is an independent power to organize justice to enforce law and justice. The provision of Article 24 Paragraph (1) of the 1945 Constitution provides guarantees to the freedom of the judiciary as an independent institution, including the freedom of judges to impose criminal sanctions.

The freedom of the judge in the imposition of Criminal as stipulated in the constitution applies also in the imposition of criminal case against children through Act No. 3 of 1997 regarding the juvenile court replaced with Law number 11 of 2012 on the Child Criminal Court system regulates the overall process of Case Settlement Children who are dealing with the law begin the investigation stage until the stage of guidance after undergoing Criminal.

In the Criminal Justice System of the Child, there are several elements that constitute a unity, namely: Child Investigator, Public Prosecutor, Child Judge and Child Correctional Officer. A fair justice will provide protection for the rights of the child, either as a suspect, a defendant, or as a convicted / inmate. Therefore, in the regulations governing Juvenile Justice, the rights of the child are the foundation of the establishment of the regulation.

The judge has the freedom in choosing a criminal to be imposed on the defendant who has been proven to commit the deed charged to him. In the Law of the Criminal Justice System of the Child, the judge's decision that can be imposed on the Child is a form of criminal or acts. Criminal consists of:¹⁰

The Basic Crime for Children consists of: 1.

Criminal warning;

Muladi and Arief, Barda Nawawi. 2010, *Teori-teori dan kebijakan pidana*, The fourth printing, Bandung: Alumni, p. 144

Wagiati soetedjo and melani, 2013, *Hukum Pidana Anak*, Refika Aditama, Bandung, p. 170.

- 0 Criminal with condition:
 - 0 Criminalization outside the institution;
 - 1 Community service; or
 - 2 Monitoring.
 - 1 Work training;
 - 2 Coaching in institutions; and
 - 3 Jail.
- b. Additional criminal consists of:
- 4 Deprivation of profits derived from a crime; or
 - 5 Fulfillment of customary obligations.

Measures that may be imposed on the Child include:

Return to parent / Guardian;
 Surrender to someone;
 Mental hospital care;
 Treatment at LPKS;
 The obligation to attend formal education and / or training conducted by the government or private entity;
 Revocation of driver's license; and / or
 Improvement due to crime.

Often said to be different from the criminal, then the action aims to protect the community, while the crime focused on the imposition of sanctions on the perpetrators who committed an act of crime. But theoretically, it is difficult to distinguish because criminal punishment is often called aimed at securing society and improving the convicted. So the criminal sanction puts the punishment on the punishment rather than education and counseling on the naughty child, whereas the sanction of the action is focused on education and coaching rather than punishment.

The criminal disparity itself does not automatically bring about an unjust disparity. Similarly, the equation in criminal prosecution does not automatically bring the right criminal.¹¹ So far there has been no formulation about the purpose of punishment and punishment guidelines in the positive law of Indonesia. As a result of the absence of this form of punishment, there have been numerous inconsistent and overlapping forms and types of criminal sanctions.¹²

In the absence of punishment guidelines, the judge does not have a definite measure as a consideration in determining the severity of the criminal to be imposed. Therefore, the provision of the Penal Code is very important for the judge in deciding a case and has a fairly rational consideration, especially in considering the dosage or the severity of the criminal sanction to be imposed.¹³

¹¹ M. Sholehuddin, 2013, *Sistem Sanksi dalam Hukum Pidana: Ide Dasar Double Track System dan Implementasinya*, Jakarta. PT Raja Grafindo Persada, p. 116
Ibid, p. 131

Dwidja Priyatno, 2016, *Sistem Pelaksanaan Pidana Penjara di Indonesia*, PT Bandung: Refika Aditama, p. 39

The Criminal Code actually contains a number of guidelines, such as Article 14a, Articles 63- 71, and Article 30. In addition, the draft of the Criminal Code already has guidelines which the judge must consider in deciding the decision: penalty guideline is regulated in Article 55 paragraph (1) Year 2005 stated that in the crime shall consider: a. the criminal offense of the offender; b. motive and purpose of committing a crime; c. the inner attitude of the offender; d. whether a crime is committed by a plan; e. how to commit a crime; f. attitudes and actions of the producer after committing a crime; g. curriculum vitae and socioeconomic circumstances of the offender; h. the criminal influence on the future of the offender; i. the effect of a crime on the victim or the victim's family; j. forgiveness from victims and / or their families; and / or k. public view of the crime committed.

Specifically, the interests of Child Players to minimize Disparity in the child's case, the judge shall consider the Rights of Child Protection in its Decision Letter. Law Number 23 Year 2002 regarding Child Protection laid down the obligation to provide protection to children based on the principles that are:

Non Discrimination

Best interests for children

Right to life, survival and development; and

Appreciation of children's opinions

In considering criminal sanctions as well as action sanctions against children conducting criminal acts need special attention, because the judge's decision on juvenile justice should prioritize the provision of educational guidance and moral coaching of the child, in addition to punitive actions. Because even though the defendant is sentenced to imprisonment, he/she still has the right to receive education and guidance in Child Correctional Institution.

CONCLUSION

Based on the above discussion, it can be concluded as follows:

The occurrence of Criminal Disparity in Judge's Decisions on Child Cases Reviewed From the Perspective on the Protection of the Rights of the Child caused by factors such as: (a) Internal factor, that is factor derived from judge itself because it has been fixed as an attribute of someone called human equation or personality of judge in the broad sense which concerns influence of social background, religious education, experience and social behavior; (b) External Factors are factors that affect the judge's decision that comes from outside the judge, among others: 1) legal factors or rules of the legislation itself and 2) State factors on self-perpetrators/defendants.

The Regulation of Criminal Disparity In Judge's Decisions on Child Cases has not been regulated in the laws and regulations due to the absence of punishment guidance especially in the crime of children, but the judges use their discretion or freedom in imposing criminal sanction against the children as regulated in Law Number 48 2009 on Judicial Power and Law No. 11 of 2012 on the Criminal Justice System of Children.

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VALIDITY OF NOTARY DEED CONTAINING ELEMENTS

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Abstract: *This study aims to determine the responsibility of the Notary in the event of making the deed and found the falsity of the contents of the Notary Act according to the Notary Position Law. The theory used is the theory of authority and legal liability theory. This research is normative research. Approach method used is the approach of law, conceptual, and case.*

Based on the results of a Notary's Research cannot be held criminal liability in case of any loss to one of the parties as a result of false documents from one of the parties, since the Notary only records what is submitted by the parties to be poured into the deed. False statements submitted by the parties shall be the responsibility of the parties. In other words, what can be accounted for by Notary is if the fraud or trickery is sourced from Notary itself.

Keywords: *criminal disparity, judge verdict responsibility of Notary, forgery*

INTRODUCTION

The need for written proofs that will require the importance of this notarial institution. Notary is a legal profession so that the Notary profession is a noble profession (*nobile officium*). Notary is called a noble official because the notary profession is very closely related to humanity. Deed made by Notary can be the legal basis for the status of property, rights and obligations of a person. The mistake of notary deed may result in the deprivation of a person's right or a person's burden of a liability; therefore the Notary in performing his / her duties must comply with the various provisions of the Notary Law.¹

Based on Article 15 paragraph (1), (2), and (3) of Law Number 30 Year 2004 which has been amended by Law Number 2 Year 2014 regarding the Notary's Office mentioned:

1. Notary public is authorized to make an authentic deed of all acts, agreements and statutes required by law and / or as required by interested parties to be declared in an authentic deed, to ensure the certainty of the date of making the deed, to keep the deed, to grant grosses, copy and quotation of deed, as long as the making of such deeds is not assigned or excluded to any other official or other person as defined by law.

¹ R. Soegondo Notodisoerjo, *Hukum Notariat Di Indonesia*, PT Raja Grafindo, Jakarta, 1993, p. 1-4.

In addition to the authority referred to in paragraph (1) Notaries are also authorized:

- ⁰ Endorse the signature and specify the date of the letter under the letter by registering in a special book;
- ¹ Record the letters under the hand by registering in a special book;
- ² Making copies of the original letters under the hand of a copy containing the description as written and described in the corresponding letter;
- ³ To certify a photocopy match with the original letter;
- ⁴ Provide legal counseling in relation to the making of the deed;
- ⁵ Make deed related to land; or
- ⁶ To make a deed of minutes of auction.

In addition to the authority referred to in paragraph (1) and paragraph (2), Notary has other authority regulated in legislation.

Based on the above description, it is clear that the importance of the function of the Notary Act, therefore, to avoid the illegality of a deed, the notary institution is regulated in UUJN.

Notary's position is very important in helping to create legal certainty and protection for the community. Notary in the realm of preventing the occurrence of legal matters through the authentic deed he made as the most perfect evidence in court, what happens if the most perfect evidence of such credibility is in doubt.²

Notaries in performing their duties and functions in making certificates outside the Notary's office and the accountability of a Notary from a Criminal standpoint contains a vacuum of legal norm (*wacum of norm*) because in UUJN it is not regulated. Notary is an extension of State where Notary fulfills state duty in civil law field. In this regard, the state in order to provide legal protection in the private sector to a citizen has delegated some of its authority to the Notary to create an authentic deed.³

Notarial Deed is a proof of writing or a letter that is perfect, because notarial deeds have 3 (three) strengths of proof that is:

The power of outward proof (*uitwendige bewijskracht*) which is the ability of the deed itself to prove its authenticity as an authentic deed.

The force of formal proof (*formele bewijskracht*) which provides certainty that such events and facts in the deeds are really known and heard by the Notary and explained by the parties to the disclosure as stated in the deed pursuant to the procedure specified in the notarial deed of Notary.

The power of material proof (*materialele bewijskracht*) which is a certainty about the matter of a deed.⁴

The juridical fact that shows the void of legal norm (*wacum of norm*) is found in UUJN itself in Article 17 paragraph 1, Article 84 and 85 UUJN Law on Amendment are:

1. Article 17 paragraph 1 reads: Notary is prohibited:

²Pengurus Pusat Ikatan Notaris Indonesia, 2008, *Jati Diri Notaris Indonesia*, PT Gramedia Pustaka, Jakarta, p. 7

³Abdul Ghofur Anshori, 2009, *Lembaga Kenotariatan Indonesia*, Perspektif Hukum dan Etika, UII Press, Yogyakarta, p. 46

⁴*Ibid*, p. 26-27.

- ⁰ Performing a position outside his or her position;
- ¹ Leaving the territory of office more than 7 (seven) consecutive work days without valid reason;
- ² Concurrently as a civil servant;
- ³ Concurrently as a state official;
- ⁴ Concurrently as an advocate;
- ⁵ Concurrently serving as a leader or an employee of a state-owned enterprise, a regional-owned enterprise or a private business entity;
- ⁶ Concurrently acting as Land Acquisition Official and / or Class an Officer outside the Notary's domicile;
- ⁷ Become Notary Substitute; or
- ⁸ Perform any other work that is contrary to religious norms, morals, or propriety that may affect the honor and dignity of the Notary's office.

Article 84, reads: The act of violation committed by Notary to the provisions as referred to in Article 16 paragraph (1) letter i, Article 16 paragraph (1) letter k, Article 41, Article 44, Article 48, Article 49, Article 50, Article 51, or Article 52 which resulted in a deed only having the power of proof as a deed under the hand or a deed becomes null and void may be the reason for the party who suffers a loss to claim the cost, compensation, and interest to the Notary .

Article 85 reads: Violation of provisions as referred to in Article 7, Article 16 paragraph (1) letter a, Article 16 paragraph (1) letter b, Article 16 paragraph (1) letter c, Article 16 paragraph (1) letter d, Article 16 paragraph (1) letter e, Article 16 paragraph (1) letter f, Article 16 paragraph (1) letter g, Article 16 paragraph (1) letter h, Article 16 paragraph (1) letter i, Article 16 paragraph (1) letter j, Article 16 paragraph (1) letter k, Article 17, Article 20, Article 27, Article 32, Article 37, Article 54, Article 58, Article 59, and / or Article 63, may be subject to sanctions in the form of:

- 0 Verbal reprimands;
- 1 Written warning;
- 2 Temporary dismissal;
- 3 Dismissal with respect; or
- 4 Dismissal with disrespect.

Based on this background, the Researcher wishes to analyze the responsibility of Notary in the event of making the deed outside the Notary's office and found the falsity of the contents of the Notary Act according to the Notary Position Law.

METHOD

This research is a normative research that is law done by reviewing materials derived from various laws and other materials from various literatures. In other words, this study examines library materials or secondary data. Approach method used is the approach of law, conceptual, and case. Types and sources of legal materials used Primary, secondary and tertiary source of legal material. All legal materials obtained were analyzed by descriptive analysis.

RESULT AND DISCUSSION

The responsibility of a notary criminal on the deed is not regulated in the Act on the amendment of UUJN but the responsibility of a Notary is criminally levied when a Notary commits a criminal act. The notary concerned cannot be held accountable, since the Notary only records what the parties have submitted to the deed. False statements submitted by the parties shall be the responsibility of the parties.⁵ In other words, what can be accounted for by Notary is if the fraud or trickery is sourced from Notary itself.⁶ The Law on Amendment of UUJN only provides for sanctions for violations committed by Notaries. Changes to UUJN sanctions may be a deed made by a Notary having no authentic power or only having the power as a deed under the hand. About the act of Notary committing a fraud or falsifying Notarial deed, the Act on Amendment of UUJN does not specifically regulate the criminal provision by because it is based on the principle of legality which is the principles of the Criminal Code that:

The State of Indonesia is a State of law based on Pancasila and the Constitution;
The State shall guarantee every citizen simultaneously his position in law and government;
Every citizen without exception shall uphold law and government.⁷

For the sake of enforcement the law of Notary shall be subject to criminal provisions as stipulated in the Criminal Code, and on the implementation. Whereas a Notary performs an act in his / her capacity of office to distinguish by the act of Notary as a person.

Article 50 of the Criminal Code states: “whoever commits acts to enforce the law shall not be punished”. The understanding of the application of Article 50 of the Criminal Code to the Notary does not merely protect the Notary to acquit the criminal act, but the important thing is whether the act he has committed at the time of the Notarial deed is in accordance with the applicable regulations.

Prove that a Notary has committed a criminal act of falsifying a deed or making a fake deed as intended in Article 2663, Article 264 and Article 266 shall be based on investigation and verification process by searching for the elements of error and deliberate of the Notary itself. It is intended to be accountable both institutionally and in the capacity of Notary as legal subjects.

Under the Law on Amendment of UUJN, it is stipulated that when a Notary in his / her position is proven to be a violation, the Notary may be penalized or sanctioned, in the form of civil sanction, administration and code of ethics, but does not regulate the existence of criminal sanction.

In practice it is found that the violation of the sanction is then qualified as a crime committed by a Notary. The aspects include:

Certainty of day, date, month, year and face;
The parties (persons) facing the Notary;
Signature facing;

⁵ Andi Mamminanga, 2008, *Pelaksanaan Kewenangan Majelis Pengawas Notaris Daerah dalam Pelaksanaan Tugas Jabatan Notaris berdasarkan UUJN, Tesis yang ditulis pada Fakultas Hukum Universitas Gajah Mada*, Yogyakarta, p. 32.

Notodisoerjo, 1982, *Hukum Notarial di Indonesia (suatu penjelasan)*, Rajawali Pers, Jakarta, p. 229.

M. Yahya Harahap, 2000, *Pembahasan Permasalahan dan Penerapan KUHAP (Penyidikan dan Penuntutan)*, Second edition, Sinar Grafika, Jakarta, p. 36.

A copy of the deed does not comply with the deed Minutes;
A copy of the deed exists, without making a deed minuta; and
Minutes of deed are not signed in full, but minuta deeds are issued.⁸

The above aspect is closely related to the act of Notary in violation of Article 15 of the Law on Amendment of UUJN, where the estimate is if the Notary does not enforce the provisions of such article will result in the act of falsifying or falsifying deed as intended in Articles 263, 264, and 266 of the Criminal Code causing harm to the interested parties.

A Notary may commit a criminal act of counterfeiting or falsifying in case of a Notary not reading and explaining the deed in the presence of witnesses witnessed by the witness whenever the objective element (element of the nature of the act is illegal in the formal sense). While the criminal act meets the subjective element, which meets the material elements.

Meanwhile, the examination of the violation done by the Notary shall be conducted by a holistic-integral examination by looking at the outward, formal and material aspects of Notarial deed, as well as the execution of duties of Notary office related to the authority of Notary. Thus, in addition to the rule of law governing the act of violation committed Notary also needs to be combined with the reality of Notary practice. Since the examination of a Notary is not appropriate to be done by those who have not studied the Notary's world, meaning that those who will examine the Notary must be able to prove a major mistake made by the Notary intellectually, in this case the logic (legal) power required in examining Notary, not logic power or power.

In general, the act of counterfeiting is a type of violation of 2 (two) norms, namely:
Truth (belief) whose offense can belong to a group of fraud crimes;
Public order whose violations are classified into criminal groups against the state / public order.⁹

In the fraudulent acts belonging to a group of fraud criminals when a person gives an illustration of a state of things (c.q. letter) as if the original or true, whereas the authenticity or truth is not possessed. Based on the definition of such counterfeiting in relation to Articles 263, 264, and 266 of the Criminal Code can be explained by the following case cases:

Case -I, Article 263 paragraph (1) of the Criminal Code: the existence of a Notary makes a deed and has been issued a copy. Then there was a dispute and in the presence of the investigator one of the parties stated that the deed was made by the assistant of Notary. Subsequently by the notary's assistant the deed is brought around to be signed by the parties and when the Notary's assistant does not meet with one of the parties, the deed is abandoned (entrusted) and after the new signing is taken. After the examination by the investigator further it turns out that the ministry of the deed is not present when the copy has been issued and has been signed by the notary in question.

Case -II Article 264 paragraph (1) of the Criminal Code: the tap comes to the Notary to make Notarial Deed. And it turns out that the encounter uses the identity of False Identity

Habib Adjie, 2012, *Menjalin Pemikiran-Pendapat Tentang Kenotariatan*, CitraAdityaBakti, Bandung, p. 120-121.
H.A.K. Moch. Anwar, 1989, *Hukum Pidana Bagian Khusus (KUHP Buku II)*, Jilid I, Citra Aditya Bakti, Bandung, p.155.

Card (fake ID). Whereas in the notarial deed, the Notary has listed the words “To me Notary public” when the agreement is executed by the parties arising legal problems because the domicile is in the compliance of fulfillment of obligations not in accordance with the ID card so that the concerned cannot find the perpetrator.¹⁰

Case -III, Article 266 paragraph (1) of the Criminal Code: Attendance comes to Notary to be made Notarial deed, and in fact the information that has been poured into the deed is false or as if the information is in accordance with the truth.

Taking into account the examples of such problems is related to violation of Article 15 of Law on Amendment of UUJN when viewed from the side of the subject (the actor) means that when the act of Notary in making authentic deed does not implement the provision, it is not automatically involved in a criminal act. It should be seen to what extent the involvement of the Notary in depth so as to cause legal problems due to the deed he made. This means that it should look for the elements of mistake and deliberate done by the notary in order to fulfill the criminal element in the Criminal Code

The Criminal Law is a law that governs what actions are prohibited and that gives a penalty to who interferes with it and regulates how to file cases before the court. In criminal law theory there is a view known as the *feitmateriel* teaching in terms of determining the existence of mistakes and accountability is done by reviewing whether the author fulfills the entire contents of the formulation of a criminal offense.

Conceptions that place an error as a determinant of criminal responsibility can also be found in the common law system, which implies: “*actus nonestreuus, nisimens sitrea*” which Wilson interprets as: “an act is not criminal in the absence of doubt” said to be criminal if there is no evil will in it. While Kadish and Paulsen interpret as: “an unwarrantable act without avicious willis no crime at all” means a behavior not without the will of evil. On the one hand, this doctrine causes the existence of *mensrea* is a necessity in a criminal offense while on the other hand it affirms that being able to account for a person for committing a criminal offense is largely determined by the existence of *mens rea* in that person.

Accordingly, according to the doctrine of the elements of criminal act (offense) consists of the subjective and objective elements. The subjective element is the element that comes from within the abuser, in this case known as the principle “there is no punishment if there is no mistake”. The mistake that is meant here is the mistake caused by the intent that includes:

Purpose as the intention is intentional in relation to “intent” is a will and intentional “motive” is a goal.

Intentional with convinced certainty that the perpetrator knows for sure or sure that in addition to the consequence, there will be another result. The perpetrator realizes that by doing that, there will be other consequences.

A consciousness of conviction of possibility is someone committing an act with the intention of causing a certain effect, but my cameraman is aware that there may be other consequences that are also prohibited and threatened by law.

Pleter E. Latumeten, 2005, *Dapatkah Notaris Dipidana, Jika KTP Penghadap Palsu Dan Dalam Akta Tercantum Penghadap Saya Notaris Kenal*, Renvoi, Nomor 11.23.II, p. 26.

The objective element in question is an element that exists beyond the self-perpetrators consisting of:

Human actions in the form of: Act, ie active deeds or positive deeds and Omission, namely the act of passive or negative actions, namely the act of silence or let.

The consequences of human actions that act is dangerous or destructive and even eliminating the interests preserved by law e.g., object, independence.

The circumstances, which are generally, distinguished, among other things, at the time the act is committed, the circumstances after the act is done.

The nature of being punishable and the unlawful nature of the nature may be punished with respect to the reasons that relieve my custodian of the punishment. The unlawful nature of the law is that it is against the law, i.e. with regard to prohibitions or orders.

In the event that a Notary is alleged to have committed a criminal act of counterfeiting deed as intended in Articles 263, 264 and 266 of the Criminal Code, it can be described as follows:

Article 263KUHP:

⁰ Anyone who makes a false or false letter that may incur any right, contract or debt relief or which is designated as evidence of something in order to serve as proof of something in order to use or order another person use the letter as if its contents are true and not in false, threatened if such use could incur a loss due to counterfeiting of the letter with imprisonment of up to six years.

¹ Threatened with the same criminal, whoever deliberately uses false or false letters, as if true and not false, if the use of the letter could cause harm.¹¹

The elements contained in the provisions of Article 263 paragraph (1) of the Criminal Code are:

The objective element is to make false letters and falsify a letter that can issue a right, issue a treaty, incurring the release of a debt, destined to be a proof of something.

Subjective Elements with a view to using and using the letter as if it were genuine or not fake, the use or use of the letter may cause harm.

Penalties may be granted under this article, if at the time of falsifying the letter shall be with the intention of using or instructing others to use the letter as if it were genuine and not false. The use of it must be able to bring losses, "can" mean no need to lose it really already exists, and then it is possible that the loss is enough, which means "Losses". Here not only includes material losses, but also losses in the field of society, morals, and honor.

The one who can be punished under this Article not only "falsify" the letter in verse (1) but also deliberately uses the false letter of the verse (2) 'Deliberately' means that the person who uses it must know thoroughly that the letter he uses If he does not know about it, he is not

Dinas Hukum Polri, 1995, *Penjabaran Unsur Pasal-Pasal Dalam KUHP dan Delik-Delik Lain Di Luar KUHP*, Jakarta, p. 91-92.

punished, it is considered to be using, for example: to hand over the letter to someone else who must use it further or submit the letter in the place where the letter should be needed. It must also be proved, that the person acts as if the letter is genuine and not falsified, so it must be harmful.

Article 264 paragraph (1) of the Criminal Code:

⁰ Counterfeiting of a letter shall be punishable by imprisonment of up to eight years, if done to: Authentic deeds; debt or debt certificate of any state or part thereof or of a public institution; sero letters or debts or sero or debt certificates from an association, foundation, company or airline; talon, dividend or interest marks from one of the letters described in detail and / or proofs issued in lieu of the letters; letters of credit or commercial papers intended for distribution.

¹ Threatened with the same criminal whoever deliberately uses the letter in the first paragraph whose contents are incorrect or falsified as if true and not falsified, if the use of the letter could cause harm.

Elements of the article has elements similar to Article 263 paragraph (1) of the Criminal Code, while the difference lies in the object of counterfeiting which in relation with the Notary is the authentic act of Article 264 paragraph (1) ke1 that the act of falsification is done against the authentic act. in this article shall contain all the elements or conditions contained in Article 263 and other than that supplemented by the requirement that the forged letter be composed of authentic letters, which letters are of a general nature and should still gain the confidence of general. An authentic deed according to that provision shall be made before a public official of the right, usually a Notary.

Article 266 paragraph (1) of the Criminal Code:

⁰ Anyone who orders to include false information in an authentic deed of something that the truth must be declared by the deed with the intention to use or order another person to use the deed as if his statement is in accordance with the truth, threatened if such use could cause harm by a maximum imprisonment of seven years.

¹ Threatened with criminal punishment, whoever intentionally uses the deed as if its content is in accordance with the truth if because of such use can cause harm.

The elements contained in the provisions of Article 266 of the Criminal Code include several elements:

The objective element is to make false letters and falsify a letter that can issue a right, issue a covenant, incurring the release of a debt, destined to be proof of something.

Subjective Elements with a view to using and using the Letter as if it were genuine or not false, the use or use of the Letter may cause harm.

According to this Article which may be punishable, for example, a person giving a false testimony to the Burgerlijke Stand to be incorporated into the birth certificate to be made by the employee, with the intent to use or order another person to use the deed as if the information

contained therein is true. The threat of punishment is not only the person who gave the information incorrectly, but also the person who deliberately used the letter (deed) containing the incorrect information. The mention of the successor is proved that the person acts as if the contents of the letter are true and the act can bring harm.¹²

Based on the aforementioned description, the Notary is allegedly qualified to make a false letter or falsify a letter as if the letter is genuine and not falsified as intended in Article 263 paragraph (1) of the Criminal Code, falsifying the letter, and the forgery has been done in the authentic deed as referred to in Article 264 paragraph (1) to 1 of the Criminal Code, and placing false information in the authentic act as intended in Article 266 paragraph (1) of the Criminal Code is the result of misuse of office for violation of Article 15 of the Law on Amendment of UUJN. Nevertheless does not necessarily result in the Notary conduct the criminal act because it must through the process of substantiation of the subject is whether the subjective element of action against the formal law and the objective element of action against the material law has been proven.

The imposition of a criminal sanction against a Notary can be made to the extent that such limitations are violated, that is, besides fulfilling the formulation of the violation contained in the Law on the Amendment of UUJN and the code of ethics of Notary office must also fulfill the formulation contained in the Criminal Code. If the act of violation or unlawful act committed by Notary fulfills the formulation of a criminal offense, but if it is found under the Act of Amendment of the UUJN a violation. Therefore, the Notary concerned cannot be sentenced to criminal sanction, because the measure to assess a deed must be based on the Law on the Amendment of the UUJN and the code of ethics of Notary's office.

IV. CONCLUSION

A Notary cannot be held liable for liability in the event of a loss to one of the parties as a result of a false document from one of the parties, since the Notary only records what the parties have submitted to the deed. False statements submitted by the parties shall be the responsibility of the parties. In other words, which can be justified to the Notary is if the fraud or trickery is sourced from the Notary itself. Therefore for the sake of enforcement the law of Notary must be subject to criminal provisions as regulated in the Criminal Code, and to its implementation.

The act of Notary in the capacity of his position which is different from the act of Notary as a legal subject (person), then Article 50 of the Criminal Code provides legal protection against Notary, meaning that the application of Article 50 of the Criminal Code to Notaries is not merely to protect Notaries to relieve him of criminal acts, Notary must be assessed from the aspect of ethics and law that is whether its action really refers to applicable law regulation. If the parties feel that the deed created harms him / her because there is an element of forgiveness and deceit, then the parties may request the cancellation of the notarial deed to the Court.

R.Soesilo, Opcit, p. 197-198

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FUNCTION OF INDONESIAN NOTARY ASSOCIATION (INI) IN THE IMPLEMENTATION OF NOTARY CANDIDATE APPRENTICESHIP

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Abstract: *The purpose of this study is to know and understand the function of Indonesian Notary Association (INI) in determining the requirements and apprenticeship model for candidates of Notary and to know and understand the regulation of candidate Notary applying internship.*

The type of research used by the authors in this study is normative legal research or also called doctrinal research. In the research of this type of law, the law is often conceptualized as what is written in law (law in books) or law is used as a benchmark to behave for human beings who are considered appropriate. By using the approach of Legislation and Conceptual Approach.

The result of research that the Indonesian Notary Association (INI) as the only organization that accommodates Notary has the function and role in applying the candidate notary apprenticeship. The Indonesian Notaries Association issued a regulation on internships that contained the requirements on the internship and joint apprenticeship model. This is because there are very few regulations on apprenticeship concerning internship, causing uniformity to Notary of apprentice recipient in giving material for Notary candidate to be ready to become a professional Notary. In addition, the contribution of Indonesian Notary Association in determining the appointment of Notary of apprentice recipients. Whereas the regulation regarding the appointment of candidates of Notary is regulated in UUJN, but the more detailed arrangement is contained in the Indonesian Association of Indonesian Notaries Association Regulation No. 06 / PERKUM / INI / 2017 concerning Internships established by the Central Board of Indonesian Notaries Association. The purpose of the issuance of the Rules of Association on apprenticeship is to organize and prepare thoroughly on matters which will be used as guidance on the material and technique of apprenticeship and counseling of code of ethics for Notary candidate, in order to produce a professional Notary, skilled, good personality and morals noble.

Keywords: *candidate notary, apprentice, Indonesian Notary Association (INI)*

INTRODUCTION

Authentic deeds made by Notary are the perfect evidence in court. This means that if a person submits an authentic deed to the judge as a proof then the judge must accept and consider what is written in the deed is an actual event, unless the interested party can prove otherwise in court proceedings. Perfection of Notary deed as evidence, then the deed can be seen as it is, do not need to be assessed or interpreted other than written in the deed.¹ So it is expected that the authentic deed made by or before the Notary can clearly determine the rights and obligations of a person, to ensure legal certainty and the settlement of cases cheaply and quickly for the community.

Notary is always related to morals and ethics when performing duties and positions, so that ethical attachment to Notaries then Notary is called as a noble profession (*officium nobile*).² Therefore, the position of Notary is an honorable position because in addition to the duty to make authentic written evidence that is authentic, notary is also required to be able to have moral, morals and good personality and obliged to respect and uphold the dignity and dignity of office. In the implementation of the Notary is obliged to comply with and be subject to the law which specially regulate Notary namely Law Number 30 Year 2004 about Notary Position (hereinafter referred to as Law No. 30 Year 2004 / UUJN) which then changed into Law Number 2 Year 2014 Concerning Amendment to Law Number 30 Year 2004 Concerning Position of Notary (hereinafter referred to as Law No. 2 Year 2014 / UUJN of Amendment), Notary Code of Conduct and prevailing laws and regulations.

Notary Profession is required to work professionally and in good quality in his position as a servant of the state or as one of the people who serve the community in the field of law. Therefore, it is expected that the Notary can share the knowledge of the law that has been learned during the practice of his position, one of them to the notary candidate who will practice that is by apprenticeship in the Notary's office in the shortest time for 24 (twenty four) months consecutively both own initiative or on the recommendation of the Notary's organization upon graduation of the two notary stages, this is in accordance with Article 3 letter f UUJN of Amendment. For a Notary who rejects the appointment of a Notary candidate shall be subject to sanctions as stated in Article 16 paragraph (13) of the UUJN of Amendment stating that the Notary may be subject to sanctions in the form of a written warning.

The apprenticeship process is one of the requirements of appointment of Notary. This appointment requirement is absolute and must be executed by the candidate of Notary, if the candidate of Notary does not do the apprenticeship, the Notary candidate is not eligible and can not be appointed Notary. This matter as regulated in Regulation of Minister of Justice and Human Right Number 25 Year 2014 About Terms and Procedures of Appointment, Transfer, Dismissal, and Renewal of Notary Period. The acceptance of the appointment of a Notary candidate is an obligation of Notary it is affirmed in Article 16 paragraph (1) subparagraph n of the UUJN of Amendment, stating that in performing his / her position, Notary must accept the apprenticeship of Notary candidate.

The existence of the requirements regarding the apprenticeship requirements for the Notary candidate provokes a question, namely UUJN only provides provisions on the obligation

1 Habib Adjie, *Kebatalan Dan Pembatalan Akta Notaris*, PT. Refika Aditama, Bandung, 2013, p. 7.

2 Abdul Ghofur Anshori, *Lembaga Kenotariatan Indonesia, Perspektif Hukum Dan Etika*, UII Press, Yogyakarta, 2009, p. 6.

to apprenticeship without providing further rules on the procedures or models in the internship process. So now there is a difference between Notaries in giving guidance to candidate Notary.

In addition, there is a new rule that comes from the Central Board of the Association of Indonesia Notary (hereinafter abbreviated as PP INI) that is the requirement of joint apprenticeship. Another purpose of this joint apprenticeship is to enhance the acquisition, skills, skills and performance of the Notary's office and enhance the understanding of the Notary's Code of Ethics and its application. But until now there is no uniformity about the joint apprenticeship model. Besides, there is no clear regulation on this joint apprenticeship, so until now some areas have not been implemented on the joint internship.

Based on the explanation described above, the authors are interested to know and understand about the function of Indonesian Notary Association (INI) in determining the requirements and apprenticeship model for candidate Notary, as well as arrangement of candidate Notary who conducting internship, So that the author is interested to carry out research with title of thesis "Function of Indonesian Notary Bond (INI) in the Implementation of Notary Candidate Apprenticeship".

The purpose of this study is to know and understand the function of Indonesian Notary Association (INI) in determining the requirements and apprenticeship model for candidates of Notary and to know and understand the regulation of candidate Notary applying internship.

THEORITICAL REVIEW

As an analytical tool used by the authors in reviewing and analyzing the problems in this study, the authors in this case using 2 (two) theories, namely Authority Theory and Legal Certainty Theory.

Authority Theory

According to a large Indonesian dictionary, the word authority is equated with the word authority, defined as the right and power to act, the power to make decisions, to rule and delegate responsibility to other persons.

Authority comes from the basic word "wenang" or "authority" which means having the power to do something; has a duty to exercise power.³ Authority means power to act, authority; decision-making power, decision-making rights; functions that should not be implemented.⁴ While authority has the meaning of authority, the right and the power it has to do something.⁵

In Lutfi Effendi's book, legitimate authority when viewed from where the authority was obtained, then there are three kinds of authority, among others:⁶

- ⁰ Attributive Authority
- ¹ Delegative authority
- ² Mandate Authority

b. The Theory of Legal Certainty

³ Umi Chulsum & Windy Novia, *Kamus Besar Bahasa Indonesia*, Kashiko, Surabaya, 2014, p. 695.

Ibid.

<https://kbbi.kemdikbud.go.id/entri/kewenangan>, KBBi daring, accessed on 01 January 2018 at 21.00 WITA.

Lutfi Effendi, *Pokok-Pokok Hukum Administrasi*, First Edition The second print, Bayu Media Publishing, Malang, 2004, p. 77

Before discussing more about the theory of legal certainty, first will be defined the definition of legal certainty. Certainty comes from the word “sure” which means of course, has remained, will not change, and must not, must.⁷ While certainty has a definite state of affairs, provisions, provisions.

Legal certainty is an indispensable feature of law, especially for written legal norms. The law without a certainty value will lose meaning because it can no longer be a guideline of behavior for all people. Sweet potatoes *incertum, ibi jus nullum* (where there is no legal certainty, there is no law).⁹

With regard to the Theory of Legal Certainty Jeremy Bentham points out that:

“The legal certainty (*zekerheid door het recht*) for individuals in society is the ultimate goal of the law. Further, Bentham formulates that the main purpose of the law is to ensure as much happiness to as many people as possible. “

2.2 Conceptual framework

Notary Public

Notary comes from the word “notaries” i.e. the name given to the Romans where the task of running the writing job at that time. There is an opinion from Notodisoerjo who says that the notary comes from the words “literary note” means a sign (letter mark or character) that says something said.¹⁰

Indonesian Notary Association (INI)

According to the change of code of ethics Notary of the extraordinary congress of Indonesian Notary Association in Banten on 29-30 May 2015, the notion of Indonesian Notary Bond is contained in Article 1 paragraph 1 which reads:

The Indonesian Notaries Association, abbreviated as INI, is an association / organization for Notaries, established since July 1, 1908, recognized as a Legal Entity (*rechtspersoon*) based on *Gouvernements Besluit* (Government Determination) dated September 5, 1908 Number 9, is the only unifying container for all and any person holding office and performing official duties as a public official in Indonesia, as it has been approved and authorized by the Government pursuant to the Articles of Association of Notaries which have been awarded the Minister of Justice Decree dated 4 December 1958 Number JA5 / 117/6 and published in the News The Republic of Indonesia dated March 6, 1959 Number 19, Supplement to the State Gazette of the Republic of Indonesia Number 6,

Apprentice Notary

Big Indonesian Dictionary advocates the understanding of internships: “Internships are prospective employees who have not been appointed permanently and have not received salary or wages as they are still in the learning stages of the Ministry of National Education”.¹¹

Regarding the apprenticeship of Notary in UUJN is regulated in Article 3 letter f which reads:

7 Umi Chulsum & Windy Novia, *Kamus Besar Bahasa Indonesia*, Kashiko, Surabaya, 2014, p. 513.

Ibid.

Salim HS, *Perkembangan Teori Dalam Ilmu Hukum*, Rajawali Press, Jakarta, 2010, p. 24.

R. Soegondo Notodisoerjo, *Hukum Notariat di Indonesia*, PT. Raja Grafindo, Jakarta, 1993, p. 13.

Kamus Besar Bahasa Indonesia, Edisi Keempat, Gramedia Pustaka Utama, Jakarta, 2011, p. 854.

“The requirement to be eligible to become a Notary as referred to in Article 2 is: having undergone an apprenticeship or having apparently worked as a Notary's employee within a period of at least 24 (twenty four) consecutive months at the Notary's office on his own initiative or on the recommendation of the Organization Notary after passing the strata two notary “.

METHOD

The type of research used by the authors in this study is normative legal research or also called doctrinal research. In the research of this type of law, the law is often conceptualized as what is written in law (law in books) or law is used as a benchmark to behave for human beings who are considered appropriate¹² by using the approach of Legislation and Conceptual Approach.

IV. RESULT AND DISCUSSION

4.1 Function of Indonesian Notary Association (INI) in Determining Apprenticeship for Notary Candidates

Indonesian Notary Association as the only organization for all notaries throughout Indonesia in the form of associations that have legal status and have a purpose, namely the establishment of truth and justice and maintaining the dignity of the dignity of a notary public as a qualified public official in the framework of his devotion to God Almighty, nation and state for the realization of legal certainty and continuity of unity and the unity and welfare of its members.¹³

The Indonesian Notary Association (INI) is the only Notary Organization regulated in Law Number 30 of 2004 concerning Notary Positions Article 82 and 83, then amended in Act Number 2 of 2014 concerning Amendment of Notary Law Article I number 41 reads as follows:

Notary publicly gathered in one container Organization notary.

Organization of Notary Organization as referred to in paragraph (1) shall be the Association of Indonesian Notary.

Notary Organizations as referred to in paragraph (1) shall be the only free and independent notarial profession containers established with the intent and purpose of improving the quality of the Notary profession.

The provisions concerning the objectives, duties, authorities, working procedures and organizational structure are stipulated in the Articles of Association and Bylaws of Notary Organizations.

The provisions concerning the determination, guidance and supervision of Notary Organizations shall be governed by a Ministerial Regulation.

The role of notary organization / association is:

Be a forum for notary to exchange (exchange of ideas and experiences),

As a professional organization is obliged to conduct self-regulation by ensuring that all members comply with the provisions of applicable laws and regulations,

Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, Revised Edition, Print IX, PT. RajaGrafindo Persada, Jakarta, 2016, hlm. 188.

¹³ Herlina Ernawati Napitupulu. *Peranan Ikatan Notaris Indonesia Dalam Pembinaan Notaris Dan Pengawasan Kode Etik Notaris Di Wilayah Sumatera Utara*. Tesis Fakultas Hukum Universitas Sumatera Utara Medan. 2017. P. 4.

Socialize the code of ethics,
Assist the government in the issue of notary,
Make recommendations for improvement of systems and mechanisms,
Cooperate with universities to improve education for notaries, ensuring that graduates of Notary programs have the competence,
Increase the profession exam as the entrance of the notary profession,
Refresher courses to update notary knowledge enhance the role of notary profession associations to ensure the enforcement of a code of notary ethics.¹⁴

Notary is required to improve his ability to become more professional and good quality in his position as a servant of the state or as one of the people who serve the community in the field of law, it is expected that the notary can share the legal knowledge that has been learned during the practice of his position, one of them to the candidate Notary who will practice is by apprenticeship in Notary's office who have practiced for 24 (twenty four) months consecutively either on their own initiative or on the recommendation of Notary organization after passing the stratum two notary, this is in accordance with Article 16 paragraph 1 Letter n UUJN of Amendment, stating that the Notary is required to accept the apprenticeship of Notary candidates.

In addition to the provisions of Article 16 paragraph 1 of the UUJN of amendment, the rules on apprenticeship are also regulated by INI in the Decision of the Central Board of Expanded Plenary Meeting of the Indonesian Notaries Association held in Balikpapan on January 12, 2017, which results from the expanded plenary board meeting part of the Indonesian Association of Association of Indonesian Notary Association No: 06 / PERKUM / INI / 2017 concerning Internships (hereinafter referred to as apprenticeship rules on apprenticeship). The basic existence of this rule is due to the affirmation contained in Article 1 number 5 and Article 82 paragraph (1) UUJN of Change, regarding the status of Indonesian Notary Association which has such an important impact in the conduct of apprenticeship and counseling about the code of ethics for Notary candidates, things can be expected to be better.

The purpose of the issuance of the Rules of Association on apprenticeship is to organize and prepare thoroughly on matters which will be used as guidance on the material and technique of apprenticeship and counseling of code of ethics for Notary candidate, in order to produce a professional Notary, skilled, good personality and morals noble.

The apprenticeship objectives set forth in Article 2 as defined in the rules of association on apprenticeship are as follows:

Increase the mastery, expertise, and skill in performing duties of Notaries and in understanding the laws and regulations related to and / or related to the implementation of the duty to the Notary candidate, in order to become a Notary who is ready to use.

Increase understanding of Notary Code of Ethics and its application, either in order to run the position of Notary or in everyday life.

Awareness of Notary candidates about the importance of apprenticeship which is an education in order to run Notary positions properly and correctly.

Harkristuti Harkrisnowo, Indonesian Notary Challenge Facing the Era of ASEAN Economic Community, was presented at XXII Congress of Indonesian Notary Association, in Palembang on 20 May 2016 in Herlina Ernawati Napitupulu. Role of Indonesian Notary Bonds in the Development of Notaries and Supervision of Notary Code of Ethics in North Sumatra Region. Thesis Faculty of Law University of North Sumatra Medan. 2017. P. 4.-5

Give confidence to applicant candidates Notary candidates in order to carry out their duties properly.

Bringing a sense of confidence in the community that the candidate Notary will run the profession of office as expected.

Based on the objective, it is expected to apprentice, able to prepare carefully about the things that will be used as guidance on the material and technique of apprenticeship and counseling code of ethics for Candidate Notary, in order to produce a professional Notary, skilled, good personality and noble stature.

Regarding the technical implementation of apprenticeship is regulated in Article 4 of association rules concerning apprenticeship which reads:

For the material contained in Article 2 paragraph (1) shall be submitted by a Notary designated by the Regional Executive, and shall be conducted jointly at a place designated by the Regional Executive;

For the material contained in Article 2 paragraph (2) shall be done by and in the Notary Office occupied by the apprenticeship.

Basically it is not just a matter of apprenticeship time which becomes benchmark or parameter that can be used as a reference that a Notary candidate has been able to become a professional Notary, but depends on how a Notary candidate is able to absorb knowledge or knowledge obtained during apprenticeship process, in addition to availability knowledge and information contained in the place of apprenticeship, since the Notary should be made an apprenticeship appointment is a Notary who has had sufficient experience so that it is deemed to have more capabilities that are beneficial to Notary candidates.

On the matter of the notary organization of the Notary Association of Indonesia (INI), proposes to hold a joint apprenticeship that must be followed by the notary candidate in addition to internship at Notary's office on their own initiative. Where a joint apprenticeship is held in addition to the objective to produce a ready-made and professional Notary also to improve the mastery, expertise, and skills in the performance of duties of Notaries and improve the understanding of the Notary Code of Ethics and its application. This joint appointment shall be followed by a Notary candidate who is an Extraordinary Member (ALB).

The requirement to become an Extraordinary Member is for the notary candidate to pay the base fee and monthly fee. This is an obligation of the members of the Extraordinary, while the amount of the base money is Rp.2.500.000 (two million five hundred thousand rupiah) and applies equally in every region in Indonesia and every member of the Extraordinary which is only levied 1 (one) time by the central board and dues is dependent on the territory of the whole of Indonesia that is Rp.100.000 (one hundred thousand rupiahs) per month for the DKI Jakarta and the Provincial Capital, and Rp.50,000 (fifty thousand rupiahs) per month for the districts / municipalities which is based on Article 39 paragraph (4) of the THA (ART-INI) Bylaw (expanded Plenary Meeting), which was held on 12 January 2017 in Palembang, which states:

“The central board has the duty and obligation to determine the amount of base money, monthly fee and compensation money based on the expanded Plenary Meeting Plenary Meeting”

The base money is one of the administrative requirements to be registered as an Extraordinary Member as stipulated in Article 4 paragraph (1) letter C on the Indonesian House of Representatives Association (ART-ANI). This is a new breakthrough from Indonesian Notary Association to guarantee and obtain the certainty of Notary candidates for apprenticeship, with the issuance of the result of this plenary meeting which explains about the apprenticeship requirement would be the responsibility of the Board of Indonesian Notary Association organization to guarantee the apprenticeship so that the apprentices are not apprentices need to be more restless and confused in finding the place of apprenticeship which is the obligation of every candidate Notary, because in Article 2 of Notary Office Law is explained in letter f stating that the candidate Notary must have undergone internship for 2 years (24 months), meaning that the candidate Notary in demand to participate in internship for 2 years to master the field and how the work of Notary in relation to the duties of the Notary. Therefore apprenticeship is indispensable and important for Notary candidates.

The requirements of a Notary candidate can be appointed to Notary is regulated in Article 3 UUN Changes that clearly read:

The requirement to be appointed as a Notary as referred to in Article 2 is:

- Indonesian citizens;
- Fear God Almighty;
- At least 27 (twenty seven) years old;
- Physically and spiritually healthy as expressed by a health certificate from a physician and a psychiatrist;
- Certified law graduates and graduates of stratum two levels of notary;
- Has undergone an apprenticeship or has worked as a Notary employee within 24 consecutive months at the Notary's office on his own initiative or on the recommendation of the Notary Organization after graduating from the two stages of the notary;
- Not being a civil servant, a state official, an advocate or not taking other positions which by law are prohibited to be categorized as Notary; and
- Has never been imprisoned by a court decision that has obtained permanent legal force for committing a criminal offense punishable with imprisonment of 5 (five) years or more.

Besides stipulated in Article 3 of the UUN of Amendment, regarding the requirements of Notary candidate to be appointed to Notary is also regulated in the Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 24 Year 2014 on Terms and Procedures for Appointment, Transfer, Dismissal, and Renewal of Notary Period then changed into Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia No. 62 of 2016 on Amendment of Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia No. 24 of 2014 on Terms and Procedures for Appointment, Transfer, Dismissal, and Renewal of Notary Period, mentioned in Article 2 which reads:

In order to be appointed as a Notary, the Notary candidate must meet the following requirements:

- ⁰ Indonesia citizens;
- ¹ Fear Allah Almighty;
- ² At least 27 (twenty seven) years old;
- ³ Physically and mentally healthy;
- ⁴ Certified law graduates and graduates of stratum two levels of notary;

- ⁵ Has undergone an apprenticeship and has apparently worked as a Notary's employee within 24 (twenty four) consecutive months at the Notary's office on his own initiative or on the recommendation of the Notary Organization after graduating from the two stages of the notary;
- ⁶ Not being a civil servant, an advocate state official, or not taking other positions which by law are prohibited to be categorized as Notary; and
- ⁷ Has never been imprisoned by a court decision that has obtained permanent legal force for committing a criminal offense punishable with imprisonment of 5 (five) years or more.

The requirements as referred to in paragraph (1) shall be proven by the completeness of supporting documents which include:

- ⁰ a. a photocopy of a legal education diploma and a master degree in a notarial or legalized notaries education;
- ¹ Photocopy of a certificate of graduation code of ethics organized by a Notary Organization legalized by the regional administrators, regional administrators, or central administrators;
- ² Original certificate of local police record;
- ³ Original physical health certificate from hospital doctor;
- ⁴ Mental health certificate from a psychiatrist or a hospital psychiatric specialist who is still valid or within 1 (one) year of the date of issuance;
- ⁵ Photocopy of identity card;
- ⁶ The original certificate of apprenticeship at the Notary's office or information has worked as a Notary's employee within a period of at least 24 (twenty four) consecutive months after graduating from the two stages of the notary or specialist education;
- ⁷ A declaration of non-status as a civil servant, a state official, an advocate, or not taking other positions which by law are prohibited to be categorized as Notary;
- ⁸ Proof of payment of Non-Tax State Revenue payment.
- ⁹ Photocopy of graduation mark of the appointment of a Notary Publicity by the Directorate General of General Legal Administration which has been legalized;
- ¹⁰ Photocopy of Taxpayer Identification Number which has been legalized;
- ¹¹ A copy of a legalized birth certificate; and
- ¹² A statement of willingness as a holder of the protocol.
- ¹³ Notary Office as referred to in paragraph (1) letter f and paragraph (2) letter g has a working period of at least 5 (five) years and has issued at least 100 (one hundred) deeds.

According to the author's opinion, the number of regulations governing the requirement of appointment of Notary candidate to become a Notary, but minimize the arrangement of apprenticeship, making Notary apprentice receiver to be confused so that they make their own apprenticeship model applied to candidate Notary received. This causes when the graduation period of the prospective Notary appointment, the uniformity of the readiness of the Notary candidate to be able to open his or her office in the future. Therefore, the authors appreciate the existence of the rules of association that are issued by the Central Executive of INI in determining the internship. This is in harmony with the theory of authority. Theory of authority is a theory that examines the authority of the subject of public law in public law relations. Since a Notary is a public official who exercises part of the State's powers.

4.2 Arrangements About Prospective Notaries Who Apply Internships

Notary is one of the positions of trust, because the Law entrusts the Notary in the case of making authentic deeds. And notary trust also attached to society entrust to notary to make deeds, trust of government in appoint and dismiss and also society that use its service in the matter of making deed. In its journey, the candidate of Notary after completing the Master degree of Notary which has been taken for approximately 2 years or more, the graduate of Master of Notary must take the apprenticeship and then status as a Notary candidate to then be a professional Notary.¹⁵

The ongoing notarial education system is still considered too loaded with knowledge weights, lacking skill weight. As a result, the resulting graduates are less prepared for work. The apprenticeship system as the last pillar to improve the skills of Notary which is deemed insufficient during the upstream education is not improved. Therefore, with the existence of this apprenticeship rules, it is expected that the Notary candidate will have completed his / her apprenticeship, becoming a Notary who is ready to run his / her position.

As has been described, the arrangement of the Notary's apprenticeship is regulated in several provisions in the UUJN of Change, namely Article 3 letter f UUJN The amendment which reads:

“The requirement to be eligible to become a Notary as referred to in Article 2 is: having undergone an internship or having apparently worked as a Notary employee within a period of at least 24 (twenty four) consecutive months at the Notary's office on his own initiative or on the recommendation of the Organization Notary after passing the strata two notary “.

Furthermore, in Article 16 paragraph (1) letter n this requires the Notary to accept the apprenticeship of Notary candidates. Then there is the addition of the article about the candidate Notary internship in the UUJN of Change, the addition of the article that is article 16A which reads:

A Notary Candidate conducting an apprenticeship shall implement the provisions referred to in Article 16 paragraph (1) letter a.

In addition to the obligations referred to in paragraph (1), the Notary candidate shall also keep confidential all matters concerning the Deed made and all the information obtained for the Deed making.

In addition to Article 88 of the UUJN amendment this reads:

At the time this Act comes into force:

The filing of a request as a Notary being processed shall be processed pursuant to Law Number 30 Year 2004 regarding Notary Position.

The period of apprenticeship undertaken by the candidate of Notary shall be calculated based on the requirements stipulated in this Law.

The obligation of the notary candidate whose apprenticeship is intended is because in practice there is no possibility of violation of obligations made by candidates of Notary Internship who may be disclosing the secrecy of what he or she knows during his apprenticeship.

Tan Thong Kie, *Studi Notariat Dan Serba-Serbi Praktek Notaris (Edisi Revisi)*, Ichtar Baru Van Hoeve, 2007, p. 12

The regulation of sanction for the candidate of Notary in the UUJN of amendment is intended to ensure that the confidentiality and interests of the parties related to the contents of the deed may be protected by law, but in the UUJN of Change does not regulate strict sanctions against the Notary candidate if the candidate of Notary who is apprentice cannot perform its obligations accordingly with existing regulations.

A Notary Candidate as a person who will become a Notary is a part of an organization member of the Notary's bond. As a Notary Public Officer in the future, the Notary candidate must and shall understand and comply with all applicable laws and regulations. This is an absolute matter considering the position of Notary is a position of trust in the process of law enforcement.

With the increasing of the young enthusiasts to become Notary and the growth of Notary candidate is quite fast with the opening of Notary program in almost all state superior universities, then of course in this case given a regulation to prepare candidates Notary so that when actually become Notary can run obligations well and full of responsibility and high dedication to his profession as a Notary who has the responsibility to bear the truth and justice as the mission of a law state based on Pancasila.

In practice, candidates who follow the internship program as required by law have many obstacles, among others; the difficulty of obtaining a place of apprenticeship for candidates of Notary, the absence of curriculum or procedure of apprenticeship of Notary candidates, and Notary where apprentices are not fully give their knowledge by reason of secrecy of occupation or occupation, and there is no criteria for Notary who is capable or competent to give knowledge of practice of notary to apprenticeship candidate Notary.

The existence of rules on apprenticeship for Notary candidates is solely for the Notary in the future to always uphold the professionalism and always guided by legislation especially UUJN, where in UUJN regulated on obligation and prohibition of Notary.

In addition to being guided by the legislation, the Notary candidate who will become a Notary Public shall be obliged to behave in accordance with Notary's code of ethics. The Notary's code of ethics acts like a traffic beacon directing the attitudes and behavior of Notaries to stay in the right corridor. The current and admitted code of ethics is the Notary Code of Indonesian Notary Association (INI), which is the result of the Extraordinary Congress of the Indonesian Notary Association held in Bandung, on January 27, 2005. This Code of Ethics is a refinement of the previous Notary Code of Conduct. The determination of one version of the Notary Code of Ethics as a reference is not solely for the benefit of Notary or INI, but to protect the public interest. The Code of Ethics makes it easy for the public to control the attitude and behavior of Notary in the field.

CONCLUSION

Indonesian Notary Association (INI) as the sole organization that facilitates Notary has the function and role in applying the apprenticeship of Notary candidates. The Indonesian Notaries Association issued a regulation on internships that contained the requirements on the internship and joint apprenticeship model. This is because there are very few regulations on apprenticeship concerning internship, causing uniformity to Notary of apprentice recipient in giving material for Notary candidate to be ready to become a professional Notary. In addition, the contribution of Indonesian Notary Association in determining the appointment of Notary of apprentice recipients.

Regulations concerning apprenticeship of Notary candidates shall be regulated in the UUJN, but the more detailed arrangements contained in the Indonesian Association of Notary Association Regulations No. 06 / PERKUM / INI / 2017 concerning Internships established by the Central Executive Board of the Indonesian Notaries Association. The purpose of the issuance of the Rules of Association on apprenticeship is to organize and prepare thoroughly on matters which will be used as guidance on the material and technique of apprenticeship and counseling of code of ethics for Notary candidate, in order to produce a professional Notary, skilled, good personality and morals noble.

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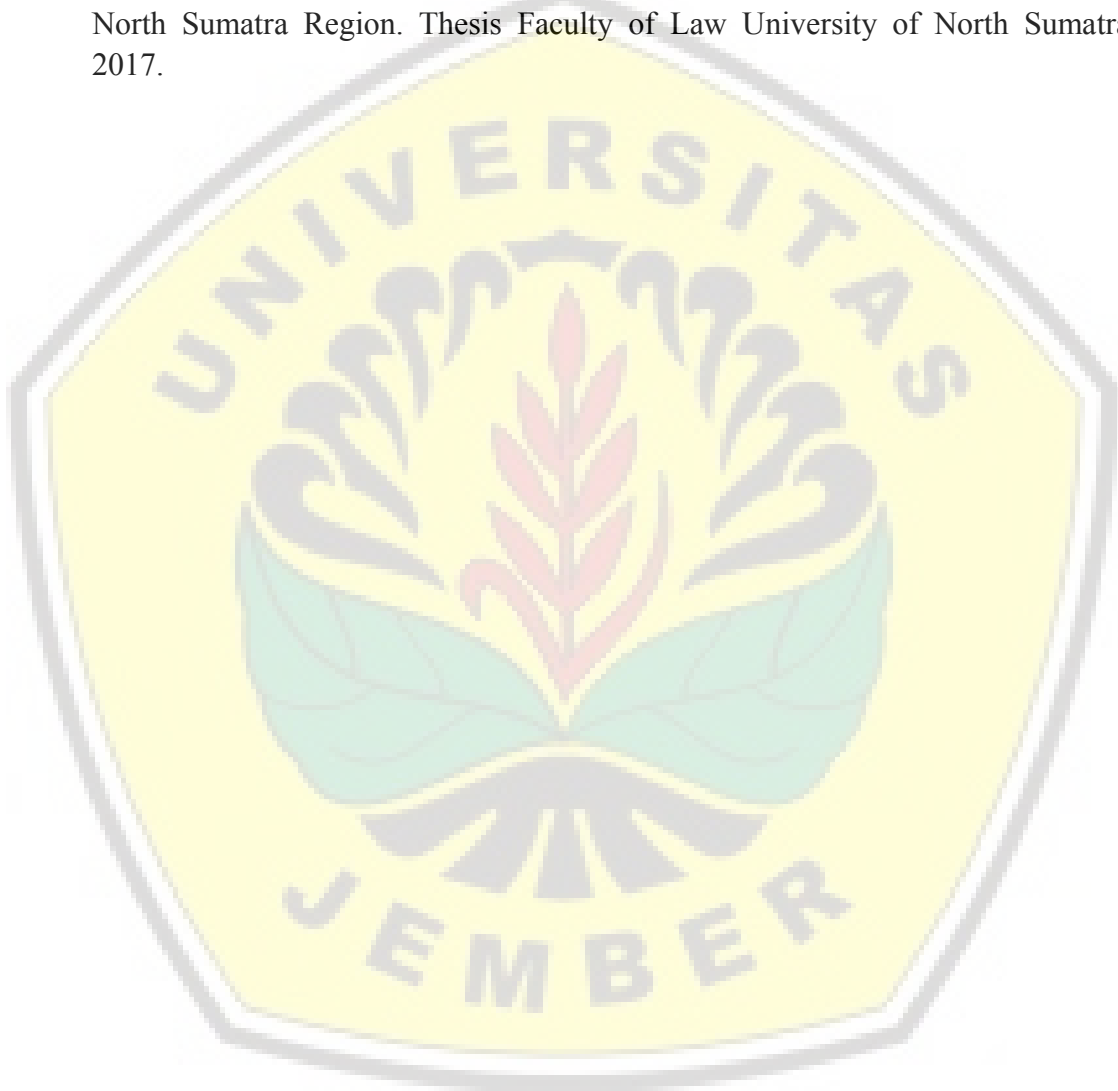
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RECORDING OF DIFFERENT MARRIAGE VIEWED FROM LAW NUMBER 23 YEAR 2006 ABOUT POPULATION ADMINISTRATION

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Abstract: *The purpose of this study is to examine and analyze various religions in Indonesia based on Law No. 23 of 2006 and to examine and analyze various religious cases in Indonesia. The type of research used is normative legal research or also called doctrinal legal research. In this study, the law is often conceptualized as what is written in written rules (law in a book) or law as a benchmark of behaving for a human being deemed appropriate. This research uses several types that are adapted to the context used in this research: invitation approach (approach to law), conceptual approach and case approach.*

The results of research related to the image of marriage of different religions viewed from the Law no. 23 of 2006 has been implemented by the mandate of Article 35 letter a along with its explanation by arranging reservations to the District Court. Making legal certainty about the marriage of different religions has not been fully able to annul the benefits of the petitioners. Because with the need to comply with the requirement to file an order to the District Court no and you can ask permission to marry it because there are still figures related to the differences among the religions in Indonesia.

Keywords: *different religion, marriage recording*

INTRODUCTION

Marriage is a sacred bond because in the bonds of marriage there is not only a bond of birth or physical only but also there is a spiritual bond based on God Almighty, the meaning is that a marriage is not just an outward relationship, but more than that that is a an inner bond or relationship between a man and a woman who aims to form a happy and eternal family based on the One Supreme Godhead.¹

As for the purpose of marriage is to form a happy and eternal family, for that husband and wife need to help each other and complement, so that each can develop personality and

¹Sution Usman Adji, *Kawin Lari dan Kawin Antar Agama*, Liberty, Yogyakarta, 1989, p. 21.

achieve the prosperity of the inner and inner. Thus in marriage must really have a round preparation, in the sense of being born and also the mental and body maturity in the sailing of the household ark.²

According to the provisions set forth in Article 2 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (hereinafter referred to as Law No. 1 Year 1974 / Marriage Law) states that, "marriage is lawful if done according to law, their respective religions and beliefs ". Article 2 Paragraph (1) of the Marriage Law may be interpreted that a marriage shall only be recognized by the State so long as such marriage is allowed and exercised according to their respective faiths and beliefs. This also applies to the marriage of different religions, as long as the marriage of the different religions is recognized and carried out lawfully according to the relevant religious law is lawful according to the State. If according to their respective religions are not allowed and not recognized its validity, then it is not legitimate according to religion. Based on this interpretation, the authors themselves argue that the marriage of different religions is not regulated in the Marriage Law, so it should be in practice cannot be allowed.

In addition, such legal marriages shall be recorded in accordance with applicable laws and regulations, in accordance with the provisions of Article 2 paragraph (2) of Law no. 1 of 1974 which reads "Every marriage is recorded according to the prevailing laws and regulations". The act of recording does not determine the validity of a marriage, but declares that the event does exist and occurs, so it is merely administrative.³

Along with the times, though Law no. 1 Year 1974 has been valid for 43 years since enacted, does not mean there is no problem in the implementation. One of them is related to issues of marriage of different religions. The phenomenon of different religious marriages is found in our society. As an example, there are weddings among artists such as Lidya Kandau and Jamal Mirdad, Ari Sihasale and Nia Zulkarnaen, Ira Wibowo and Katon Bagaskara, Deddy Corbuzier and Kalina and others. Usually to deal with the arrangements contained in the Law of Marriage, there are four ways commonly adopted married couple of different religious marriage. First, the determination of the court, it is based on the Jurisprudence of Supreme Court Decision Number 1400 K / Pdt / 1986, in which the Civil Registry Office is allowed to hold a marriage of different religions.⁴ *Secondly, marriage is done according to the law of each religion. Marriage is done first according to the religious law of a bride (husband / wife) and then followed by marriage according to the next religious law of the bride.*⁵ Third, both partners determine the choice of law. Where one spouse declares to be subject to the law of her partner by means of "conversion", but after the marriage takes place each party re-embrace their respective religions.⁶ Fourth, marry abroad. Where the deed obtained from the country where the marriage took to Indonesia to be recorded only.⁷

The marriage of different religions is not regulated in the Marriage Act, but the ways of marrying the different religions described above are very rampant in society, not only among artists but also among ordinary people. This is actually due to the fact that the Marriage Law is

Sudarsono, *Hukum Perkawinan Nasional*, Rineka Cipta, Jakarta, 2005, p. 7.

Wantjik K Shaleh, *Hukum Perkawinan Di Indonesia*, Ghalia Indonesia, Jakarta, 1982, p. 17.

Moh. Syamsul Muarif, "Legalitas Perkawinan Beda Agama Dalam Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Undang-Undang Nomor 23 Tahun 2006 Tentang Perkawinan", *Thesis Magister Al-Ahwal Al-Syakhsiyah*, Universitas Islam Negeri Maulana Ibrahim, Malang, 2015, p. 5.

Sirman Dahwal, *Hukum Perkawinan Beda Agama Dalam Teori Dan Praktiknya Di Indonesia*, Mandar Maju, Bandung, 2016, p. 16-17.

Ibid, p. 17.

Ibid, p. 18.

not strictly regulated to prohibit the existence of different religious marriages in Indonesia. So it should be necessary to change the marriage law or the formation of implementing regulations that can formulate firmly and appropriately to prohibit the occurrence of marriage of different religions in Indonesia.

Subsequently, Law No. 23 of 2006 on Population Administration (hereinafter referred to as Law No. 23 of 2006/Population Administration Act), where it is expected that the formulation of the Population Administration Act can reinforce the rules regarding the non-permissibility of marriage of different religions in Indonesia in accordance with the mandate of the Marriage Law. But it is regrettable that the Population Administration Act actually provides an opportunity for those who will hold a different religious marriage. This is as stated in Article 35 letter a reads, "The registration of marriage as intended in Article 34 shall also apply to the marriage established by the Court. Further described in the elucidation of Article 35 letter a, namely, "Referred to" Marriage as stipulated by the Court "is a marriage made between people of different religions".

The enactment of the provision of Article 35 Sub-Article a of the Population Administration Act is one of the setbacks for marriage arrangements in Indonesia, as it is apparent that the government inconsistency in facing the marriage phenomenon of different religions. It is precisely with the provision of Article 35 letter a causes a conflict of norms between the Marriage Law and the Population Administration Act. On the one hand, the Marriage Law does not regulate the existence of different religious marriages, but on the other hand the government provides an opportunity to be able to hold and register the marriage of different religions through the establishment of the court.

It causes the meaning of marriage which should be a bond between birth and soul between a man and woman who are practiced on the basis of religion and belief respectively precisely deviate far, because in essence the legitimacy of a marriage according to the Law of Marriage is a marriage which is carried out according to religion and beliefs of the parties so that they can be registered either in the KUA or at the Office of Population and Civil Registration. However, after the Law on Population Administration, the marriage of different religions which according to the Law of Marriage is not regulated and is not allowed to be given space to be held or registered in the Office of Administration and Population through the determination of the court.

Besides other problems that occur there is uniformity of opinion of judges related to the marriage of different religions. This can be seen with the application of the determination of a marriage of different religions received or rejected by the Panel of Judges. This can be seen from several decisions that have been made compiler, namely Stipulation of District Court Number 85/Pdt.P/2014/PN. Pti, Determination of the District Court Number 46/Pdt.P/2016/PN. Skt., Determination of District Court Number 8/Pdt.P/2013/PN. Ung, and Stipulation of District Court Number 71/Pdt.P/2017/PN. Bla.

The purpose of this study is to examine and analyze the recording of religious marriages in Indonesia based on Law no. 23 of 2006 and to review and analyze the settlement of cases of different religious marriages in Indonesia.

LITERATURE REVIEW

2.1 Theoretical Framework

2.1.1 Legal certainty

Certainty is a word that comes from a certain word that has a meaning of course, has remained, and should not.⁸ While certainty has meaning provisions and provisions.⁹ If the word certainty is combined with the word law becomes legal certainty, which has the meaning as a provision or legal provision of a country that is able to guarantee the rights and obligations of every citizen.

The normative legal certainty is when a rule is created and enacted as it is clearly defined and logical. Clearly, in the sense that there is no doubt (multi interpretation) and logical does not cause collision and obscurity of norm in the system of norms with each other.

2.1.2 Theory of Justice

Among the well-known theories of justice include the theory of justice put forward by Aristotle based on the principle of equality, justice is done to the same things are treated equally and things that are not equally are treated unequally in proportionality (justice consist in treating equals equally and unequal unequally in proportion to their inequality).¹⁰

Aristotle distinguished justice into two:¹¹

- ⁰ Universal (general) justice that is justice that is formed simultaneously with the formulation of law;
- ¹ Specific justice is identified with fairness or equalities. This particular justice is divided into:
 - ⁰ Distributive justice is proportional justice;
 - ¹ Rectifications justice is also called remedial justice, corrective justice or compensatory justice that is justice in the relationship between law enchantments in a business transaction or contract in which contains the sense of equalities.

2.2 Concept

2.2.1 Marriage

Marriage is derived from the word "marriage" which means to establish a life with married or married.¹² While marriage has meaning matters relating to mating, marriage, animal intercourse.¹³

Article 1 of the Marriage Law regulates the definition of marriage that is, "Marriage is a mental bond between a man and a woman as husband and wife in order to form a happy and eternal family (household) based on the One Godhead".

2.2.2 Marriage Different Religion

What is meant by the marriage of different religions is a marriage performed by people who embrace different religions and beliefs that differ from each other. For example marriage between a Muslim man with a Protestant woman and vice versa.¹⁴

W. J. S. Poerwadarminta, *Kamus Umum Bahasa Indonesia*, Balai Pustaka, Jakarta, 1986, p. 716.

Ibid.

E. Sumaryono, *Etika Hukum Relevansi Teori Hukum Kodrat Thomas Aquinas*, Kanisius, Yogyakarta, 2006, p. 256.

Ibid.

Umi Chulsum & Windy Novia, *Kamus Besar Bahasa Indonesia*, Kashiko, Surabaya, 2014. p. 350.

Ibid.

Abdurrahman dan Riduan Syahrani, *Masalah-Masalah Hukum Perkawinan di Indonesia*, Alumni, Bandung, 1978, p. 20.

Furthermore Rusli and R. Tama argued that from the definition of marriage formulated in Article 1 of Law Number 1 Year 1974, then what is meant by the marriage of different religions is the bond of birth and bond between a man with a woman, who because of different religions, causes the inclusion of two different rules concerning the terms and procedures of marriage in accordance with their respective religious law, with the aim of establishing a happy and eternal family based on the One Supreme Godhead. From this formula, it can be seen that in the marriage of religious differences related to the existence of two rules (law) religion (different) that is about the terms and procedures of marriage implementation.¹⁵

According to Abdurrahman, the marriage of different religions is a marriage done by people who embrace different religions and beliefs with each other.¹⁶

METHOD

The type of research used is normative legal research or also called doctrinal legal research. In the research of this type of law, the law is often conceptualized as what is written in law (law in books) or law is used as a benchmark to behave for human beings who are considered appropriate.¹⁷ This research uses several approaches adapted to the problems raised in this research is statute approach, conceptual approach and case approach.

IV. RESULT AND CONCLUSION

4.1 Implementation of Marriage Recording Differences in Indonesia

4.1.1 Arrangement of Marriage Registration Before the Establishment of Law no. 23 of 2006

Article 2 Paragraph (1) of the Marriage Law states that marriage is lawful if done according to the law of each religion and belief. In the next explanation mentioned that there is no marriage outside the law of each of his religion and belief. If it is violated then the marriage cannot take place.¹⁸ Article 2 paragraph (2) of the Marriage Law states also that each marriage is recorded according to the prevailing laws and regulations. As mentioned in the general explanation that marriage registration is the same as important events in the life of a person such as birth, death listed in the certificate of an official deed is also listed in the listing list. The act of recording does not determine the validity of a marriage, but declares that the event does exist and occurs, so it is merely administrative.¹⁹

The registration of marriage is regulated in Article 2 of Government Regulation no. 9 of 1975 stating that:

For the Islamic recording by the Registrar Officer as referred to in Law no. 32 of 1954 concerning the Marriage Registers, Talah and Rekujuk.

For non-Muslims, the registration shall be made by the marriage registry officer at the Civil Registry Office.

Article 3 PP. 9 of 1975 states that anyone who wishes to marry shall notify his or her intent, whether oral or written to the appointing officer at the marriage, shall be held within a period of at least ten working days before the marriage takes place. The will of marriage shall

Rusli dan R. Tama, *Perkawinan Antar Agama dan Masalahnya*, Pionir Jaya, Bandung, 1986, p. 17.

Ibid.

Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, Edisi Revisi PT. RajaGrafindo Persada, Jakarta, 2016, p.

K. Wantjik Saleh, *Hukum Perkawinan di Indonesia*, Ghalia Indonesia, Jakarta, 1976, p. 16.

Ibid.

contain: Name, Age, Religion or belief, occupation, residence of the prospective bridegroom, if one or both have ever married also mentioned the name of the previous wife or husband's name.

Article 6 PP. 9 of 1975 states that the recording officer in addition to examining whether the terms of marriage have been met and whether there are no marital obstacles under the law, and also examines:

The birth certificate of the prospective bride.

Information about the name, religion or belief, occupation and residence of the parents of the prospective bride.

A written permit or court permit as referred to in Article 6 paragraph (2), paragraph (3), paragraph (4) and paragraph (5) of the Marriage Law.

Dispensation of the courts or officials as referred to in Article 7 paragraph (2) of the Marriage Law.

Court or official dispensation.

The death certificate of a spouse or husband or divorce certificate for marriage for a second or more time.

Authentic or under authorized power of attorney authorized by the registrar officer, if one of the prospective bridegroom or both cannot attend by himself for any important reason so represented by others.

Upon fulfillment of the procedures and conditions of notification, and there is no marriage impediment, the registrar shall notify the notification of the will of marriage in the Office of the Record of Marriage at a designated place and readable by the public. Ten days after the announcement of the marriage and during the announcement there was no prevention of marriage, the marriage could take place.

The problems with marriage recording and its procedures and legal basis are as follows:

The Marriage Law in Article 2 paragraph (2) states:

“Every marriage is recorded according to the prevailing laws and regulations”.

Article 10 paragraph (3) of PP. 9 Year 1975 states:

“By observing the ordinances of marriage according to their respective laws of religion and belief, marriage is performed before the clerk and attended by two witnesses”. Article 11 paragraph (1) states:

“Shortly after the marriage in accordance with the provisions of Article 10 of this government regulation the bride and groom sign the marriage certificate which has been prepared by the Registrar Officer under the applicable provisions”. Article 11 paragraph (2) states:

“The marriage certificate signed by the bridegroom is further signed by both witnesses and the Registrar who attends the marriage and for those who are married according to the religion of Islam are also signed by the marriage guardian or represent him”. Article 11 paragraph (3) states:

“By signing a marriage certificate, the marriage has been officially registered”.

According to Sudikno Mertokusumo²⁰, a deed is a signed letter, containing events which form the basis of a right or an engagement, and originally made deliberately for proof. According

Sudikno Mertokusumo, *Hukum Acara Perdata di Indonesia Edisi Revisi*, Cahay Atma Pustaka, Yogyakarta, 2013, p. 106.

to Wahyono Darmabrata, the marriage certificate is an instrument of evidence proving the truth about the occurrence of legal events in the form of marriage events.²¹

4.1.2 Arrangement of Marriage Recording of Different Religions after the Establishment of Law no. 23 of 2006

The formation of Law no. 23 of 2006 became the first milestone of regulation on civil registration in national law. The ordinances which previously regulated civil registration in Indonesia were declared no longer valid.

Some considerations for the establishment of this Law are:

The Unitary State of the Republic of Indonesia pursuant to Pancasila and the 1945 Constitution is obliged to provide protection and recognition of the determination of personal status and legal status of any important population and events experienced by Indonesians residing within and / or outside the territory of the Unitary State of the Republic of Indonesia.

To provide protection, recognition, determination of the personal status and legal status of any important population event and event experienced by Indonesians and Indonesian citizens outside the territory of the Unitary State of the Republic of Indonesia, a regulation on Population Administration is required.

Arrangements on Population Administration can only be accomplished if supported by professional services and awareness rising, including Indonesian citizens residing in the country.

The existing laws on the Population Administration are no longer appropriate to the orderly and non-discriminatory Citizenship Administration services, so there is a need for a comprehensive arrangement to be the guidance for all state administration related to population.

The objective of restoring the population administration by the establishment of the Population Administration Law is to provide the fulfillment of administrative rights such as public services as well as the protection related to the population document without any discriminatory treatment.

Through the Law on Population Administration particularly Article 35 letter a, the positive law in Indonesia opens the possibility of recognizing the marriage of different religions in Indonesia by applying for the establishment of a court on which the marriage of religious differences can be registered in the Civil Registry Office. The validity of the marriage will be judged by the District Court Judge where the petition is filed.

Marriage registration is an administrative act and not a legal requirement for marriage, but it is still very important to do, as it is authentic evidence of a person's legal status. The form is a marriage book or marriage certificate, which indicates that marriage, has actually taken place and is legally valid.

The issue though every marriage must be registered, but the law requires marriage to be registered, but the law requires that marriage must be approved by religion first. This is because, since the enactment of the Marriage Law, Indonesia no longer knows what is known as civil

Wahyono Darmabrata dan Surini Ahlan Syarif, *Hukum Perkawinan dan Keluarga di Indonesia*, Rizkita, Jakarta, 2002, p. 39- (hereinafter referred to as Wahyono I)

marriage.²² Marriage in Indonesia shall be carried out in accordance with the religious ordinances of the parties that carry out the marriage. The consequence of this provision, marriage recording becomes a separate issue, because not all couples who will carry out marriage, religion same. There are couples whose religions are different, causing difficulties because the law prohibits the marriage of religious differences, while they sometimes remain in their respective religions. Without the endorsement of religious authorities, KUA authorities and civil registry authorities as marriage registers cannot record the marriage.

Therefore many parties are deliberately looking for loopholes in order to carry out the marriage even though different religions. The trick is to smuggle the law by way of marriage carried out twice according to each religion of the married parties, subjection to one religion, or conduct marriage abroad. All have their own consequences. Thus, to prevent attempts to smuggle the law in ways mentioned by the authors, the marriage of different religions is accommodated by the formation of Law no. 23 of 2006.

Article 35 Sub-Article a of Law no. 23 of 2006 states, “The marriage registration shall also apply to marriages set by the court”. In the explanation of the article it is described that, “The meaning of marriage set by the court is a marriage performed among people of different religions.

The provisions of Article 35 and Article 36 of this law are understandable and reasonable. But it becomes odd when reading the explanation of Article 35 letter a which, if associated with Article 2 paragraph (1) and Article 8 letter f of Marriage Law. The phrase stated above, shows that an explanation of a section of a law abolishes or annuls a provision or sound of another article of law.

Article 2 Paragraph (1) of the Marriage Law states that, “Marriage is lawful, if done according to the law of their respective religion and belief. Where in his explanation lays out that there is no marriage outside the law of each of his religion and belief, in accordance with the 1945 Constitution.

Based on the explanation of Article 2 of the Marriage Law referred to by the law of each religion and its belief it shall include the provisions of the laws and regulations applicable to its religious class and belief as long as it is not contradictory or otherwise specified in this Law.

4.1.3 Implementation of Marriage Recording of Different Religions Before the Establishment of Law no. 23 of 2006

Regarding the marriage of different religions is not regulated in the Marriage Law. So there is a legal vacuum (*recht vacuum*). However, for couples who have been dammed by their love, they try to find a way for the marriage to take place. As Wahyono Darmabrata points out about the different religious marriages, in which he argues, there are 3 (three) common ways for married couples to marry:²³

Civil marriage does not look at all the status of religion, age, social status and others, but only looks at everything in terms of cultivation alone.

Wahyono Darmabrata, *Tinjauan Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan Beserta Undang-Undang dan Peraturan Pelaksanaannya*, Gitama Jaya, Jakarta, 2003, p. 102. (hereinafter referred to as Wahyono II)

Asking for a court decision first. On the basis of the determination of that marriage couples in the Office of Civil Registry. But this method can no longer be implemented since the issuance of Presidential Decree no. 12 of 1983.

Marriage is exercised according to the law of each religion: (i) Marriage is done first according to the bride's religious law (usually husband), then followed by marriage according to the next religious law of the bride. The issue of which marriage is considered valid. If the second (last) legal marriage becomes a re-issue of the first marital status, (ii) both partners determine the choice of law. One view states are subject to the law of their partner. In this way, one spouse "converts" as a form of law submission.

Frequently used later, is a marriage abroad. Several recorded meanings choose this way as an effort to deal with the difficulty of marriage of different religions.

In the case of the certificates of the different religious pairs, the letters must be accompanied by applying to the Civil Registry Office (for non-Muslims) and the Office of Religious Affairs (for Muslims) to carry on their marriage and recording. Then if the will to establish a different religious marriage is rejected, then it can apply to the District Court for those who are religious other than Islam and / or the Religious Courts for those who are Muslims to get the marriage's determination of marriage to different religions and its recording, and on the process of licensing and the recording of different religious marriages, accompanied by a Court Decision on the possibility of marriage of different religions. Thus, according to the court's decision, the marriage of different religions can be carried out and also the recording.

In addition to court decisions, marriage of religious differences is usually done abroad marriage; the Marriage Law provides a space that can be used as a means to legalize the marriage. Article 56 of the Marriage Law states that a marriage which takes place outside Indonesia between two Indonesians or an Indonesian citizen with a foreign citizen is lawful if done according to the law applicable in the country where the marriage is held and for the Indonesian Citizen is not violates the provisions of this law.

4.1.4 Implementation of Marriage Recording of Different Religions After the Establishment of Law no. 23 of 2006

The enactment of Law no. 23 of 2006 allows different pairs of religions to be registered with their marriage of origin through the Stipulation of Courts. In Article 35 letter a, the marriage registration shall also apply to marriages set by the court. In the explanation of this article mentioned marriage set by the court is a marriage performed among people of different religions.

Ratification of Law no. 23 of 2006 adheres to several provisions on marriage of different religions. This law places the recording of a population event such as marriage as a right. To see how far the implementation of different religious marriages in Indonesia after the Act no. 23 of 2006, then the authors in this case will analyze 2 (two) decisions related to marriage applications different religion.

Analysis of Application for Recording of Marriage of Different Religions Received (Stipulation of Court Number 85 / Pdt.P / 2014 / PN Pti)

Analysis of Unacceptable Admittance of Marriage Recording Application (Stipulation of Court Number 71 / Pdt P / 2017 / PN Bla)

Based on the two decisions that have made the analysis, there are still differences of opinion between the Judges in giving the determination related to the marriage of different religions, so there is still the acceptance accepted or rejected by the District Court. Basically there are Judges referring to the Marriage Act is also based on Law no. 23 of 2006 in providing legal considerations.

4.2 *Legal Certainty of Marriage Differences in Religion in Indonesia*

4.2.1 *Review of marriage*

The provisions contained in Article 2 paragraph (1) of the Marriage Law clearly shows that Law Number 1 Year 1974 on Marriage determines the validity of a marriage to the respective religious and belief laws. After marriage takes place according to the ordinances of each religion and belief, the bride and groom sign the marriage certificate prepared by the marriage registry official.²⁴

In addition to being able to legally marry, must be met the terms of marriage. There are several articles governing the terms of marriage in Law no. 1 of 1974. From several articles can be concluded that marriage is considered legal according to Law no. 1 of 1974 if it meets the following conditions:²⁵

Marriage is done according to the law of each religion and belief.

The marriage must be recorded or registered to the authorized official or agency.

Marriage is based on the approval of both prospective brides.

A marriage of a person who has not reached the age of 21 must obtain permission from both parents or guardian, or the court determining the marriage permit if no family party expresses their opinion about the marriage permit.

Marriage is only permitted if the man has reached the age of 19 years and the woman has reached the age of 16 years, unless there is another dispensation from the court.

Marriage takes place between two people who have no blood relation either from straight line down, upward or sideways and there is no relationship between semenda and the relationship of husbandry, and the relationship of marriage that is some brothers of his wife, in the case of a married husband more than one.

Unlawful marriage if committed by a person who is still married to another person unless there is an exception from the court.

Unlawful marriage if committed by spouses who have been divorced twice, unless religion and belief determine otherwise.

4.2.2 *Arrangement of Marriage in Indonesia*

Arrangement of Marriage According to the Civil Code

Marriage according to the Civil Code prevailing in Indonesia until 1974 from 30 April 1847 only as "Civil Engagement". There is no article mentioning the definition and purpose of marriage in the Civil Code as well as in the Marriage Law. Article 26 of the Civil Code only states that the Act considers marriage in terms of its relationship with the Civil Code alone. This

Hilman Hadikusuma, *Hukum Perkawinan Indonesia*, CV. Mandar Maju, Bandung, 2003, p. 88. (hereinafter referred to as Hilman Hadikusuma II)

Wasman and Wardah Nuronyah, *Hukum Perkawinan Islam Di Indonesia (Perbandingan Fiqih dan Hukum Positif)*, Teras, Yogyakarta, 2011, p. 49-50

means that the rules according to religious law are not important as long as they are not regulated in the Civil Code.

Marriage according to religion is not prohibited, but its implementation should be done after the marriage according to the Civil Law. As stipulated in Article 81 of the Civil Code, “No religious ceremonies are to be held, before both parties prove to their religious officials that marriage in the presence of civil registry employees has taken place.

Furthermore, will be discussed related to the legal requirements of marriage according to the Civil Code. Legitimate requirements of marriage there are two kinds, namely material requirements and formal conditions. Material requirements are conditions that are inherent in the parties to marriage, also called subjective conditions, whereas formal conditions are the procedures or procedures for marriage under religious law and law, also called objective conditions.²⁶

Arrangement of Marriage According to Marriage Law

Article 2 Paragraph (1) of the Marriage Law states that, “Marriage is lawful if done according to the law of their respective religions and beliefs. In line with “under the One Supreme Godhead” in Article 1 of the Marriage Law, then the religious norms and beliefs that determine the validity of marriage.

Then Article 2 Paragraph (2) of the Marriage Law adds, each marriage is recorded according to the prevailing laws and regulations, this is the only paragraph that regulates the marriage recording.

Of the Marriage Law, which contains the legal validity of marriage in Article 2 paragraph and formally in Article 2 paragraph (2), nationally the validity of the marriage shall apply to all Indonesians.²⁷

A marriage may take place if the prospective bridegroom fulfills the conditions for marriage. The terms of marriage in Indonesia are set forth in Articles 6, 7 and 11 of the Marriage and Regulation Law. 9 of 1975.

Arrangement of Different Religious Marriage in Indonesia

Currently in Indonesia a national marriage law (law) has been established that applies to all Indonesians, namely Law Number 1 Year 1974 regarding Marriage. The law is contained in the sheet

The Republic of Indonesia Year 1974 Number I: while the explanation is contained in Supplement to State Gazette Number 3019.²⁸

Prof. Dr. Mr. Hazairin was quoted by Drs. Sudarsono, SH in his book National Marriage Law states: Article 2 refers first to the law of each religion and belief for each of its adherents. According to the above explanation of Article 2 paragraph (1) “there is no marriage beyond the law of each religion and its belief”. So, according to Prof. Dr. Mr. Hazairin for Muslims is no possibility to marry in violation of its own religious law. So it is with Christians and for Hindus or Buddhists. The law of religion and belief in question is not only found in the holy books or in beliefs that are formed in Christian churches or in community units (as in Bali) who believe in

Abdulkadir Muhammad, *Hukum Acara Perdata Indonesia*. Citra Aditya Bakti, Bandung, 2008, p. 76.

Nurdin Ilyas, *Pernikahan Yang Suci, Berlandaskan Tuntutan Agama*, Bintang Cemerlang, Yogyakarta, 2000, p. 13.
Sudarsono, *Hukum Perkawinan Nasional*, *op. cit.*, p. 1.

the Supreme Godhead, but also all provisions -the provisions of the legislation (which are still applicable to each group of religions and beliefs respectively) that have preceded this National Marriage Law and which will be fixed later (see chapters 11: 2, 12, 16: 2, 39: 3, 40: 2, 43: 2, chapter 67).

The unregulated marriage of religious differences explicitly in Law no. 1 of 1974 causes different interpretations of Article 2 paragraph (1) of Law no. 1 Year 1974. This causes legal uncertainty for couples who make different religious marriages while the marriage of different religions in Indonesia cannot be avoided as a result of the heterogeneous society. The author argues with the existence of Article 2 paragraph (1) jo. Article 8 letters (f) of Law no. 1 In 1974 actually did not want the occurrence of different marriages religion. 64 Because in Article 8 (f) it is stated that marriage is prohibited between two persons having a relationship which, by their religion or other applicable law, is prohibited from marrying. There clearly stated “prohibited between two persons prohibited by his religion”, it is clear that marriage between a Muslim and a polytheist is not permitted either by Islamic law or Article 8 letter (f) of Law Number 1 Year 1974 regarding Marriage.

On interfaith marriages authorized by the Supreme Court in its decision dated January 20, 1989 Number: 1400 K/Pdt/1986, on interfaith marriage in filling a legal void embraced an establishment which reflects an attempt to fill the legal void , because in Law No. 1 of 1974 does not strictly regulate the prohibition of marriage of different religions. This verdict is a very bold breakthrough in the solution of the law. In the verdict, the panel of judges is of the opinion that even if the applicant is Muslim as according to Article 63 paragraph (1) of Law Number 1 Year 1974 stated that the authority to intervene is the Religious Courts, but rejection based on religious differences as intended in Article 8 (f) Law Number 1 Year 1974 and since the case is not a case as referred to in Article 60 paragraph (3) of Law Number 1 Year 1974 it is appropriate if the case is handled by the District Court.

However, based on the determination that the authors have reviewed in Chapter II in this study, that the presence of Law no. 23 of 2006 does not necessarily provide legal certainty for the implementation of different religious marriages in Indonesia. But just give certainty that the marriage of different religion can be listed in Indonesia. In order to establish a different religious marriage, a marriage of different religions must apply to the court in order to have the marriage and be registered at the Office of Population and Civil Registry. In this case, whether or not the marriage partners of different religions are married based on the legal considerations of the judges. Thus, although the rules are clearly regulated in Article 35 letter and its explanation, it does not guarantee that the interfaith marriages can be held and registered in the Office of Population and Civil Registry.

CONCLUSION

Implementation of recording of marriage of different religions viewed from Law no. 23 of 2006 has been carried out based on the mandate of Article 35 letter a and its explanation by applying to the District Court.

The legal certainty of the marriage of religious differences has not been fully applicable to the interests of the petitioners. Due to the need to comply with the requirement to apply for stipulation to the District Court does not necessarily permit applicants to obtain permission to

marry it is due to the still different perceptions of judges related to the arrangement of marriage of different religions in Indonesia.

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Regulations

Of the 1945 Constitution of the Republic of

Indonesia Code of Civil law

Law no. 1 Year 1974 about Marriage

Government Regulation Number 9 Year 1975 on Implementation of Law Number 1 Year 1974 about Marriage

Supreme Court Number: 1400 K / Pdt / 1986, on interfaith marriage
Court Decision Number 85 / Pdt.P / 2014 / PN Pti Stipulation of
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IMPLEMENTATION OF PAWN LAND AND LEGAL PROBLEMS AFTER THE ENACTMENT OF ARTICLE 7 OF LAW NO. 56 PRP YEAR 1960 (STUDY IN EAST LOMBOK DISTRICT)

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Abstract: *The purpose of this research is to know the implementation of agricultural land pledge in East Lombok Regency after the enactment of Article 7 of Law No. 56 PRP Year 1960. Using the type of empirical law research, this study examines the prevailing laws in the community. Using the sociological juridical approach and case approach.*

The result of the research that the procedure and the implementation of the pledge of agricultural land in East Lombok Regency after the enactment of article 7 of the law no. 56 Prp 1960 has several ways of implementing it, namely by making a deadline and pledge not using the deadline of the mortgage and some make an agreement through the village head and also both parties of pawnshops and mortgage receivers make their own agreements both orally and in writing. Once the requirements are met the agreement is established and approved by the parties and pledge of agricultural land can be implemented. Whereas cases of lawsuits concerning land pledge brought to court are about redemption of the land of pledge from the mortgagee by the landowner or the receiver of the pledge, whereby the mortgage receiver difficulties to obtain his land even though it has been through a familial settlement in advance or through the community leaders either mediate at the Village office. That the problem of pledge won by the landowner is due to having very strong evidence in court, both written evidence of land ownership and having considerable witnesses.

Keywords: *legal issues, agricultural land pledge, east lombok district*

INTRODUCTION

Within the scope of agrarian land is a part of the earth, which is called the surface of the earth. The soil here does not govern the land in all its aspects, but only regulates one of its aspects, namely the land in the juridical sense called right. Land as part of the earth is mentioned in Article 4 paragraph (1) of BAL, namely:

“On the basis of the right of control of the state as referred to in Article 2 it is determined that there are various kinds of rights to the surface of the earth, called land, which can be given to and possessed by persons, either alone or together with others and legal entities “. Thus it is clear that the land in the juridical sense is the surface of the earth, whereas the right to land is the right to a certain part of the surface of the earth, which is limited, two dimensionless with length and width.¹

As stated in Article 4 paragraph 2 that land rights authorize to use the land, earth, water, and space beyond which it is necessary for purposes directly related to the use of land and within the limits prescribed by law.

Humans try to meet the desired needs, in the fulfillment of this is in need of money so that the desired immediately fulfilled, so that the original nothing will exist. An effort to fulfill this one of them is by pledge. Pawn is meant in this case is a pledge on land that is farmland.² Boedi Harsono stated the pledge is:³

“The legal relationship between a person and the land belonging to someone else, who has received the money-loot from him. As long as the pawn money has not been returned, the land is controlled by a “pawnbroker”. During that time the right of the land is entirely the right of the pawnbroker. The refund of the pledge or commonly called “redemption”, depends on the willingness and ability of the pawning landlord. Many pawns last for years, even tens of years because landowners have not been able to make redemption.

The jurisdiction of land plots has been regulated in the 56 PRP law. In 1960, on the widespread income of agricultural land. In Article 7 paragraph (1) stated that:

Anyone who controls the farmland with a lien that at the time of the entry into force of this rule has lasted 7 years (between 5-10 years) or more is obliged to return the land to the pawns without paying the ransom, within a month after the existing crops are completed in harvest with no right to demand payment.

The provisions of Article 7 paragraph (1) above, in formal jurisdiction have canceled the land pledge system that has been running in areas that use customary law. This is because Indonesia is a country of pluralism so those in societies not only apply regulations made by the government but also customary law or customs that have been done for generations. Despite the regulation as set forth in Article 7 which has canceled the land pledge system that has been running in areas that use customary law. But in fact in pawn farming communities implementation takes place run using customary law and customs of each region, which basically implementation it is an agreement whereby the use of agricultural land in the transaction of accounts payable. In the execution of the mortgage of agricultural land, shall be obliged to repay the debt to the holder if the pledge of his farm back to him. Farmers who rely on agricultural produce to obtain maximum results are very difficult to cope with the problem of sudden and urgent needs at the time of harvest. Moreover, the need for harvest is just enough to meet the daily needs, the need for others such as medicine, school fees, marriage and others are always overcome by mortgaging the farmland. As is the case in the community in the Lombok regency of eastern West Nusa Tenggara province, agricultural land pledges are based on customs

Urip Santoso, *Hukum Agraria*, Kencana, Jakarta, 2013, p. 9-10

Muji Rahardjo dan Sigit Supto Nugroho, *Gadai Tanah Menurut Hukum Adat, Sosial*, Volume 13 Nomor 2 September 2012, p.

Boedi Harsono, *Hukum agraria Indonesia*, Volume I, DJambatan Jakarta 2002, p. 394

that have been handed down for generations. Pawn farms are done under the hands of transactions conducted orally on the basis of trust and kinship.⁴ No time limit on the redemption of the land can even be continued by the heirs of the pawns and the mortgage holders where the previous parties have died. Because the mortgagor is unable to redeem his soil back down to the heirs. As for if there is a problem in the pawn farm in East Lombok will finish it in kinship first and if it cannot be resolved kinship then they will solve it through litigation path.

The purpose of this research is to know the implementation of agricultural land pledge in East Lombok Regency after the enactment of Article 7 of Law No. 56 PRP Year 1960.

LITERATURE REVIEW

The theory and concept as a blade analysis in this study are:

2.1 Theory

2.1.1 The Effectiveness of The Law

Salim Hs & Erlies Septiana Nurbani, according to Hans Kelsen's definition of legal effectiveness:

“Do people in fact act in any way to avoid sanctions threatened by legal norms or not, and whether the sanctions are actually implemented if the conditions are met or not met”.⁵

Lawrence M. Friedman suggests that there are three elements that must be considered in law enforcement, which includes structure, substance, and legal culture.⁶

2.1.2 Dispute Resolution Theory

Disputes are disagreements, disputes or disagreements that occur between one party with another and or between one party with various parties related to something of value, whether in money or in kind.⁷

Laura Nader and Harry F.Todd Jr. As quoted by Salim HS that there are 7 (seven) ways of dispute resolution in society, namely:⁸

Lumping it

Parties who feel unfair treatment, failing in an attempt to emphasize their demands, have made the decision to ignore the issue or issue that led to the prosecution and he continued his relationships with those who felt his disadvantage.

Avoidance

The offending party chooses to reduce the relationships with the adverse party or to stop the relationship altogether.

Coercion

One party imposes a solution to the other

Negotiation

The two opposing parties are the decision makers, the solution to the problem is done by both of them without any third party and they make their own rules.

The results of interviews with community leaders in the village of Pringgasela H. Muskirin. SH.

Salim Hs & Erlies Septiana Nurbani, *Penerepan Teori Hukum Pada Penelitian Tesis Dan Disertasi*, Rajawali Pers, Jakarta, 2014, p. 302.

Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial (A Legal Sistem a Social Science Perspective)*, Translated by M. Khozim, Nusa Media, Bandung, 2009, p. 7-9.

Salim HS, *Perkembangan Teori Dalam Ilmu Hukum*, Raja Grafindo Persada, Jakarta, 2010, p. 83.

Salim HS, *op.cit*, p. 96-97.

Mediation

Troubleshooting is done with the help of third parties. Third parties may be determined by both parties to the dispute, or appointed by the appropriate authorities.

Arbitration

Two parties to the dispute agree to request a third party intermediary, the arbitrator.

Adjudication

In this case the third party has the authority to interfere with the problem solving, regardless of the wishes of the parties to the dispute.

2.1.3 Theory of Legal Pluralism

The term pluralism theory of law comes from the English legal pluralism theory, Dutch language called *theorie van het rechtspluralisme*, while in German called *theorie des rechtspluralismus*.⁹ A legal pluralism occurs when one of the following three conditions exists:¹⁰

The legal system of national politics is more powerful because it has the ability to destroy the Indigenous system.

There are contradictory obligations of rules established by the legal system of the state absolutely applicable and the legal system Customs may remain in effect as long as permitted by the legal system of the country and executed in accordance with the form required by the state.

Any depiction or review of customary law conducted, in the sense of an assessment conducted by jurists or other state lawyers must follow the legal classification embraced by the legal system of the state.

2.2 Concept

2.2.1 Pawn

A pawn is a right earned by a debtor of a moving good which is handed over to him by a debtor or by another on his behalf, and which gives the debtor the power to take the repayment of the goods precedence over the other indebted persons, with the exception the cost of auctioning the goods and the costs incurred to rescue them after the goods were made to mortgage, which expenses should take precedence.¹¹

Subject to the provisions of Article 1150 of the Civil Code, pawn is the right earned by a creditor or another person of a moving object which is deposited by the debtor or another person on his behalf, to guarantee a debt, and which gives the creditor the power to get repaid of the object more than to other creditors, except for the cost of auctioning the item and the expenses incurred for maintenance after it has been mortgaged, which expenses should take precedence.¹²

According to Boedi Harsono, Pawn is a legal relationship between a person and the land of another, who has received a lien from him. As long as the pawn money has not been returned, the land is controlled by a "pawnbroker". During that time the whole land became the right of

Salim HS, Erlies Septiana Nurbani, *Op. cit.*, p. 95.

Jhon Griffiths, *Memahami Pluralisme Hukum, Sebuah Deskripsi Konseptual*, in M.Hatta Roma Tampubolon, unpublished dissertation, 2014, p. 64.

¹¹*Ibid.*, p. 432.

¹²Abdulkadir Muhammad, *Hukum Perdata Agraria*, PT. Citra Aditya Bakti, Bandung, 2014, p. 171.

the pawnbroker. The refund of lien or so-called “redemption”, depends on the will and ability of the mortgaged landowner.¹³

2.2.2 Pawn Land

Pawn land is the handover of land to be controlled by another person by receiving a cash payment whereby the seller (pawns, landowner) remains entitled to redeem the land from the pawnbroker (the receiver of the pledge, the mortgage holder, the pawn lord).¹⁴ Pawn land according to the provisions of the PRP Act 56 of 1960 is the relationship between a person with the land belonging to someone else who has money owed him.¹⁵ As long as the debt has not been paid, the land remains in possession of the lender (pawnbroker), during which the total yield of the land becomes the right of the pawnbroker, thus the interest of the debt.

Ter Haar's opinion above concludes that the land pledge is a transaction (surrender) of land to another party (the holder / receiver of the pledge) by receiving a cash sum payment in cash, with the agreement that the lender (who handed over or who owns the land) is entitled to withdraw the land by redeeming the payment above.

2.2.3 Pawn Land of Agriculture

The pawn issue of agricultural land was originally done based on customary law of each region, so that every region has provisions on the procedure of execution of mortgage-mortgaged agricultural land.¹⁶

Pawn of agricultural land is regulated firstly in Indonesian legislation in UUPA Article 16 paragraph 1 letter h jo Article 53. The Article of the LoGA states that land pledge is included in temporary land rights. Land titles which are land rights are temporary due to the existence of elements that violate the principle of BAL. The temporary nature of the land lien means that the mortgage of this land will be wiped out.

METHOD

The type of research to be used is empirical law research; this study examines the applicable law in the community environment. This study was conducted by studying and analyzing the implementation of the mortgage of agricultural land after the enactment of Article 7 of the Law no. 56 PRP in 1960 by collecting and tracking data and information through field study in East Lombok regency, West Nusa Tenggara.

The types of data used in this study are:

Primary data, namely data in the form of interviews, community leaders and perpetrators who had problems with agricultural land.

Secondary data, ie data obtained by an organization or individual originating from other parties who have previously collected and processed.¹⁷

¹³Boedi Harsono, op.cit, p. 391.

¹⁴Hilman Hadikusuma, *Hukum Perjanjian Adat*, Offset Alumni, Bandung, 1979, p.138.

¹⁵Lilieq Istiqomah, *Hak Gadaai Atas Tanah Sesudah Berlakunya Hukum Agraria Nasional*, Usaha Offset Printing, Surabaya, 1982, p. 85.

¹⁶M. Arba, *Hukum Agraria Indonesia*, Sinar Grafika, Jakarta, 2015, p. 196-197.
Muslan Abdurrahman, *Sosiologi dan Metode Penelitian Hukum*, Umm Press, Malang, 2009, p. 112.

This study uses a kind of sociological juridical approach to have the object of study on community behavior.¹⁸ The sociological jurisdiction approach is used to study and analyze the process of agricultural land pledge in East Lombok regency in completing agricultural land pledge. While the case approach is intended to learn about how the background cases that occur about paw farming land until the completion.

IV. RESULT AND DISCUSSION

4.1 Overview of Research Sites

East Lombok regency is located on the eastern tip of the island of Lombok with an astronomical location between 1160-1170 East Longitude and 80-90 South Latitude, with borders:

West side	: District Lombok Utara and Central Lombok;
East	: Alas Strait;
North	: Java Sea;
South	: Ocean of Indonesia.

The total area of East Lombok Regency is 2,679.88 km² consisting of land area of 1,605.55 km² (59.91 percent) and sea area of 1,074.33 km² (40.09 percent). The land area of East Lombok Regency covers 33.88 percent of the total of Lombok Island or 7.97 percent of the land area of West Nusa Tenggara Province. The plains in East Lombok include mountains and lowlands that extend to the coastal areas. Mountainous area located in the northern region of Mount Rinjani National Park with a peak height of 3726 meters from the surface sea. As for the middle to the south of the lowlands.

Sub-district with the largest (mainland) area that is District Sambelia, Sembalun, and Jerowaru. These three sub-districts are quite large because they contain state forest areas. While the district with the smallest area of Sukamulia, Sakra, and Montong Gading. Land use in East Lombok is mostly used for agricultural business. Total land area in 2016 is 48,191 ha or about 30,02 percent from district area. The rice fields are mostly planted with rice (93.64%), either once, twice, or three times a year.

The population of East Lombok in 2016 reached 1,173,781 people consisting of 542,012 males and 622,006 women. Thus the sex ratio (male to female) of about 87.11 means that on average there are 87 men per 100 women. dependent burden still high 55.13 means that every 100 of usiaproduktif population (15-64) bore 55 people unproductive age (0-14 and 65 +). In the productive age group, the number of women is more than men. This is why migration of productive age population occurs mostly in male population.¹⁹

4.2 The implementation of farm land pledge in east lombok district after the implementation of Article 7 of Law no. 56 PRP Year 1960

The lien on agricultural land already exists and is used by the community based on the unwritten law that is customary law and custom which until now still maintained by one of

¹⁸Mukti Fajar ND & Yulianto Achmad, *Dualisme Penelitian Hukum Nonmatif & Empiris*, Prints III, Pustaka Pelajar, Yogyakarta, 2015, p. 51.

Regional Statistics of East Lombok Regency Year 2017

society in East Lombok regency. In the customary law of pledge is the legal relationship between a person and the land belonging to another, who has received the pawning money thereof. As long as the pawn money has not been returned, the land is controlled by a “pawnbroker”. The refund of lien or redemption depends on the willingness and ability of the landowner concerned. So based on that if the landowner who pawned his farm, for decades if not pay ransom then the land remains in the control of the holder. It is certainly very detrimental to the pawnshops.

Pawn of agricultural land for the community is the primary choice and is one of the most frequent transactions when it comes to economic problems and urgent needs. Pawn is commonly found in the community among families or neighbors who usually already know each other because it is considered to provide ease in obtaining money to meet the needs of urgent needs without having to sell his farm. Pawn is an alternative to obtaining money other than banks or other financial institutions because of the convenience and fast process of obtaining loan money compared to borrowing money in banks or in other financial institutions where complicated procedures and administration and require time to the community prefer to pawn their farms to family or to the neighbor.

Pawn of agricultural land according to customary law is based on the principle of mutual help and on the basis of trust. However, if examined from the reality of practice in the community, mortgage pawn by customary law that exist in the community that has been running for generations contain elements of extortion, oppression and have greater interest than the bank interest if the period exceeds 7 years, because if the pawns has not been able to redeem the pawn ground for his pawn money even though it has been mastered and worked by the pawnbrokers for decades, has not been able to take back his land until the redemption, not even a little land of pawn object recognized by the pawn holders as land purchased with how to sell off, especially if sipejual pledge died first. This is due to the sale of land pledge made under customary law is not done in writing.²⁰

Pawn is itself a temporary right set forth in Law No. 5 of 1960 on Basic Agrarian Basic Rules (hereinafter referred to as LoGA) The provisions of these land rights are regulated in the LoGA and are granted temporary properties, which will be deleted in because it contains the nature of extortion and contrary to the spirit of the Basic Agrarian Law. The fact that until now cannot be abolished and that can be done is to reduce the properties of extortion.²¹ To limit the extortion properties of farmland lien, it is further stipulated in Law Number 56 PRP (Regulation of Law) of 1960 on the Stipulation of the Area of Agricultural Land, hereinafter referred to in Article 7 paragraph (1), (2) and (3) on the rules of time limits and the manner of redemption in the pledge of agricultural land. The legislation is intended to protect the weak economic party, i.e. farmers who need money forced to mortgage their rice fields. Considering that after mastering his rice field for 7 years, the receiver of the mortgage enough to get the rice field results until it has recovered the lien that has been issued.²² The provisions stipulated in the provisions of Article 7 are:

“Whoever controls farmland with a lien that at the time of the coming into effect of Law 56 PRP 1960 has lasted 7 years or more is required to return the land to its owner within a month after the existing crops are harvested, with no right to demand payment of ransom. Regarding the lien that at the time of the coming into effect of Law 56 PRP 1960 has not

M. Arba, *Hukum Agrari Indonesia*, Sinar grafika, Jakarta, 2015, p. 197.

Urip Santoso, *Hukum Agraria Kajian Komprehensif*, Print I, Kencana, Jakarta, 2012, p. 134.

Subekti, *Jaminan-jaminan untuk pemebrrian kredit menurut hukum indonesia*, Citra aditya bakti, Bandung, 1991.

lasted 7 years, the landowner has the right to request it back at any time after the existing crops are harvested, by paying a ransom the amount of which is calculated according to the formula:

$$\frac{(7 + \frac{1}{2}) - \text{Time goes on liens} = X \text{ lien}}{7}$$

Provided that at any time the right of the liens has lasted 7 years, the holder-the mortgage is obliged to return the land without payment of the redemption money, within a month after the existing crops is harvested “.

Based on the provisions of Article 7, the formal jurisdiction has canceled the agricultural land pledge system that has been running in the midst of people who still use customs. The implementation of land pledge after Government Regulation no. 24 of 1997 became no clear rules. The implementation of land pledge is not done in writing and the absence of registration as well. Implementation of land pledge which is not to be done. This makes the problem in the implementation of more and more pawn.

Pawn of land which has been regulated in the rules mentioned above is still causing problems in the implementation. This problem arose in the presence of many cases of land pledge brought to court and resulted in a court decision. The verdict on land pledge is on the average of the problem of returning land of pawn. Land pledge that has been passed on by the heirs has many complaints. The lawsuit was committed by the heirs of the mortgagers. The lawsuit was to return the land of their pledge which has been controlled by the pledge receiver for more than 7 years.

The decisions contained in the website of the Supreme Court ruling on land plots many rejected the plaintiff's claim that the land was returned. Most lawsuits are rejected because the plaintiff has no evidence of land pledge. No such proof is due to land pledge made only verbally without a written agreement.

People who make farm land pledge are mostly done orally. This is done because in customary law and customs during this pledge of land is only done orally only. While after the land pledge is governed by the laws and regulations, the rules governing the pledge of land also do not clearly regulate the form of the mortgage agreement. The land pledge arrangements that do not clearly govern this pawn agreement form turn out to be the reason of many land pledge issues that on the judicial process. If indeed this form of agreement becomes the reason for problems in land pledge, should the form of the agreement be strictly regulated in the legislation on land pledge.

Arrangement of this agreement form with the written form will be able to minimize the problems that will arise in land pledge. The written agreements contained in the land pledge agreement become a proof for the pawnbroker. If the pledge of agricultural land has been for 7 years but the land of the mortgage has not been returned, then the pawnbroker may use the written agreement as proof that his land is returned.

The above description can illustrate that preventive law protection has not been well implemented due to unclear arrangements in the form of land pledge agreements. This makes the execution of land lien more done in oral agreements. Such a form makes the implementation also

not registered as regulated in legislation. In addition to the lack of clarity of legislation on land pledge governing land pledge agreement there is also a regulation concerning the registration of land plots in trouble. The problem in the legislation regulating the registration is due to the arrangement of registration of land pledge in the Joint Instruction of the Minister of Home Affairs and Regional Autonomy with the Minister of Agrarian Affairs no. Sekra 9/1/2 on the Implementation of Regulation No. 56 of 1960 on Stipulation of Land Area of Agriculture is ruled out because of Government Regulation Number 24 of 1997 concerning Land Registration.

The description explains that the rules governing land pledge need to be enrolled to become invalid. The non-validity of this makes the registration of the mortgage becomes difficult to do. Uncontrolled execution of the mortgage can result in the pawning and the large power of agricultural land related regulations on the determination of agricultural land area.

So the unclear arrangement of the agreement form in the legislation concerning land pledge and the absence of regulation concerning registration of pledge of agricultural land is the thing that makes the implementation of land pledge many problems occur. The problems that occur due to the lack of regulatory coverage of the implementation of land pledge make the protection of land preventive pawn law has not materialized.

But in reality in the community still just use the way that has been done for generations including the people of East Lombok. *sebatikan* said by the head of the village of *sakra Anugrah Bayu Adi*:²³

“The people of *Sakra* *elek* during *ne ngelakuang nyasak teak kadu adat rampant* *biase* with *toak laek*, *endek ne arak nanggut nanggep nanggep* duration *ne more than 7 years*, *luek gati sak lebeh 7 years*, *ye* because custom *tulak kepeng tulak tanak*, *wah walk* hereditary habits *sine sides*, and society mutually believe, *rousing engagement tips with toak laek: yes engkat biwih ikat engkat lek ate*”

Meaning:

“The people of *Sakra Village* during this time when doing the pledge is done with customs, no one demands if the land pledge period of more than 7 years, very much land pledge over a period of more than 7 years, but due to the custom of returning money back land, which running down and down like this. And the people trust each other as according to the letters of the sacrament *ie overlap: yes engel biwih yes engkat lek ate* (that's a word in the mouth he also said in the heart) “.

Based on the above, the use of customs that have been hereditary is preferred over national law. In rural communities in East Lombok the implementation of Article 7 of Law Number 56 PRP Year 1960 can be divided into 2 (two) community groups.

4.2.1 People who already know the provisions of article 7 of the Law No. 56 PRP year 1960

This community group already knows about the rules in chapter 7 but prefers to use the habit because according to them the mortgage is done on the basis of kinship, mutual trust and also to help each other. As *Inaq Hapipah* says:²⁴

²³The result of interview with the head of the sacrament village of *Bapak Lalu Anugrah Bayu Adi* at the village office on March 25, 2018.
²⁴Interview with *Inaq Hapipah* dated March 26, 2018.

“wahku nanggep bangket kanca kebon luas a 55 are. Nanggep tanak lekan 2008 – 2018 kadu kebutuhan mendadak biaya anak tama polisi”.

Meaning:

“Bahasa Indonesia: I pawned 55 acres of rice fields and gardens, pounding the soil from 2008 -2018 for the sudden need for child police entrance fees”.

Certainly if it refers to the provisions of Article 7 of Law No.56 then the land should have been returned free of charge because it has been more than 7 years, but in fact the land is still in the control of H. Tasim (receiver of pawn) even though both parties have known the rules of the article 7 such. Because according to them the agreement continues to use customs that prevailed from generation to generation that has been done since the first return of money then return the land. The receiver of the pledge, namely H. Tasim states:²⁵

“endekku takut ginna gugat insaallah niat ta keluarga bagus nulung inaq hapipah, wah ngeraos lek ita endek mungkin gin na berbuat sampai gugat lek pengadilan lek embe-embe lek desa ta sik aran nanggep tanak pertanian sino nulakang kepeng nanggep marak biasa, merasa berdosa ita mun endek ngeno caranta ja soal aa akad ta sik pertama tulak tanak tulak kepeng ta”

Meaning:

“Bahasa Indonesia: I am not afraid to be sued because God willing the good family intention to help Inaq Hapipah and Inaq Hapipah also has stated it is impossible to do so because of the contract with the family to pledge, which where lien usually return the pawn money as usual People will be vindicated without redemption because the contract agreement lent it back the land back the money “.

This is in line with what Mul'an said to the village head of Pringgasela:²⁶

“timak na taok aturan tentang nanggep, masyarakat kereng gunaang kebiasaan sik arak lek masyarakat wah turun temurun kaduang aa”.

Meaning:

“Although people know the rules of article 7, people prefer to use habits that have been used since the first, the community to the village office just to make an agreement that there has been a pawn transaction even more that do not report only agreement between them alone or orally only transactions “.

Based on this it can be seen that the community implementation of the mortgage is done in the following way:

Orally or unwritten

Pawn of agricultural land is usually done in the face of the village head or community leaders. The presence of such officers is generally not a requirement for the legality of the farm plot, but is intended to strengthen the position and thereby reduce the risk of the mortgage holder in the event of a later rebuttal. In this case the two parties make a verbal agreement when they meet, then when there is agreement between the mortgagee and the

The result of interview with H. Tasim in Rempung Village on March 27, 2018.

Interview with village head Pringgasela Bpk Mul'an at Pringgasela Village office on 27 March 2018.

holder of the pledge, then there is a pledge agreement. Then the mortgagor will give up his land to the pawnbroker and the mortgagor will receive some money from the pawnbroker.

Written

In this case the pawns and the holder of the pledge make an agreement which is witnessed by the Village Head made in writing signed by both parties who carry out the pledge to know the Village Head / Community Store.

The execution of pledge that took place in the East Lombok Society where the transfer of land rights orally or unregistered land is still considered valid for the parties to the land transfer agreement, but has no permanent legal force. As in Article 19 of the LoGA states that: Any agreement on the transfer of land rights (including grant / mortgage / guarantee of money with land rights as dependents) shall be proven by a deed made by an officer appointed by the agrarian minister, in the appointment of the deed cannot be proven then the action concerned is not legitimate, Such circumstances do not guarantee legal certainty. If there is a dispute between the parties to the agreement in the execution of the agreement. As regulated in Government Regulation No. 24 of 1997 on Land Registration.²⁷

For people who make a pledge with the agreement. Normally the Agreement also governs the deadline, the deadline in the agreement is divided into:

1) Unlimited pledge agreement

On an indefinite pledge agreement both parties agree that the pledge is not bound by time so that redemption can be made at any time. This indefinite treaty implies that the pawnbroker can control the land until the landowner can redeem the land (without any provision of time). In the sense or concept of existing mortgage in the regency of East Lombok, pledge of agricultural land may continue despite exceeding seven years. Based on interviews with Amaq Illiyin can be explained that if the pawn is not determined time and pledge the land has lasted seven years but the landowner must still redeem the land. If the landowner has not been able to redeem, then the mortgage is continued until the landowner can redeem.²⁸

In the event of this redemption, there is no compulsion for the pawnbroker to ask the pawnbroker to redeem the money. From the results of interviews conducted Inaq. Mahnim and H. Alwan Wijaya in accordance with this provisions. Inaq Mahnim desperately needs money, but he did not ask the recipient of pledge to redeem the land pledge, so Inaq. Mahnim mortgaged the land to others, in order to get a bigger amount of lien than before because of urgent necessities and nothing else reliable, this is what is called a pawn operation. As said by Inaq Mahnim who made the agreement in the village office of the infantry.²⁹

“endek kami ngadu batas waktu nanggep tanak lek bangket, wah kebiasaan lek tene marak ngene, kebiasaan turun-temurun lekan papuk balok ta laek ngene cara aa, jari aa mun ta mele nebus aa piran-piran melen ta, mun wah arak kepeng”.

Meaning:

“I mortgaged my rice field indefinitely because the habit here is like this so I can redeem at any time if there is sustenance”

It is also in harmony with what H. Alwan Wijaya says:³⁰

Muji Rahardjo dan Sigit Sapto Nugroho, *Gadai Tanah Menurut Hukum Adat Sosial*, Volume 13 No. 2 September 2012, p. 93

Interview with Bpk Illiyin Kaur Umum Desa Pengadangan March 27, 2018.

Interview with Inaq Mahnim at his Village Village on March 28, 2018.

Interview with H. Alwan Wijaya at his house RW Damai Pringgasela village powerhouse on 28 March 2018.

“ita nanggep tanak ndek ulak arak batas waktu a ndek ta ulak miak perjanjian sok ta tok ita pada ita jari wah ono, pira na arak kepeng ta ba ta tebus a so”

Meaning:

“I mortgaged the land not using the time limit of fellow family, when any new money will be redeemed”.

Due to the absence of this time limit sometimes in the community as long as this lien takes place, on the agreement of both parties the mortgage money can be added.

2) Pawn agreement with deadline

In this type of mortgage agreement the parties agree on their own deadline. The deadline here consists of:

The deadline is allowed to redeem

In this case the parties agree that the land may be redeemed if it has passed the designated time limit for example 2 years so that the charter cannot redeem the land at any time.

As a mortgage agreement made by Amaq Anah (chargor) with Eka Erma (the pawnbroker) they agreed that the pawnbroker can redeem the land after the pawn has run for 2 years, then before the pawnbroker walks 2 years cannot redeem the land.

Deadline for redemption

In this case the parties agreed on the time to redeem. Like a mortgage agreement made by a bailiff, he pays his land on a deadline from May 13, 2016 to May 13, 2019. So before the maturing date the pawnbroker must redeem the land, but if it intends to be extended it will create a new agreement letter which must be approved by the parties.

Based on these, it can be concluded that if the agreement with the Time Limit is allowed to be redeemed, the pawn only cannot redeem before the redemption period ends and the pawnbroker can redeem the land at any time after the limit cannot be redeemed after its meaning thereafter there is no time limit to redeem while in the deadline agreement to have a charter builder must redeem according to the time specified in this case means there is a deadline for redemption.

4.2.2 People who do not know the provisions of Article 7 of Law No. 56 PRP year 1960

The level of education certainly greatly affects the knowledge of a person considering the village community is more low-educated (see the level of education) then the knowledge of a very low regulation even do not want to know about the regulations made by the government. For people who do not know the rules they are certainly doing the pledge with hereditary practices implemented.

Paws that occur among rural communities often occur between families as happens between amaq embut and father Darmawan Good wife Ainiah who is a cousin. According to amaq embut as pawn:

“The land on the plot of 25 acres, the land has no certificate. started on a pledge in 1986 2018 exchanged for a calf for 10 million at the time, the calf was used by the deceased for the marriage of the deceased with the fine wife of Ainiah (spoken by Muhammad Ahwan Rosadi first son of the deceased) there is no agreement on when to redeem the land the redemption can be made if paying a sum of the price of a cow or buying a cow

as much as a condition at the time of mortgage. Contract used orally with two witnesses i.e. the first witness Aripin the second hajj, customs in Bangka Keceng. Terara District East Lombok, people can redeem their land in October because at that time the last season of tobacco planting. The deceased father Darmawan died in 1996 leaving the heirs. 1. Muhammad Akwan Rosadi (son) 2. M. Tohir Abrori (Son) and wife Baiq Ainiah. The family has a profit to return or redeem the land that has long been pawned by the deceased over a period of more than 7 years but at that time want to redeem in not a month of time to redeem it in order to come back in October because of October there is finished tobacco season and harvest”.

With so long the pledge of this land goes Muhammad Akhwan Rosadi do not know the rules about the law no 56 PRP year 1960 in article 7 paragraph 1 that pawn farm land that has lasted seven years or more then the pledge recipient is obliged to return the land to the land owner a month after the plant is finished harvested with no right to demand ransom. And according to the family of the beneficiary of the mortgage is also a person whose education is low and does not know the problem of government rules.

The case of pledge between H. Saiful and H.Nasri which has no pawning deadline, according to H. Saiful child statement:

Nurhidaya son of (H Saiful): because there is no term of the pawn redemption agreement, the mortgage is redeemed if it has money to redeem.

Me: how do you resolve this mortgage because according to Law no 56 of 19960 chapter 7 if more than 7 years is returned free of charge, how do you respond to the rule of the government.

Nurhidaya: the principle of our permanent settlement of the family resolved it by redeeming according to the mortgaged money to pawn the land, because our previous contract was like that back money back land. It is impossible for us to sue the court because of the government's rules; we have entered into a mortgage agreement with redeemed settlement.

And we prefer to use lien than borrow money in the bank that the procedure is long and complicated and a lot of administrative costs if the principle of pawn money is not flowering, the value of money is getting down, the value of land is rising, which is conveyed mother Nurhidayah child from Amaq Saiful deceased .

He plans to redeem his father's land with his siblings by sending his father's s allegedly Saiful, i.e., the Busrah meant here is over pawning, over pawn which was in the pawn of 100 million in raise again due to over pawning to 150 million 100 million in give to H Nasri the first pawnbroker who is given 50 million to anak2 H Saiful as added pawn. So the way of settlement of mortgage is done here done over pawns by landowners where landowners need money. And the landowner asks to raise his mortgage to H Nasri. However, he cannot meet the demands of the landowner, so the landowner has the initiative to seek another mortgagor, to cover the mortgage whose mortgage amount is more than H Nasri and his father's brother willing to continue his mortgage with a mortgage of 150 million which was once lined by H Nasri 100 million. The remaining 50 million is used for family purposes.

Based on the case the mortgage that occurs in the community can be up to the heirs. So in principle in the mortgage of the land the time of redemption is up to the mercenary without any time limit or expiration and even the right to redeem to the heirs of the pawnbroker unless otherwise agreed. Neither does the lien end with the death of the pawnbroker. If the holder of the pledge dies then the right is transferred to his heirs. The data that has been levied in East Lombok as follows:

Table 1. Data Pumping Agricultural Land in East Lombok
Source: Primary data processed, 2018

No	The pawns	Pawnbrokers	The amount of the mortgage	Deadline	Location
1	Amaq dohri	Siti marhamah	15.000.000	2 tahun	Lenek
2	H.Alwan W	Amaq is	60.000.000	Tidak ada	Sembelia
3	Qonitah	Wardiah	20.000.000	3 tahun	Pringgasela
4	H. Ahib	H. Aul	50.000.000	Tidak ada	Semalun
5	H. saiful	H.nasri	130.000.000	Tidak ada	Pringgasela
6	Tasim	Inaq yandi	140.000.000	Tidak ada	Suralaga
7	Rosadi	Amaq Embut	10.000.000	1986-2018	Jenggik
8	Mahnim	Ismail	60.000.000	Tidak ada	Pengadangan
9	Hapipah	Muslihan	125.000.000	Tidak ada	Pringgasela
10	Amaq Anah	Eka erma	45.000.000	2 tahun	Pengadangan
11	Sahudin	Suriani	50.000.000	Tidak ada	Sakra
12	H. Bukaah	Sapiaah	13.000.000	Tidak ada	Anjani
13	Amaq Ramli	H. Salman	20.000.000	Tidak ada	Sakra

To know the extent of the effectiveness of the law, it must first be able to measure the extent to which the rule of law is obeyed or disobeyed. Of course, if a rule of law is obeyed by most of the targets to which obedience is concerned, it can be said that the rule of law is effective. Nevertheless, even if it can be said that the rules adhered to are effective, but still can be questioned further the degree of effectiveness. Someone obey or not a rule of law, depending on his interests.

Furthermore, to answer the question, when a rule of law or legislation is considered ineffective, then the answer is:

If most people do not obey it.

If the obedience of most citizens is only compliance or compliance. In other words, although most citizens seem to obey the rule of law or legislation, the size or quality of the effectiveness of the rules or legislation can still be questioned.

Based on the data it can be seen if people in East Lombok more pawn transaction without any time limit and people prefer to use the habit compared with national law of course this is because the customs of society, economy and public knowledge of a rule make the implementation of the provisions of Article 7 Undang- Law Number 56 Prp (Perpu) of 1960 on the Acceleration of Agricultural Land in East Lombok is not effective.

CONCLUSION

East Lombok people prefer to use pawn agreements indefinitely compared with the deadline so that the mortgage can last up to the heirs of each party. It is because of the pledge of many happening among families or neighbors who have known each other before and also the sense of mutual mutuality between the two parties, pawnshop agreement more made orally between the parties compared with the written agreement, as written only through the village head without there is an agreement through a notary.

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