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INTRODUCTION

The 1992 United Nations Conference on Environment and Development or “Earth Summit” that was held in Rio de Janeiro, Brazil had established Agenda 21 which contains the blueprint for sustainability in the 21st century. It is also a commitment to sustainable development as agreed by many Governments of the world. This Agenda, monitored by the International Commission on Sustainable Development, addresses the development of societies and economies by focusing on the conservation and preservation of the environment and natural resources. Through this Agenda, everyone has roles to assume to achieve sustainable development as well as involved in the process of deciding on the environment that affects all of us. As such, sustainable development means inculcating the process of maintaining human needs while preserving the environment for future generations. It also means we must use the available resources efficiently so that they will be available for many years to come.

The Brundtland Report of the United Nations Commission on Environment and Development defined the concept of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. The concept of sustainable development implies first, the integration of environmental issues with the imperatives of economic development in order to meet the immediate needs of populations today without undermining the aspirations of future generations. Thus, sustainable development can only be achieved in a long-term perspective. The objectives for Sustainable Development include social progress and equality, environmental protection, conservation of natural resources and stable economic growth. Thus, Sustainable Development rests on three pillars, economic activities, social equality and environmental activities that promote the ability of the present and future generations to live within the Earth’s capacity to support us.

Basically, the Rio Declaration enunciated the key principles of sustainability including, but not limited to:
(a) The principle of integration;
(b) The precautionary principle;
(c) The principle of intergenerational and intergenerational equity; and
(d) The polluters pay principle.

SUSTAINABILITY IN MALAYSIA

Malaysia such as many other developing countries faces conflict between economic growth and conservation of environment. However, it has recognized the concept of sustainable development and has embedded this concept in its policies, vision, mission and plans. Malaysia is also very active in international sustainability activities, which have been reflected by its participation in the 13th session of the commission on sustainable development in New York in 2005. Malaysia has also incorporated the principal of Agenda 21 as one of the important sustainable development documents in its planning process. In 2013, study benchmarking the performance of 146 countries on an Environmental Sustainability Index, Malaysia ranked 38th. This was not a particularly comfortable result for the country: Brazil, Argentina and Costa Rica — which, like Malaysia, have substantial pollution stresses associated with rapid industrialization, are members of the group of 12 mega-diverse nations and have relatively stable socio-political systems — all ranked higher on the index.

On the biodiversity side, the 2013 Red List of Threatened Species published by the International Union for Conservation of Nature ranked Malaysia as the country with the third-highest number of endangered species (1,141), after only Ecuador (2,208 species) and the United States (1,192 species). On the 2010 Climate Change Performance Index, which rates the emission levels, emission trends and climate policies of the world’s 57 largest carbon dioxide emitters, Malaysia appeared in the bottom-ranked group of countries alongside countries like Canada, Australia, the United States and Saudi Arabia.

Nevertheless, international comparison or league-table is usually messy and not a hard science. For instance, the 2014 Environmental Performance Index (EPI) developed by Yale and Columbia university ranked Malaysia 51 out of 178 countries surveyed. Yet in the 2013 edition of the EPI Malaysia is ranked 56 among 163 countries surveyed. This is most likely due to a change in assessment methodology than real improvements on the ground.

Malaysia's policy on sustainable development is clearly enunciated in the 7th Malaysia Plan (GOM 1996). The Plan which also describes the measures taken to emphasize sustainable development during earlier Malaysia Plan periodes, outlines new measures that will be initiated during the 7th Malaysia Plan (1996 - 2000) to enhance Malaysia's ability to develop sustainably. The 7th Malaysia Plan states that there is a need to strengthen environmental database and information systems to "...clearly delineate the relationship between the environment and sustainable development." And that the development of indicators of sustainable development will be initiated, to provide a yardstick for monitoring and evaluating progress towards sustainable development in Malaysia.

INITIATIVES BY THE MALAYSIAN GOVERNMENT

National Policy
Malaysia is an upper-middle income economy with a gross national income of USD 9,770 per capita in year 2013. It is a highly open economy where, exports comprise over 100
percent of GDP and a leading exporter of electrical appliances, electronic parts and components, palm oil, and natural gas. Malaysia is also externally competitive, ranking 12th out of 135 economies in the World Bank 2013 - Doing Business survey. Malaysia’s GDP growth was 4.7 percent in 2013 and projected at 5.0 percent in 2014. Malaysia has progressed from being a producer of raw materials, such as tin and rubber, in the 1970s to being a diversified economy that grew on average 7.3 percent between 1985 and 1995. After the Asian financial crisis of 1997-1998, Malaysia has continued to post solid growth rates, averaging 5.5 percent per year from 2000 – 2008. Growth was accompanied by a dramatic reduction in poverty, from 12.3 percent in 1984 to 2.3 percent in 2009. However, pockets of poverty exist and income inequality remains high relative to the developed countries Malaysia aspires to emulate.

Malaysia’s development has been shaped by the vision encapsulated in the three key national policy frameworks: the New Economic Policy (NEP), 1971–1990; the National Development Policy (NDP), 1991–2000; and the National Vision Policy (NVP), 2001–2010. In 2010, Malaysia launched the New Economic Model (NEM), which aims for the country to reach high income status by 2020 while ensuring that growth is also sustainable and inclusive. The NEM envisions economic growth that is primarily driven by the private sector and which moves the Malaysian economy into higher value-added activities in both industry and services. To achieve these goals, Malaysia will need better skills, more competition, a leaner public sector, a better knowledge base, smarter cities, and greater efforts to ensure environmental sustainability. The World Bank’s partnership with Malaysia is one of knowledge-sharing and is centered on supporting the government’s vision of bringing Malaysia among the ranks of high income economies through inclusive and sustainable growth. Malaysia has not borrowed from the Bank since 1999, and reimburses the Bank for the advisory services provided. In 2012, the government and the World Bank extended their Framework Agreement for advisory services through 2014. The World Bank and Malaysia have collaborated on a number of projects in the areas of human development and competitiveness since 2009, when the Framework Agreement was first signed. In terms of economy sustainability, Malaysia has long undergone policy reforms towards sustainable development with process of greening Malaysia’s economy started as early as the 1970s by the introduction of regulations to manage pollution from the palm oil industry. Since 1976, the importance of environmental protection in Malaysia’s economic development has been recognized when reference to it was made in the country’s five-year development plan.

1. The Malaysian Quality of Life Index (MQLI)

The MQLI is an assessment approach that has been developed by the Economic Planning Unit (EPU) of the Prime Minister’s Department in 1999. MQLI was updated in 2004 and has encompassed 14 rubrics. This approach has viewed the subject in national level or mega scope level. Since the majority of rubrics are related to social, economic, and environmental sustainable development, it is consider a sustainable development assessment approach. According to the quality of life index, Malaysia has improved during the 2000 to 2010 period, where the Malaysian Quality of Life Index (MQLI) increased by 11.9 points from 100 points for the base year 2000 to 111.9 point in 2010. Referring to the MQLI 2011 report released by the Economic Planning Unit (EPU) of the Prime Minister’s Department, the education component recorded the highest increase of 20.4 points, followed by transport and communications (20.3 points) and housing (15.7 points). The report said the greater participation rates in pre-school and secondary school levels, better teacher-students ratios a well as higher literacy rates resulted in an improved education sub-index. Other components
measured in MQLI were culture and leisure, income and distribution, public safety, health, social participation, environment, family life and working conditions also recorded improvements.

In the year 2013, based on the new Malaysian Wellbeing Index (MWI), it was reported that, Malaysian people enjoys better services in terms of access to communications, education, health, housing and transportation. Living conditions were also enhanced through improved accommodation and basic amenities, greater conservation of the environment and increased public safety. According to the Malaysian Wellbeing Report 2013, the citizens were able to increasingly enjoy culture and leisure as well as participate in community and social activities. The report said during the period of 2000 to 2012, the MWI recorded an increase of 25.4 points, an indication of an improvement in the well-being of the people. The MWI replaced the Malaysian Quality of Life Index (MQLI) which had been in place from 1999 to 2011. It said the improvement could be attributed to the wide range of policies and programmes implemented by the government to enhance the quality and standard of living of the people. The report further said that the least improvement was recorded by the family component due to increasing number of divorce rates, juvenile crimes and non-communicable diseases.

2. The Federal Town and Country Planning (TCPD-F) Initiative

The TCPD-F is responsible for physical planning at the national level. The establishment is to create a balance between physical development and human development. Although the department’s mandate encompasses entire individual States, it has the most relevance in urban areas, and the policies it adopts can significantly influence the patterns of urban development in Malaysia. The TCPD-F Act is adopted by the individual States’ legislature. In this way there is some uniformity among individual States in terms of physical planning policies and implementation.

One of the functions of the National Physical Planning Council (NPPC) to promote town and country planning as an effective and efficient instrument for the improvement of the physical environment and towards the achievement of sustainable development in the country.

TERAJU and PEMANDU

Malaysian government in their effort to achieve peace and political stability has adopted various policies related to economic development that were also aimed at ensuring peace and political stability, apart from their obvious economic objectives. The National Operational Council (NOC) with its members representing every ethnic group in the country was established to be the caretaker government which took over the role of the parliament after the 13th May tragedy. It was this council which deliberated on all issues and prepared the New Economic Policy (NEP). This policy, which came after the tragedy, is an excellent example of such a double-edged policy. Its twin objectives were the eradication of poverty and the restructuring of society through the ‘equitable wealth distribution’ among ethnic groups in the country. The NEP policy was a very popular policy. It gives a great hope to the Malays by restoring their confidence in the country and its leadership.

Malaysia’s target through NEP was to achieve the ‘equitable wealth distribution’ among ethnic group in such a way as not to disrupt growth. In other words, the NEP targets were to be achieved not through any disrupting redistribution but through active Bumiputra
participation and contribution to the country’s economic growth. Thus if the NEP was to succeed, it had to be implemented under long-term high growth strategies. This goal was to be realized through two important channels. First, it was to enhance the education and skill levels of Bumiputra to raise their productivity as members of the labour force. This would contribute to an increase in aggregate supply, leading to high growth. Second, improvement in Bumiputra productivity would increase their incomes, enabling them to consume more. The NEP created both a demand side pull and a supply side push to propel the economy to generate and sustain high growth rates that benefited Malaysia’s private business sector and society at large.

In order to ensure that Bumiputra equity is 30 per cent of equities in all economic sectors by 2020 can be achieved, Prime Minister, has announced the formation of Unit Peneraju Agenda Bumiputra (TERAJU) on February 8, 2011 which functions as the secretariat for Bumiputra Agenda Action Council (MTAB) with main objective is to lead coordinate and drive Bumiputra transformation and participation in the economy to reduce the economic gap that exists between Bumiputras and other races in the Malaysian society.

TERAJU has been tasked to focus on five areas which are:

a) Entrepreneurship and Wealth Creation;
b) Funding;
c) Education and Employment;
d) Institutional and Policy Instrument Review; and
e) Stakeholder Management.

The TERAJU programme represents a new approach based on meritocracy among Bumiputras with no question of cronyism but only to help those who can truly succeed. According to Prime Minister Dato’ Najib, the switch in the approach towards assisting Bumiputra entrepreneurs based on meritocracy was seen as being better as previous methods, such as giving initial public offerings (IPOs) through the Bumiputera quota, did not last long as the shares were often resold on the market. To achieve this objective, TERAJU will also work with the Performance Management and Delivery Unit (PEMANDU) to discuss Bumiputra agenda issues. In this regard TERAJU will function as an agency that will propose the transformation agenda in all programmes which is undertaken by all government institutions and agencies to enhance institutional effectiveness and programmes, which has been implemented related to Bumiputra interest.

**Eradication of poverty**

Among other indicators whether a State is successfully achieve the level of sustainable development is by looking at the poverty index. Under the New Economic Policy (NEP), the Malaysian Government established a 20-year time frame to reduce absolute poverty aimed also at eventually eradicating it, and restructuring society to equalize economic opportunity for all Malaysians by eliminating the identification of economic function with race. Poverty eradication and economic restructuring remains the prerequisites to create a united and equitable society after the NEP. In this regard, United Nation Development Programme had joint-ventured with the Economy Planning Unit (EPU) in Prime Ministers’ Department and other States and relevant ministries to organize few programs such as Blueprint Development Of The Health Sector Reform And Transformation, Study to Identify Strategies and Programs to Eradicate Poverty and Improve Employment and Equity Restructuring in Sabah and
Sarawak, Strengthening Capacity in Poverty Monitoring, Policy Formulation and Evaluation and few others in order to combat poverty at all level.

In 2012, it was reported that Malaysia’s overall poverty rate dropped to 1.7% in 2012, compared to 3.8% in 2009. With this achievement, the target under the 10th Malaysia Plan to reduce overall poverty to 2% in 2015 has been achieved three years earlier. Minister at the Prime Minister was reported to say that the decrease rate of the poverty is a result of rapid economic development and the effectiveness of poverty eradication programs carried out by the Government. He said the fall in incidences of poverty happened in both urban and rural areas, with urban poverty falling to just 1% in 2012 compared to 1.7% in 2009, while rural areas registered a significant drop from 8.4% in 2009 to just 3.4% in 2012. Sabah registered the biggest reduction in poverty from 19.7% of the population in 2009 to 8.1% three years later. The minister said all states registered a reduction in poverty rates, with marked improvements in Penang, Selangor, Malacca and the federal territories – all of which averaged 0% hard core poor in their areas as at 2012. He further reported to say that the achievement is proof that the Federal Government’s initiatives to eradicate poverty have succeeded and been of benefit to the citizen regardless of differences in political ideology. Meanwhile, Malaysians enjoyed an annual increase of 7.2% to their average household income over the 2009-2012 period, or a nearly a RM1,000 hike in their average monthly income from RM4,025 in 2009 to RM5,000 in 2012. Despite similar growth rates, urban household income grew at 6.6% per annum from RM4,705 a month in 2009 to RM5,742 in 2012 while rural household income went up at a rate of 6.4% a year from a monthly average of RM2,545 in 2009 to RM3,080 in 2012.

Employment

The unemployment rate in Malaysia averaged 3% in an estimated labor force of 12.7 million, including 1.8 million documented and an estimated 1.3 million undocumented foreign workers, who have contributed to its low-wage economic growth strategy. While it has experienced impressive economic growth in the last four decades, bolstered by low wages, oil revenues, foreign direct investment targeted at the manufacturing sector, and high global demand for its commodities – especially palm oil, Malaysia now finds itself in a ‘middle-income trap’, as its inadequate financial, technological and market infrastructure and human capital have not allowed it to compete in economically higher-value-added products and services.

The Statistics Department reported Malaysia's unemployment is on the rise, with the seasonally adjusted unemployment rate at 3.4% in May 2014 compared with 3% in April 2014 and 3% a year ago. The report shows that the number of unemployed persons increased in May by 35,800 persons (8.9%) to 439,4000 against 403,6000 in April and the number of employed persons decreased by 80,900 (0.6%) to 13.04 million persons. It was reported that the labor force participation rate fell in May by 0.4% to 66% compared to 66.4% in April. The decline was due to the decrease in the number of persons in the labor market by 45,000 persons (0.3%) to 13.48 million and an increase of 110,000 persons (1.6%) outside the labor force from 6.83 million to 6.94 million persons. However, despite the fact that the unemployment rate is on the rise, Malaysia is categorized as a country with full employment under the International Labor Organization (ILO) standard. According to Human Resources Minister, Datuk Richard Riot Jaem said Malaysia was also deemed safe as it did not fall below the stipulated four per cent in the ILO standard, which indicated a country was facing unemployment issues. He further reported to say that
according to the Statistics Department, Malaysia currently has a three per cent unemployment rate, which equals to 411,400 people. However, until August, there were 422,248 people who have registered as job seekers with the Labor Department and of that figure, 233,065 (55.2 per cent) and 189,183 (44.8 per cent) were graduates and non-graduates, respectively. Human Resource Ministry through the Job Emplacement Program (3P), managed to secure jobs for 155,299 people as of August and 40,270 (25.9 per cent) and 51,611 (74.1 per cent) were graduates and non-graduates, respectively.

Education

In October 2011, the Ministry of Education launched a comprehensive review of the education system in Malaysia in order to develop a new National Education Blueprint. This decision was made in the context of rising international education standards, the Government’s aspiration of better preparing Malaysia’s children for the needs of the 21st century, and increased public and parental expectations of education policy. Five system aspirations for the Malaysian education system are access, quality, equity, unity and efficiency as highlighted in the Preliminary report, Malaysia Education Blue Print, 2013-2015. Among other shifts highlighted to transform the system is by providing equal access to quality education of an international standard; to ensure every child is proficient in Bahasa Malaysia and English language and to transform teaching profession into profession of choice.

The Malaysian education system is on track to becoming among the world’s best as stringent monitoring is in place to ensure its success under the Government Transformation Plan (GTP). The GTP report said Malaysia also ranks among the top in the world for equitable access to education. The targets of GTP 2.0 include achieving 92% enrolment at pre-schools; scoring international average in Program for International Student Assessment (Pisa) and Trends in International Mathematics and Science Study (TIMMS); and reducing urban-rural achievement gaps by 25%.

The initiatives under GTP encompass changes aimed at “three-foot horizon”, which would form the first wave of change towards the overall goals of the 12-year Malaysian Education Blueprint. Four key initiatives under GTP 1.0 include improving access to quality early childhood education, Literacy and Numeracy Screening Program (Linus), implementing high-performing schools and school improvement program, and implementing new deals for principals and headmasters. The initiatives aim to immediately arrest the decline in student outcomes and to establish a foundation for future improvements within the education sector.

CHALLENGES IN ESTABLISHING SUSTAINABLE DEVELOPMENT IN MALAYSIA

Looking at all the initiatives mentioned above taken by government to establish sustainable development in Malaysia especially on socio-economic aspect, it seems pretty on the paper. In essence, the words are in the right place but in truth the actions are not. Nevertheless, it can be argued that the implementation and supervision of sustainable development policy is not yet convincing.
Subsidies

Among other challenges for Malaysia in implementing sustainable development is due to fact that natural resources in Malaysia are awfully underpriced through subsidies like water, fuel and paddy seed. World Bank senior country economist Fredrico Gil Sander in presenting annual report on Malaysia, opined that Malaysia needs to manage its natural resources sustainably and also ensure that the transformation of its economy continues apace via deep-seated reforms under the strategic reform initiatives under the Economic Transformation Program for growth to be maintained. World Bank economists said the country had done extremely well so far in managing natural resources and spending the revenues derived from commodities to diversify into other sectors of the economy. However, spending in recent years has been skewed towards the oil and gas industry due to high prices. As a result, said the trend in diversification seemed to have slowed down. Sander said that without the rise in commodity prices, Malaysia would have experienced a current account deficit. He said the reliance on revenues derived from commodities had also been used on subsidies instead of more targeted measures to buffer vulnerable segments of the population while the economy underwent a transformation. It is further reported that the World bank is on the opinion that the country needs to overhaul its subsidy system and spend revenues derived from the boom in commodity prices on initiatives that would enable the economy to move up the value chain.

Federalism

Other than that, the second challenge spotted that may hinder the successful implementation of sustainable development in Malaysia is the issue of federalism. Malaysia continues to bebe devilled by the problem of federalism due to the fact that environmental policy is mainly a federal jurisdiction, but land encompassing agriculture, forestry, mining and water is a state jurisdiction. The power of the states over land has constrained national policy-making. There is a dire need to revisit constitutional elements to address sustainability. Exclusive power is given under Federal Constitution by stating that federal law shall prevail if there is any inconsistency with state law. The constitution has allowed the federal government to declare an area or areas of a state to be development areas. It does not provide any mechanism for safe guard and the federal government can just rely and define the term of “national interest” to justify their act. Upon this parliament may legislate on areas or even matters that fall under the jurisdiction. One may say with the provision, the division of powers between federal and states have virtually been reduced to a mere theory and that the states are being put to the mercy of the federal authorities. The provision also completes the list of options open to the federal government to encroach the states’ jurisdiction. The Lynas project can be the best example on how the current federal used their power for the ‘national interest’ regardless the unpleasant outcome to the citizen.

Unbalance division of power in the 9th Schedule of Federal Constitution between federal and states may crippled the administration of sustainable development in Malaysia, for example, forestry, fall under the jurisdiction of state, however the research and development on them are conducted by federal agencies. It gives an implication that states are assumed to be incompetent and must always put under federal supervision.

Be that as it may, it is quite apparent that thus far the problems that have undermined Malaysian federalism were not entirely legal but instead political. It cannot be denied that the future of the federation will eventually depend on politics and political system. By looking at
the current politic situation in Malaysia which few states (Selangor, Pulau Pinang and Kelantan) are now lead by the opposition, the issue of federalism will always remain unsolved and will be debated forever.

**Awareness**

Third is the general apathy among our public about the environment and sustainability. Malaysians generally lack understanding of the underlying causes of environmental problems. Continuous environmental education is necessary and should be targeting the schools in more concrete ways. Accordingly, to record any success stories of sustainable development, issues must be tackled on local, national, and international level where nations must work towards solutions agreeable by all and to protect the integrity of the global environmental and developmental system.

The implementation of 3R; reduction of waste through waste minimization, reuse and recycling must be visible and to be conducted efficiently. According to a World Bank report, the average Malaysian throws away 1.64kg of waste per day. The report shows that, this is 0.44kg of additional waste that is produced by the average worldwide city dweller at 1.2kg. At this rate, the waste production of Malaysians would increase by a drastic 65% from 10,000 tonnes per day in 2010 to 17,000 tonnes per day by 2020, filling up to the brim the capacity of two out of three landfills at Jeram in Kuala Selangor and TanjungDuaBelas in Kuala Langat by 2035.

The report further mentioned that solid waste management continues to be a costly affair with about two-thirds of the local councils’ total collected annual assessment fees being spent to manage solid waste in Malaysia. Despite that, our waste recycling rate is way below the average levels at a mere 11% of the total solid waste being produced compared to 57% in Singapore and 66% in Germany. Solid waste management is viewed as a serious business by the government as it is an Entry Point Project under the Greater Kuala Lumpur/Klang Valley (or GKL) National Key Economic Area, whereby four major initiatives are dedicated to improve solid waste management in GKL, driven by the mantra Reduce, Reuse and Recycle (3R). The solutions are actually quite simple: Throw away less, recycle more and separate waste at its source.

**Corruption**

Corruption is one of the biggest obstacles to a nation’s development. It does not only deprive the people of benefits but it adversely affects the functioning of the government administration and erodes accountability. In all, corruption cripples development by undermining the rule of law and weakening the institutional foundation on which economic growth depends. The harmful effects of corruption are especially severe on the poor, who are the hardest hit by economic decline, are more reliant on the provision of public services, and are least capable of paying the extra cost associated with bribery, fraud, and the misappropriation of economic privileges. With all this in mind, there is no doubt that corruption must be eradicated at all levels especially in the government and civil service.

The efficiency of Malaysia Anti-Corruption Commission is still yet to be proved. Malaysia took 53 spot in the Corruption Perception Index (CPI) in 2013. The country scored 50 on the survey which gauges the perceived level of public sector corruption among 183 countries. Malaysia is ranked third among ASEAN nations behind Singapore (9.3) and Brunei.
After all the measures taken by government to combat corruption, the CPI improved disappointingly by only one point from 49 last year to 50 points out of 100 in 2013. Regionally it placed 3rd, behind Singapore at No. 5 and Brunei at No. 38, but fared far better than the Philippines (94) and neighbouring Thailand (102).

CONCLUSION

Sustainable development implies the incorporation of environment concerns into planning and policies. In order to achieve the Malaysian Vision 2020, which approximately only 6 years from now, more conducive and proactive steps need to be done by the government in all aspects; be it social, economy and environment.

Considering the facts mentioned above, it can be concluded that Malaysia has a long way to go to achieve sustainability development due to the fact that the absence of the spirit of good governance. It has to be admitted wholeheartedly that there is no best way of achieving good governance, however, the following stands out as the most common elements needed or required in achieving good governance: accountability, transparency, combating corruption, participatory government, rule of law, effectiveness and efficiency, equity and inclusiveness.

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NATURAL DISASTER AND BANK CREDIT: 
DEBT WRITE OFF CASES IN INDONESIA 

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ABSTRACT 
Post-disaster brings non-performing loan impact for bank’s costumers and the law hasn’t been able to give legal assurance in the settlement; so that in arising banking cases, debtor tends to settle it with non-legal settlement. Debt write-off concept in the form of cancellation with certain terms and criteria will build people’s trust towards bank. 

Key Words: Natural disaster, Bank, Debt write-off 

INTRODUCTION 
Geographically, Indonesia is a country which is vulnerable to natural disaster. As known, earth’s surface consists of some layers called plates. These plates are moving at all times. A crash produced by these plates causes earthquake. The tremor isn’t only felt on earth’s surface. Sea surface will also move based on curvature and mound at the bottom of the sea so that can create a very big wave named tsunami. Besides that, in most area in Indonesia, many active volcanoes belong to many regions and are potential for causing volcano eruption disaster and let out a dangerous spurt of hot lava. Therefore, earthquake and volcano eruption happen to be the most frequent natural disasters in Indonesia since long time ago until now. Also, flood disaster occurs almost in every year in some areas in Indonesia. 

Natural disasters will bring about impact on human casualties, loss of properties, damage on infrastructures and facilities, and socio-economic impact that causes, especially, in the disturbance of distribution line of food and fuel. Also, exporting delivery cannot be in maximization, many industrial areas grow incapable, while the banking world will face the risk of the increase of non-performing loans in some regions. So, those natural disasters will bring about impact on banking world in the domain of lending matters, namely non-performing loan. 

Non-performing loan problem caused by natural disaster always leave post-disaster problems in banking sector, especially bad debt; there are many non-performing loan cases in banking sector in which the customers remain liable for paying off their debt. Non-performing loan, as mentioned above, due to natural disaster, is an element of unpredictability which has a sense that the debtor is willing to make a repayment, yet is incapable. This is caused by forceful situation (force majeure) that is also called overmacht. In this forceful situation, an unpredictable event occurs out of mistake of the debtor after the contract is entered into. This event hinders the debtor to fulfill his obligation before being imposed negligent and, in this case, the debtor cannot be blamed on and doesn’t have liability for that event. 

Pay close attention to this non-performing loan settlement due to natural disaster on victims, the law hasn’t given legal assurance on debtors because even though the customers are insolvent, the bank still binds them to repay the debt.
Thus, the law should be able to settle the existing conflict where law cannot be trapped in the fun of internal businesses like the determination of system, logic of regulation, and so on, which appear to be incapable to give proper response on the existing social problem. The way to use the law must be changed in order to function it well in society\(^1\) because the law is established to prosper its people. As a consequence, it takes rules to be the need of economy because, without them, people find it hard to talk about coordination of economy in society. The performance of economy itself takes sufficient rules to restrict people’s conduct so that the action of welfare among people can be achieved.\(^2\)

With the concept of debt write-off on non-performing loan due to natural disaster on customers, it is fully hoped that banking sector can unrestrictedly enlarge its expansion and can focus and concentrate more in undertaking the business with an objective to prosper the people in a country. This is in line with the concept of welfare state, in which purpose of a state is public welfare, as stated in the Preamble of Basic Constitution of Republic of Indonesia. The state is an instrument to achieve communal purpose, together with social prosperity and justice for all the people. It takes government’s attempts and readiness to restore level of stability of economy including in some disaster areas in the homeland.

**RESEARCH METHODOLOGY**

This research uses normative research methodology with book studies including statutes, judicial verdict, and doctrines related to natural disaster as *force majeure* and debt write-off.

**NATURAL DISASTER AS FORCEFUL SITUATION(*FORCE MAJEURE*) IN BANKING CREDIT**

Forceful situation (*force majeure*) is a situation which occurs not because of an element of mistake but an unforeseeable event that takes place at the time of designing, arrangement and performance of the contract, experienced by the debtor or a party that has an obligation to do the obligation in a contract, such as natural disasters (volcano eruption, earthquake, tsunami, flood, etc), weather and climate circumstances. Besides them, there also can be changes of government’s rules and policies, a labor strike or demonstration. All of those result in the late performance of obligation or contractual legal obligation both permanently and temporarily.

Forceful situation (*force majeure/overmacht*) is a term which is rarely found in statutes. If it is, it often just becomes a small part of the whole regulation. For instance, in Indonesia’s Civil Code, it is not clearly defined, however, there are two articles defining *force majeure*, namely Article 1244 and Article 1245 of Civil Code. Article 1244 of Civil Code states:

“*If there is a reason for it, the debtor must be punished to repay cost, loss and interest in the case he cannot prove it, that not in the fixed time the bond performed, due to something unforeseeable, still cannot be imposed on him, all of which there is no bad will on him.*”

Article 1245 of Civil Code states:

“There is no repayment on cost, loss and interest, if because of force majeure or because of accidental occurrence, the debtor is obstructed to give or to do something liable, or because the same things have done illegal conduct.

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\(^1\)Satjipto Rahardjo, *Biarkan Hukum Mengalir, Catatan Kritis Tentang Pergulatan Manusia dan Hukum*, (Jakarta: Kompas, 2008), page 135.

Based on those articles, it can be concluded that *force majeure* is a situation in which the contractual promise is not performed because of definite unforeseeable things, and the debtor has no option on those unforeseeable events or things.

Besides being regulated in Civil Code, the meaning of *force majeure* doesn’t escape from the attention of law experts. R. Subekti states, taken from above articles, that it can be understood that *force majeure* is an unforeseeable event, accidental, cannot be taken responsible for, compelling, which means the debtor is forced not to keep his promise.\(^3\) Related to *force majeure*, Mariam Darus Badrulzaman gives an understanding that *force majeure* is the existence of unpredictable things and it cannot be charged on somebody while that party, by all possible efforts, tries to properly fulfill his obligation. Also stated that it is the debtor who proposes force *majeure* in the case when after entering an agreement, unforeseeable things arise, and in this case, it cannot be blamed on him.\(^4\) Then, Mariam Darus Badrulzaman explains that there are three elements that should be fulfilled for *force majeure*. They are as follows: a) The situation where the obligation is not fulfilled because there is an occurrence of vanishing or destroying the physical object of bond; b) There is a factor located out of the mistake of debtor because it obstructs debtor to fulfill the obligation; c) The causing factor is unforeseeable and cannot be charged on debtor.

Observed from the criteria of *force majeure*’s time period, it can be distinguished into the following situations: a) permanent *force majeure*, which means, at anytime, the obligation remains impossible for performance, for example because object of the contract is totally destroyed; b) temporary *force majeure*, which means the fulfillment of obligation cannot be performed temporarily because of some events, for example the existence of government policy which forbids things that are not forbidden before. If then the prohibition is erased, debtor can again perform obligation.\(^5\)

According to Agus Yudha Hernoko, needs to be noticed about the nature of *force majeure* on possibility of performing obligation, namely:

1. Absolute *force majeure* (permanent) which causes the performance of obligation impossible; and
2. Relative *force majeure* (temporary) which causes the performance of obligation cannot normally be done or temporarily postponed until the fulfillment of obligation is possible.

In its development, doctrine of *force majeure* can also be meant *impossibility, frustration, impracticability*. Doctrine of *impossibility* is a failure to perform contractual obligation that can be excused if an arising unforeseeable event causes the performance of contract impossible. *Impossibility* can come up based on two following circumstances: 1) An unforeseeable event arising causes the performance of obligation physically impossible as well as the death of promisor or obligor which existence is quite vital performing contractual obligation. Physical *impossibility* is applied in the situation where certain important for performing obligation stuff is destroyed; 2) A plea based on *impossibility* can be filed if the performance of obligation is legally impossible. Easiness because of unforeseeable illegality

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\(^3\) R. Subekti, *Hukum Perjanjian*, (Jakarta: PT Intermasa, the twenty-first print, 2005), page 55.  
engulfs a situation in which the contractual obligation performance remains doable but that action would break law or order of the state.⁶

Doctrine of *frustration* applies where, due to some external event, performance of a contract becomes impossible, illegal or radically different from what was originally envisaged. If this happens through the fault of neither party, and the contract itself makes no sufficient provision for what has occurred, it is possible that the law may treat the contract as terminated. In such a case, both parties are freed from any further obligations under the contract. As for any losses already incurred, these will be allocated between the parties in accordance with principles contained in the Law Reform (*Frustrated Contracts*) Act 1943.⁷

Doctrine of *impracticability* concentrates on the emergence of situation that considerably boosts cost, level of difficulty or risk of obligation of parties. Its difference from *frustration* shows dissatisfaction of a party due to a situation disrupting original purpose of contract, while *impossibility* could get rid of a performing party’s liabilities.⁸

Doctrines of *force majeure*, *impossibility*, *frustration*, *impracticability* have a similarity which is each of them has a potential to be explained in the framework that this is meant to put aside a contract due to reasons unrelated to the existence or content of contract. Each of these doctrines has a potential to be a valid doctrine to not performing a contract due to unforeseeable event, so that performance of obligations in contract remains impossible.

Historically, the notion about the *force majeure* is having two teachings, namely objective teaching (absolute) and subjective teaching (relative). According to objective *force majeure* teaching, the debtor is in forceful situation if the fulfillment of the performance is impossible (there is an element of *impossibility*) to be done by anyone or everyone. According to subjective *force majeure* teaching, *force majeure* exists when the debtor still possibly performs the obligation but practically with big difficulty and sacrifice (there is an element of *difficulty*), so that in such situation the creditor couldn’t ask for obligation performance.⁹

*Force majeure* is seen as a situation affected by calamity that cannot be avoided properly by parties under a contract (Supreme Court Decree of Republic of Indonesia Number 409 K/Sip/1983). *Force majeure* has closed the possibilities or other alternatives for parties affected by *force majeure* to fulfill contractual obligations (Supreme Court Decree of Republic of Indonesia Number 24 Sip/1958).¹⁰

The court, in France, has an opinion in determining both the existence and non-existence of *force majeure* in the basis of “expression” which are some psychic or material obstacles excluding an insensible sense of fear or worry on something that will appear as obstacles to perform obligations by one party. *Expression* has a wider meaning than “Act of God” or “vij major”. *Vij major* itself, in Latin word, is defined as “a superior force”, which means a

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power that is bigger and more superior; a power that is irresistible (irresistible force). This may result in losses arising directly from a natural cause that cannot be avoided even though has practiced prudence, diligence, and care. Another terminology is vis divina or superior force. This is an irresistible power; an inevitable event or Act of God; a definite uncontrollable natural force, in other condition, for instance, an armed attack suddenly carried out by enemies or a robbery using violation forcefully which probably terminates someone’s liabilities in the contract entered into.\footnote{Siti Anisah, Op.Cit, page 62.}

**NON-PERFORMING LOAN DUE TO NATURAL DISASTER AND ITS NON-LEGAL SETTLEMENT**

Bank’s natural business is trading in credit and cash. Therefore, keeping and managing people’s money is a business of trust and defines banks as an institution of trust.

Credit loan in banking is truly a high-risk activity because even though bank has analyzed the propriety of a credit request and minimized risk contained in the credit loan but unforeseeable factors or force majeure are inevitable, likewise an event of natural disaster. This will give rise to the increase of non-performing loans in banks in those disaster areas.

Non-performing loan settlement due to natural disaster has not given law assurance for debtor because it doesn’t guarantee the debt write-off, in which the law, particularly banking regulations, doesn’t play enough role and it renders the debtor conducting the settlement through non-legal factors.

Tsunami natural disaster event in Aceh, in 2004, also brought its own problem where banks’ customers, as debtors, filed lawsuit against banks with a reason not being able to repay their debts due to the event of earthquake and tsunami. In Supreme Court Decree Number 1175/K/Pdt/2007 and Supreme Court Decree Number 680 PK/Pdt/2010, although judges considered the occurrence of earthquake and tsunami as force majeure, the banks’ customers remained liable to repay their debts to banks and the claim could not accepted.

Post-earthquake in Nias, hundreds of victims whose houses were destroyed, even the debtor who was dead, were asked to repay bank debts. Many members of society felt incapable and depressed by the banks’ demeanor which didn’t want to compromise. Victims of earthquake in Nias were still haunted by state owned banks’ debt because their debts hadn’t been cancelled. Their properties and businesses were in fact destroyed due to terrible calamity that occurred at the end of March 2005. The banks kept asking for repayments of the debts towards victims along with the interest and penalty although some debtors had passed away, in this case, the banks kept asking the heirs to repay their parents’ debts. There was also a debtor using his credit to build house, but because of the earthquake, the finished house was destroyed, and bank kept asking for the debt repayment. In this matter, government was considered discriminative in treating debtors as victims of Nias earthquake rather than victims of Yogyakarta and Middle Java earthquake who were granted debt cancellation. The debtors who are victims of natural disaster unable to build their businesses, facilitated by Elsaka Non-govermental Organization (LSM) through its letter on June 12th 2006 to Governor of Bank of Indonesia, also asked government, in this case Bank of Indonesia, to give special treatment in the form of debt write-off. Elsaka Agency represented 150 debtors...
victims of Nias earthquake with total credit of Rp 17,200,000,000 (seventeen billion and two hundred million rupiahs).\textsuperscript{12}

Post-earthquake in Yogyakarta and Middle Java, through Governor of Yogyakarta, people proposed non-performing loan cancellation on small and intermediate micro business proprietors (UMKM) in state-owned banks to Ministry of State-Owned Company to be submitted to House of Representatives. In the case of Yogyakarta earthquake on May 27\textsuperscript{th} 2006, Bank of Indonesia together with Yogyakarta branch state-owned banks attempted to do cancellation on failed UMKM credits due to natural disaster. Because state-owned banks didn’t dare to directly execute it, they asked for approval of House of Representatives. Approval from Minister of State-Owned Company as a government power holder and from Minister of Finance as a shareholder representing government were not enough. State-owned banks did face dilemma in executing cancellation. In one side, actually this is just a normal corporate activity that is usually done by private banks. However, in state-owned banks, because of the status of being owned by state, ambiguity arises. Owned by whose countries? Does it belong to government, the people, or House of Representatives? If Board of Director of state-owned banks was determined to perform cancellation, their action could be interpreted as having a potential to injure finance of the state. Because of that, state-owned banks had to ask permission from House of Representatives although it could be just decided by Minister of State-Owned Company and Minister of Finance as shareholders of state-owned company.\textsuperscript{13} Yogyakarta’s UMKM cancellation was finally approved by House of Representatives for 9,400,000,000,000 (nine billion and four hundred million rupiahs), but it took almost seven years to get that permission from House of Representatives.

Banks, particularly the state-owned ones, had also proposed a request of cancellation for victims of Mount Sinabung in Karo County North Sumatera that occurred in 2013, to Ministry of State-Owned Company so that the credit was totally written off including the interest in the same situation with what happened to debtors of Yogyakarta Mount Merapi eruption in the last 2010.\textsuperscript{14} The amount of credit in arrears in post majeure had reached Rp 71,663,000,000,- (seventy-one billion six hundred and sixty three million rupiahs) gathered from 2288 debtors (bank account holders). The debtors came from four districts with total amount of credit as much as Rp 71,663,000,000 (seventy-one billion six hundred and sixty three million rupiahs) or 2288 accounts of debtors with specification for Rp 71,000,000,000 (seventy-one billion) consisting of 2118 accounts equivalent with Rp 69,274,000,000,- (sixty-nine billion two hundred and seventy four million rupiahs) total credit of general banks and 170 accounts equivalent with Rp 2,389,000,000,- (two billion three hundred and eighty nine million rupiahs) total credit of rural banks (BPR).\textsuperscript{15} But the proposal couldn’t be right away decided by Ministry of State-Owned Company because legal regulation related to it hadn’t been created. Therefore, in the same situation with what happened in Yogyakarta, Ministry of State-Owned Company had to request approval from House of Representatives of Indonesia in the motive of humanity.

The occurrence of big flood in Manado a couple of years ago rendered many members of society incapable to repay credit installment to some banks as providers of their business credit. According to data of BRI Bank, from total amount of 357597 debtors that became

\textsuperscript{12}Sinar Indonesia Baru Newspaper (Medan-Indonesia), on June 14 2006.
\textsuperscript{13}T Tony Prasetiantono (Head of Research Center of Economy and Public Policy UGM), Bencana Alam dan Peran Bank, Kompas Newspaper February 17 2014.
\textsuperscript{14}Sinar Indonesia Baru Newspaper, (Medan-Indonesia) on February 20 2014.
\textsuperscript{15}Data of Financial Service Authority (OJK) Region 5 Sumatera, Medan.
victims, 8251 of them were potential debtors for non-performing credit with loan of Rp 272,800,000,000 (two hundred and seventy-two billion and eight hundred million rupiahs) out of total loan of Rp 18,200,000,000,000 (eighteen trillion and two hundred billion rupiahs). According to data of BNI Bank, total credit of Rp 5,000,000,000 (five billion rupiahs) covered 46 debtors and credit loan above Rp 5,000,000,000 (five billion rupiahs) covered two debtors with residue of 27,000,000,000 (twenty-seven billion rupiahs). Meanwhile, flood disaster in Jakarta area and its surroundings caused many non-performing loans. According to data of BRI Bank, for Jakarta 2 Office Area that was impacted by flood (Bekasi Branch Office, Radio Dalam Branch Office, Tambun Branch Office) had 254850 debtors with total amount of loan Rp 28,600,000,000,000 (twenty-eight trillion and six hundred billion rupiahs). Out of that total amount, 4847 debtors had a potential to have non-performing loan as much as Rp 583,000,000,000 (five hundred and eighty-three billion rupiahs) with an estimation of 2% NPL increase probability while Jakarta 3 Office Area (Daan Mogot Branch Office dan Jelambar Branch Office) had at least 259.885 debtors that had outstanding credit for Rp 14,600,000,000,000 (fourteen trillion and six hundred billion rupiahs). This had non-performing loan potential for Rp 252,000,000,000 (two hundred and fifty-two billion rupiahs) with total debtors of 5229 debtors and NPL increase for 1.7%. From those two mentioned areas, there was at least Rp 835,000,000,000 (eight hundred and thirty-five billion rupiahs) credit loan that wasn’t probably repaid by 10103 debtors.

Victims of Mount Kelud eruption in 2014 also demanded debt cancellation and grant of business capital relief for the victims from government. Banks credits used for farming and buying seeds and fertilizers had vanished before harvest time because of Mount Kelud eruption. Financial Service Authority (OJK), as an agency replacing Bank of Indonesia through Statutes Number 21 of 2013, only asked all banks to help impacted debtors to settle the credit through credit restructuring. According to data of OJK, the amount of impacted debtors due to Mount Kelud eruption reached 11000 debtors with credit value Rp 300,000,000,000. They were spread in seven general banks and 33 banks of people for lending matters. OJK only asked all banks to help the impacted debtors to settle the credit in the form of restructuring. OJK would assess the condition of debtors’ impacted businesses whether it’s awfully, normally, or lightly impacted. The treatment would be different. It could be repayment postponing, rescheduling, or other reliefs. It depended on each bank’s management.

Non-legal factor that was mentioned in this discourse before is the situation when government, especially government and society’s support through Non-governmental Company (LSM), takes sides in the problem. Government reconciliation on victims of disasters is an implementation of Welfare State. This non-legal factor is implemented when non-performing loan settlement doesn’t give legal assurance for debtors for not guaranteeing the write-off of their debts.

DEBT WRITE-OFF AS A CONCEPT OF NON-PERFORMING LOAN SETTLEMENT DUE TO NATURAL DISASTER IN INDONESIA

Non-performing loan settlement due to natural disaster through debt write-off is a model that can be implemented for victims of natural disaster. In banking, non-performing loan cancellation can be distinguished into two following types: administrative write-off which

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17 Quoted from Bekasibusiness.com, accessed on May 21, 2014.
doesn’t abolish bank’s right to collect; called haircut and the write-off considered as a loss which the debt cannot be collected anymore; called cancellation.  

An emergence of a norm is an important factor among a number of factors which affect debt write-off, so that debt write-off isn’t purely an economic issue but an issue of social justice and human rights. Thus, recent effort to write off debt looks challenging to accomplish. People see issues of trust as an expensive thing and can’t be achieved in Indonesia. People still expect a salvation from government and bank concerning the incapability in repaying debt due to disasters.

With a new approach of welfare state concept in Indonesia, this will bring a fresh and promising mechanism for good governance and for bank’s conduct towards debt write-off due to natural disaster. People’s welfare will be prioritized under the agenda of government. Welfare will be delegated not only for government but also in an active support within a real practice done by industry and society. Good governance integration with bank and society will bring about a better economic sustainability that will breed a better profit stability for national economy and development of Indonesia.

Concept of bank’s credit debt write-off due to events of natural disaster is in the form of cancellation with a term in which the disaster must be a national disaster stated in government’s resolution as national disaster. Definition of debtors impacted by disaster must fulfill the following criteria: a) Contract of credit is actualized before the occurrence of disaster; b) Debtors are directly and permanently impacted so that performing the obligation of repayment would be hard and impossible in which debtors’ businesses are gone, having significant dropping of revenue, or having no more prospect at all; c) Have been or will have been estimated to undergo a difficulty in repaying the fund or loan interest due to impacts of natural disaster; d) Debtors are deceased or their existence is unknown because of being impacted by disaster.

Indonesia has Constitution of Republic of Indonesia Number 24 of 2007 concerning Disaster Controlling; in Article 5 stated that government and regional government become the responsible parties in performing disaster controlling. Natural disaster, in accordance with this constitution, is disaster caused by an event or a group of events caused by the nature inter alia earthquake, tsunami, volcano eruption, flood, drought, typhoon, and landslide. National disaster is disaster caused by an event or a group of events caused by human that covers social conflict between groups or societal communities and terrorism.

Resolution of status and level of national and regional disaster as stated in Article 7 Section 2, containing the following indicators: a) the amount of victims; b) property loss; c) facility and infrastructure damage; d) the emerging socio-economic impact. Furthermore, according to Government Regulation of Republic of Indonesia Number 22 of 2008 about Funding and Controlling of Disaster Relief, government and regional government provide and give disaster reliefs to victims. Those disaster reliefs are as follows: a) grief assistance, b) disability assistance, c) amortizing loan for productive business, d) relief of basic necessities of life.

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18 Regulation of Bank of Indonesia Number: 7/2/PBI/2005, concerning Assessment of Asset Quality of General Bank  
Amortizing loan for productive business is given in the forms of productive business credit and inventory goods ownership credit. As a result, bank can give new credit for debtors impacted by natural disaster. This is in line with the concept of welfare state, as stated by Jeremy Bentham (1748-1832) that government has a responsibility to take care of the greatest number of their citizen.\textsuperscript{20} It means that government has a responsibility to please as many citizens as it has.

The write-off of the non-performing credit debt will render banks more unrestricted to enlarge expansion and to be more focused to run business with the purpose to prosper the people of their nation. This is in accordance with the concept of welfare state; the purpose of a state is public welfare as stated in Preamble of Basic Constitution of Republic of Indonesia. The state is an instrument in achieving communal purpose for the sake of social prosperity and justice for whole people. The concept of welfare state by W. Friedman contains the following four functions:\textsuperscript{21} 1) The State as provider, 2) The State as regulator, 3) The State as Entrepreneur, 4) The State as Umpire.

Good governance will create people trust towards banks whose main business is trust. Therefore, banks, as an institution that provides financial contribution and investment, will help to increase production of goods and service which will ensure the renewal of goods and service’s provision in the market, while significant contribution of credit is to provide service to people and to rise facilities of trading, production, service, and even daily consumption when all of these are meant to improve life quality of people.

CONCLUSION

Natural disaster is a forceful situation (force majeure) that permanently causes the delay of obligation performance or contractual legal obligation this is often defined as Act of God. In its development, doctrine of force majeure is also defined as impossibility, frustration and impracticability which all have potential for being a valid doctrine to not to perform contract due to unforeseeable event, so that the obligations in contract are impossible.

Law hasn’t given legal assurance to debtors impacted by natural disaster regarding their credit debt to banks. This results in post-disaster cases inter alia debtors’ legal lawsuit against banks, act of discrimination towards state-owned banks’ debtors, restructuring the credit debt without concerning the situation of debtors’ businesses, and so on. Hence, debtors attempt non-legal settlement. Non-legal factor determined in this discourse is government reconciliation which are especially government and society’s support through Non-governmental Company (LSM).

The concept of credit debt write-off in bank due to events of natural disaster is in the form of cancellation with a term or condition of a national disaster which is also stated in government resolution. Definition of debtors impacted by disaster must fulfill the following criteria: a) Contract of credit is actualized before the occurrence of disaster; b) Debtors are directly and permanently impacted so that performing the obligation of repayment would be hard and impossible in which debtors’ businesses are gone, having significant dropping of revenue, or having no more prospect at all; c) Have been or will have been estimated to undergo a

difficulty in repaying the fund or loan interest due to impacts of natural disaster; d) Debtors are deceased or their existence is unknown because of being impacted by disaster.

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INTRODUCTION

Not all of foreign award can be executed or in other words the foreign award may be refused to be implemented. One of that reasons this time has always been the basis for the rejection of a foreign award can be implemented is the contrary to the public policy principle in a country where the implementation of the award. It is set in Article V (2) New York Convention 1958 that “The recognition or enforcement of the award would be contrary to the public policy of that country.”

Contrary to public policy is the main reason a foreign arbitral award in Indonesia to be given recognition and enforceable in Indonesia in Article 66 (C) of Arbitration Law. But in Indonesia, none of the rules and laws relating that give restriction or scope the meaning of public policy, therefore, the judge is free to interpret the meaning of public order in general and turn aside the legal certainty.

Meaning of public policy should be defined and definite explanation in Arbitration Law and other regulations related so as to create legal certainty and predict the influence of the party in the arbitration decision involving them can be given recognition and can be implemented or not. Therefore, there is no explanation of the meaning of public order narrowly, the justices

ABSTRACT

Contrary to the “public policy” is the one of the main reasons for the recognition and enforcement of foreign arbitral award in Indonesia in Article 66 (C) of Arbitration and Alternative Dispute Resolution Law No. 30 of 1999 ((hereinafter referred to Arbitration Law). It follows the rules of Article V of the New York Convention 1958 in which Indonesia was ratified through Presidential Decree No. 34 of 1981. That article aims to provide a form of judge interpretation of the meaning of public order before and after the enactment of Arbitration Law, so there is no legal certainty. Therefore the meaning of “public policy” does not limit the scope described in the decree and the Arbitration Law, therefore the interpretation obtained by the decision of the Supreme Court who refused and received recognition of foreign arbitral award in Indonesia. Through the interpretation of this article, the parties involved in the arbitration agreement can predict whether their arbitration award may be given the recognition and implementation in Indonesia, but the interpretation would be turn aside the legal certainty.

Keywords: public policy, recognition, foreign arbitration award, legal certainty.
can do the interpretation of the meaning of public order through decisions exequatur petition to the Supreme Court with regard meaning of public order granted by the Supreme Court Rules. Judge interpretation of the meaning of public order existed before the enactment of Arbitration Law, then by the birth of the Arbitration Law changes occur in the meaning of public order as a result of the judge interpretation as several award from the Supreme Court.

Through this article, the author aims to summarize the scope of the current significance of public policy by the Supreme Court through its decisions before and after the birth of the Arbitration Law, so that the parties' arbitration recognition of a foreign award can predict whether it will be accepted or rejected and the parties can’t resolve their disputes in vain through arbitration which later turned out to not be implemented because it was considered contrary to public policy.

METHOD OF RESEARCH

This research is using normative legal research by library research and Supreme Court decision before and after the birth of Arbitration Law.

ARBITRATION IN INDONESIA

Law of arbitration in Indonesia can’t be separated from the history of arbitration in Netherlands. Arbitration in Indonesia was first introduced through Reglement op de Rectsvordering (Rv) and Het Herziene Indoneisch Reglement (HIR) or Rechtsreglement Buitengewesten (RBg), because the arbitration provided for Article 615 until Article 651 of Reglemen Civil Procedure (Reglement op de Rechtvordering / Rv, Statute 1847: 52) and Article 377 of the Updated Indonesian Reglemen (Het Herziene Indoneisch Reglement / HIR, Statute 1941: 44) and Article 705 Reglemen Events Regional Affairs for Java and Madura (Rechtsreglement buitengewesten / RBg, Statute 1927: 227), which in Article 615 paragraph (1) Rv, among others, determine that “Ieder kan de geschillen omtrent deregeert waarover hij de vrije beschikking heeft, aan de uitspraak van scheidsmannenonderwerpen” (“allowed to anyone, who is involved in a dispute about the rights that are within his power to release it, to submit the dispute to the termination of one or more of the referee ”). Arbitration which was originally intended for residents of the European groups be valid also for the class of Bumi Putera under Article 377 HIR / Article 705 RBg.

Article 3 paragraph (1) of the Law on Principles of Judicial Authority No. 14 of 1970 which states that "All courts throughout the territory of the Republic of Indonesia is a country of justice and determined by law" in which the description of the article mentioned that "this article (Article 3 paragraph (1)) implies that in addition to the state court, is not allowed to mention the justice-justice is not done by the state judiciary. Settlement outside of court on the basis of the peace or by the referee (arbitrage) still allowed."

Arbitration according to Gill "is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in judicial manner by another person or persons, other that a court of competent jurisdiction." According to Van Houtte “dispute in international trade are not always resolved by court, contracting parties often agree that possible disputes concerning the contract will be settled through arbitration.”

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Indonesia ratified the New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958) through Presidential Decree No. 34 of 1981 on August 5, 1981 and registered with the Secretary General of the United Nations on October 7, 1981 to be supporting the increasing foreign investment opportunities in Indonesia by having previously been enacted Law No. 5 of 1968 on the Settlement of Disputes Between States and Nationals Regarding Foreign Investment and Law No. 12 of 1970 on Amendment and Supplement Act No. 6 of 1968 on Domestic Investment. Then Supreme Court Rules (PERMA) No. 1 of 1990 on the Implementation Procedures of Foreign Arbitral Awards and the last born of Article 81 Arbitration Law and that Article 615 until Article 651 and Article 377 HIR Rv / RBg Article 705 is no longer valid.

Through those rules then there is hope for the guarantee and protection of international law that the arbitration agreement made by the parties outside the country can be implemented in Indonesia as written by Tinneke in her dissertation that "With the participation of Indonesia in the New York Convention in 1958, then foreign investors has got bail and legal protection that the award they have gained abroad can be implemented for debtors whose assets are located in Indonesia." Huala Adolf explain that “despite those positive traits that arbitration has, the efficacy of arbitration awards lies on its enforcement. Arbitration will be an effective or efficient way of the resolution of the dispute if its awards, in the end of the day, are voluntarily adhered to by the parties.” Similar with Adolf, Alan Redfern and Martin Hunter explain that “the process of resolving disputes by international commercial arbitration – a practice which increases in popularity each year – only works because it is held in a place by a complex system of national laws and international treaties.” As the above statements made by Redfern and Hunter, the arbitration decision will be effective if implemented in place a system in which there are national laws and treaties / international treaties complicated (complex). Theoretically arbitration decision binding on the parties to the dispute, as the provisions of Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides that, “each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with rules of procedure of the territory where the award is relied upon...” However, the fact that the implementation of the arbitration award has been rendered by the arbitration body is only voluntary. The effectiveness of an arbitration award requiring certainty and legal protection in the implementation, the arbitration award should still be carried out by the same

24 Tineke Louise Tuegeh Longdong, Asas Ketertiban Umum & Konvensi New York 1958: Sebuah Tinjauan atas pelaksanaan Konvensi New York 1958 pada putusan-putusan Mahkamah Agung RI dan Pengadilan Asing”, PT. Citra Aditya Bakti, Bandung, 1998, p.3., as write by Jacques Werner, in “Should the New York Convention be Revised to provide for Court Intervention in Arbitral Proceeding? “ Journal of International Arbitration, Vol.9 No.1, March 1992, page 117 : “... quite often the parties assume, without having actually checked, that the court environment in a given country will be favourable and helpful to them, particularly if they have adhered to the New York Convention and are consequently presumed to be well disposed towards the needs of modern international arbitration.”


procedure is based on the determination of the form of judgment or order of a judicial forum that has the same effect if you want to gain certainty of law in its implementation.  

With the Presidential Decree No. 34 of 1981, the Supreme Court Regulation No. 1 of 1990 on Procedures for the Implementation of Foreign Arbitral Awards and Arbitration Law then there is a legal protection for the parties to the dispute in the case of commercial agreements (commercial trade/transaction), affect that although the dispute resolution through arbitration has been known since the enactment of Rv, but no award of international arbitration institution can be recognized and implemented in Indonesia before ratified the New York Convention 1958 by Indonesia because Indonesia adheres to the principle of sovereignty accordance with Article 463 Rv which provides that a foreign court decisions can’t be executed in Indonesia.

The enforcement of foreign arbitral awards is not easy. This is because determining application execution against an arbitration award to be implemented in the territory of a Contracting State may give rise to a conflict of interest between the parties to the dispute. Keren dan Tweeddale explain that, “once an award has been given, the parties’ interests become diametrically opposed. The successful party will wish to enforce the award and the unsuccessful party will wish to prevent enforcement.” Even that issues are often discussed in the arbitration is a matter of execution of an international arbitral award itself, because basically, not all international arbitration award can be executed in a country. In addition, the manner and procedure for the execution of an international arbitral award may also vary from one country to another.

The differences and the execution procedure is then answer by the New York Convention which subsequently enacted on June 10, 1958 and to date has been followed by the 145 countries in the world to accommodate a universal setting to the recognition and enforcement of a foreign award. The presence of the New York Convention is to create a common perception, the universality of the recognition and implementation arrangements of the international arbitral award to the member States. Universality perception and regulation of the foreign arbitral awards are determined by the New York Convention, in fact, still very difficult to be implemented in the territory of a state, because of, there are differences in the manner and procedure execution of international arbitral award in various countries in the world are caused by the freedom of every Country in determining its national law with respect to the recognition and enforcement of foreign arbitral awards in particular foreign arbitration.

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29 Id.fn.P. 291.


32 Albert Jan Van Den Berg, Chef of Netherlands Arbitration Institute, Rotterdam , said that “two basic actions contemplated by the New York Convention: (1) the first action is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards; and (2) the second action contemplated by the New York Convention is the referral by a court to arbitration” as write in Albert Jan Van Den Berg, “The New York Convention of 1958: An Overview”, Commercial Arbitration Yearbook, Vol. XXVIII, 2009, p. 1

33 Jan Paulsson, Vice President of London Court of International Arbitration, said that, “broadly speaking, the New York Convention was intended to make it easier to enforce an arbitral award rendered in one
Hefin, add on the fact the difficulty of applying the recognition and enforcement of foreign arbitral award in national law in his statement “There is a tension that lies at the heart of the relationship of the courts and arbitration. On the one hand, the concept of arbitration as a consensual process, reinforced by the ideas of trans-nationalism, leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side, there is the plain fact, palatable or not, that it is only a court that possesses coercive powers which can rescue the arbitration if it is in danger of foundering.” An additional fact which makes it difficult to enforce the arbitral award is that States are free to determine any regulations concerning the recognition and enforcement of international arbitration related its public policy. Erman Rajagukguk said that “The national character of public policy indicates that the decision is up to the national country concerned. Therefore, each country can rule whether public policy and its related issues are part of the country’s public policy. Courts around the world have recognized that article V of the Convention is discretionary.”

After the enactment of Arbitration Law, ideally not be found again a significant problem to execute a foreign arbitral award in the Republic of Indonesia, because Article III of the New York Convention provides that the execution of foreign arbitral awards from state convention participants should not be more difficult than the execution of domestic arbitral award. However, until now there are still some jurisprudence of the Supreme Court's refusal to decide on the implementation of the arbitration award on the basis of its decision was based on the consideration of non-fulfillment the public policy principle force in Indonesia. The principle of public policy in which became a benchmark recognition or rejection of an arbitration award if it was going to do the execution. While in the case, there is no rule of law or limitation regarding the purpose and scope of what is included within the meaning of the principle of public order, giving rise to differences in interpretation between the judges with the other judges on the matter.

**INTERPRETATION THE MEANING OF PUBLIC POLICY ON THE SUPREME COURT DECISION**

Indonesia is a unitary state with a form of republic with a presidential government system. Indonesian civil law is based on Dutch law, in contrast to Common Law countries, the Anglo-Saxon legal tradition does not recognize the doctrine of precedent (stare decisis). Indonesia built according to the concept of Dutch law (Roman law) coupled with the concept of customary law (Adat law). After the independence of the legal establishment also

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36 Constitution of the Republic of Indonesia 1945 (the constitution) Art. 1 (2).
influenced by philosophy of Pancasila, that in accordance with Article 7 paragraph (1) of Law No. 12 of 2011 is set rank Indonesian law sources, namely:

1. The constitution of the Republic of Indonesia 1945.
2. Provisions of People Representative Assembly
3. Law / Regulation in lieu of Law (Government Regulation).
4. Government Regulations (PP)
5. Presidential Decrees (Keppres).
6. Provincial Regulations;
7. District/City Regulation.

Pancasila are (1) belief in one supreme God; (2) just and civilised humanity; (3) united nation; (4) democracy guided by inner wisdom derived from unanimous agreement of the People's representatives, and (5) social justice though Republic. Influence of Pancasila on the psyche of contemporary Indonesian should not be overlooked. While customary law is as a picture of institution diverse and unwritten provisions that applicable to certain Indonesian citizens non-urban areas. According to De Souza and Karolewski custom and customary law is the law, customs, mores and institutions of a particular community and in turn it is defined by them. Custom and customary law is unwritten and more than a pattern of behavior that is observed from the regulation system. Indigenous is the most common form of law in Indonesia, the application of customary law consistent with other relevant law causing legal pluralism. This was due primarily to the administrative approach taken in the 352 years ago when the Dutch ruled the East Indies, is seen in Article 163 of the constitution for the Dutch East Indies (Indische Staatsregeling) which divides the Indonesian population into four ethnic groups, namely (1) Europe and Japan, (2) Indigenous Indonesia, (3) East Asian (Chinese, Arabic and Indian) and (4) other groups that are not included in the other three categories. This is persist despite guarantees for the citizens of the State for equality before the law.

Therefore, customary law is included in the section Indonesian legal system, it affects the interpretation of customary law judge in understanding and assessing the appropriate scope of the public policy of New York Convention Article V (2) (b). Foreign award may be refused if the decision implementation in Indonesia that violate public policy of the principle Indonesian legal system and society. But not described in detail in the existing legislation on the limits and scope of public policy, so the court interpretation in Indonesia regarding the scope of public policy is open.

The public policy principle recognized in any legal system. Indonesia adheres Continental European legal system, where judges as decision makers in the judiciary. In terms of the recognition and enforcement of foreign arbitration, the judge has the duty to be able to find the law. One form of public policy is the constitution.

37 C.G. De Souza and M.A. Karolewski, Dispute Resolution in Indonesia, Business Opportunities in Indonesia, (Singapore : Prentice Hall, 1998).
38 Constitution 1945 Art. 27 (1).
39 Article V (2) (b) New York Convention explain that: “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: b) the recognition and enforcement of the award would be contrary to the public policy of that country.”
40 Supreme Court Regulation No. 1 of 1999 refers to “all underlying principles of the legal system and society of Indonesia.” In its identification of enforceable foreign arbitral awards.
41 Decision No. 86/PDT.G/2002/PN.JKT.PST.
In the common law system of public policy principle known as public policy, while in the civil law legal system known as the *ordre public*, one of them in France. The terms of the principle of public policy as in Dutch *openbare orde*, *vorbehaltklausel* in German, *ordine* in Italian and *orden public* in Spanish. 42

According to Julian D.M. Lew, basically the term public policy and ordre public are the same and refer to the same thing, but different content and applications. Ordre public is generally provide a wider and more freedom to apply than public policy that very limited in explaining the problems faced. 43 Until now there has been no clear definition of what is meant by the public policy principle and has a lot of writers who try to explain it, but only just thought to antagonize. Black’s Law Dictionary defining principle of public policy as follows: “broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is ‘contrary to public policy’ also termed policy of the law.”

Based on this definition, public policy is a principle and standard making body established by statute or by the court as a basis or principle that is important for a State and all of society. This definition makes clear that the principle of public policy was originally a principle known in the legal scope of the agreement or contract law. The public policy is subsequently to be a limitation in the principle of freedom of contract (*contract vrijheid*) which has been adopted by every law, both common law system 44 and civil law system. 45

The relationship between the freedom of contract principle contained in Article 1338 (1) of the Code Civil with the public policy principle are due in drafting agreements in Indonesia, although it is free to make their own contracts, but each contract must be eligible validity of the agreement in accordance with Article 1320 of the Code Civil:

1. Agreed they are joined to the contract.
2. Proficient to make an engagement.
3. A certain things.
4. Lawful reason

The fourth requirement "Lawful reason" will be limited by the public policy principle. There are several elements of the four conditions, including: *agreement without causa* (Article 1335 of the Code Civil), *for which lawful* (Article 1336 of the Code Civil) and that is most related to the cause of public order is *the forbidden* (Article 1337 of the Code Civil). 46 An agreement relating to a cause that prohibited law or contrary to good morals or public order as a condition of the objective validity of such an agreement, declared null and void. 47

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46 Id.fn, p. 80.
47 Id.fn, p. 82.
Based on the Black's Law definition that provide the use of public policy principle to assess, it is also used in the arbitration dispute resolution which was originally born as an assessor with an agreement arising from the dispute and led to the arbitration decision should be implemented. If it is not contrary to the public policy principle, such as international trade contracts that generate foreign award. Foreign arbitral awards relating to commercial agreements must be requested exequatur (recognition) from the Supreme Court through the Central Jakarta District Court, where the execution of the award shall be rejected if it is contrary to public policy in accordance with Article 66 (c) Arbitration Law.

Similarly, in Supreme Court Rules No. 1 of 1990, in Article 4 stipulates that the foreign award is contrary to public policy which can’t obtain the exequatur of the Supreme Court. Furthermore, in Article 4 (2) given a clear definition of what is meant by the public policy principle set the scope of public policy which refers to "all the principles that underlying Indonesian legal system and society." In Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara award,\(^48\) the district court rejected the exequatur (application for recognition) of Swiss award because the award is contrary to the public policy to postpone presidential the project and declare the breaches were made to protect the country from the financial crisis in Asia, in other words that the Central Jakarta District Court declared that the public policy means any act that profoundly affect the welfare of Indonesia and its people. Thus the recognition award is contrary to the purpose of the president's decision was contrary to public policy.

In contrast to the decision of Bankers Trust Co. and Bankers Trust International Plc v PT Mayora Indah Tbk \(^49\) where the Supreme Court held that any violation of the order of Indonesian procedural law is a violation of public policy. Whereas in the case of ED & F Man ( Sugar ) Ltd v. Yani Haryanto,\(^50\) Supreme Court stated that the Indonesian contract with the United Kingdom to sugar import contrary to the public policy because of Presidential Decree No. 43 of 1971 and Presidential Decree No. 43 of 1978 protect the domestic sugar industry and ban the import of sugar foreigners, meaning of public policy, including the protection of domestic industry, because if the arbitral award recognized and implemented it would lead to instability of the national economy and was forbidden under Article 1337 of the Civil Code. In addition to economic factors such as detailed, formal legal considerations are also included in the scope of the public policy as the Supreme Court\(^51\) ruling that exequatur rejected because of an order in a foreign award to stop the judicial process in Indonesia or rule of procedure in a state, thus violating the sovereignty principle of Republic Indonesia, there is no a strength foreign matter that may interfere with the ongoing legal process in Indonesia.

Thus, opening wide judge interpretation of the public policy, it will override the legal certainty principle in Indonesia. The stacking therefore need a special rule that explicitly gives the limits and scope of the public policy principles, so that Indonesia become more friendly in the execution of foreign arbitral awards territory.

\(^{48}\) Decision No. 444 PK/Pdt/2007.
\(^{49}\) Decision No. 001/Pdt/Arb.Int/1999/PN.JKT.PST.
\(^{50}\) Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST.
\(^{51}\) Decision No. 01 K/Pdt.Sus/2010.
CONCLUSION

From the description of this article it was concluded that prior the enactment of Arbitration Law, the notion of public policy is still influenced by customary law and any underlying legal system and the people of Indonesia. Meanwhile, after the birth of the Arbitration Act definition of public policy is not only about economics and non-economic factors, but also includes a formal procedural law applicable in Indonesia, Protection of domestic industry, the principle of state sovereignty, economy of state, laws in force in Indonesia, and the unwritten law in the society.

For that to be able to predict the achievement of the recognition of foreign arbitral award that involving them and in order to raise create legal certainty, the government need to create regulations that impose a limit on the scope of public policy so as not to give an opportunity for the judge to give a broad interpretation that would negatively meaning of public policy and there is no legal certainty.

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Decision No. 01 K/Pdt.Sus/2010.
INTERNATIONAL LEGAL MEASURES TO COMBAT TERRORIST FINANCING

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ABSTRACT

Following the terrorist attacks in the USA on September 11th, 2001, it was discovered that money laundering was a significant source of finance for terrorists. Although, the amount of money that involve is not as much as in drug and gun trafficking, terrorist financing has been the most important substance to be monitor. Further, various legal measures have been taken internationally in order to combat terrorist financing. This research analyses the legal measures that have been taken internationally and at EU level to combat terrorist financing. Major regulations of terrorist financing and money laundering indicated a vulnerability of legal instrument to define the linkage of money laundering and terrorist financing. Furthermore, there is also an indication of fundamental rights abuse in implementing the regulation.

Key words: Money Laundering, Terrorist Financing, International Legal measures, EU.

INTRODUCTION

Terrorism financing attach to money laundering since terrorist attack in the United States on September 11, 2001. The event gives a new power to fight against terrorism since that time. The breaking point that made it significant to be associated within the money laundering context was the effect of intimidation given by terrorist attack. In addition, before the bombing occurred, terrorism happened to be slightly associated with money laundering activity because it was suspected only involved a small sum of money rather than smuggling and drug trafficking. Nevertheless, further development noted that the attack had made a significant changing in international financial market, banking business and their regulations. The United State becomes the leading country to fight this activity since the attack and also taken it into an international character.52 However, how can we associate money laundering with terrorist activity? What are the legal measures that had been taken internationally and at the European Union level to combat terrorist financing? And finally how these legal measures could effectively counter terrorist financing?

This essay evaluates the nature of relation between money laundering and terrorist financing. In addition, it will start with the debate on the terminology of terrorism and how the terminology has been developed respectively. Subsequently, it will also describe the development of legal measure that had been taken internationally and also regionally at the EU level to fight terrorist financing.

THE LINK BETWEEN TERRORIST FINANCING AND MONEY LAUNDERING

The United Nation started to discuss the terrorist financing since the late 1990s in G8 foreign minister meeting. The objective of the meeting was to have universal convention against

terrorist financing. To gain a comprehensive understanding about terrorist financing, the termination of terrorism itself has to be universally agreed. This definition will be elaborated more in the next chapter, but in a brief, terrorism is defined as an act which intended to cause death or serious bodily injury to intimidate a population or compel a government or an international organization. Further, the United Nation Convention for the Suppression on the Financing Terrorism which defines terrorist finance in paragraph 1 of article 2 involves a broader explanation about the intention of funding and the method of funding which can be an offense by any means, directly or indirectly, unlawfully and willfully, collect or provides fund which based on their knowledge will be used to carry out a terrorism activity. This is to prevent a hole in terrorist financing definition.

Meanwhile, the termination of money laundering describes as a criminal action to process the money to be a legal source of fund by a series of transaction in order to use the money legally in financial transaction. It is meant to disguise illegal money to become a legal source of fund to conduct in a financial transaction. This process of disguising the money involves three stages: the first one will be placement, then layering and the last phase will be integration. The placement will be the most difficult part because this will be an initial stage to put the money into a financial institution. The difficulties will be in defining the legal activities which underlying the source of the money. The layering phase is maintaining multiple complex financial transactions to obscure the audit. The last phase of money laundering will be to integrate the money into the real economy to legitimate the fund in commercial transaction.

The relation between money laundering and terrorist financing occurred directly and indirectly, unlawfully and willfully intended to fund the activity. Unlawful source could be considered taken from money laundering activity. The money could be taken from lawful money and layered the process for absorbing the money origin in order to be used in terrorist financing. This activity meant to cover and protect the funder. A difficulty to capture terrorist financing is how the financial institution has to differentiate it with charity activity since charity itself is a fine undercover for criminal funding. Therefore, charity has also to be suspected as an undercover activity of terrorist financing, the source and the recipient of the fund has to be seriously monitored to fight against terrorist financing. A preventive step for this action is as the regulation which has been done by the international organization, such as United Nations, OECD, FATF, EU and every nations that had been regulated domestically in their states regarding money laundering and terrorist financing. Moreover, recently international organization evolve to gain a more comprehensive coordination among financial institution internationally and government in a domestic area.

The most recent finding of relation between Money Laundering (ML) and Terrorist Financing (TF) is through diamond trading. In total, 64 cases were received from team members or retrieved from open sources. From the cases collected displayed links between the different stages of the diamonds trade and various predicate offences. These include drug trafficking,

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fraud, smuggling, theft and robbery, large scale tax offences, forgery and fictitious invoices among other offences. Drug trafficking and smuggling were found to be the most prevalent predicate offences. Almost 50% of the cases concerned non-cash payment means. Cash as the sole method of payment was reported only in 10% of the cases. These figures echo one of the main conclusions of the report that the extent of cash usage in the trade is growing smaller. This has significance with respect to the FATF definition of Dealers in Precious Stones and the AML/CFT standards which apply to Diamond Dealers only when they engage in cash transactions with their customers.

The vulnerability of diamond transaction is identified through each level of diamond trading system. In at least 15 cases that were provided by the countries, diamonds were used as an alternate currency. As indicated previously, criminals will often purchase diamonds as a means of laundering proceeds of crime and then sell the diamonds to obtain cash at a later date or a different location. In this case, ML is engaged in to purchase the diamonds and then the diamonds are sold to recover cash. This amounts to laundering of the proceeds of crime.

“...The U.S. Department of the Treasury designated Kassim Tajideen and Abd Al Menhem Qubaysi, two Africa-based supporters of the Hezbollah terrorist organisation. Under E.O. 13224, E.O. 13224 targets terrorists and those providing support to terrorists or acts of terrorism by freezing any assets the designees have under US jurisdiction and prohibiting U.S. persons from engaging in any transactions with them. Kassim Tajideen is said to be a financial contributor to Hezbollah who operated a network of businesses in Lebanon and Africa. He has contributed tens of millions of dollars to Hezbollah and has sent funds to Hezbollah through his brother, a Hezbollah commander. In addition, Kassim Tajideen and his brothers run cover companies for Hezbollah in Africa. In 2003, Tajideen was arrested in Belgium in connection with fraud, ML, and diamond smuggling. Abd Al Menhem Qubaysi was a Cote d’Ivoire-based Hezbollah supporter and was the personal representative of Hezbollah Secretary-General Hassan Nasrallah. Qubaysi communicated with Hezbollah leaders and has hosted senior Hezbollah officials traveling to Cote d’Ivoire and other parts of Africa to raise money for Hezbollah. Qubaysi played a visible role in Hezbollah activities in Cote d’Ivoire, including speaking at Hezbollah fundraising events and sponsoring meetings with high-ranking members of the terrorist organisation.”

Diamond trade, as an international phenomenon, needed a complete and global analysis to understand and determine ML and TF threats and vulnerabilities related to this unique trade.

THE OFFENSE OF TERRORIST FINANCING

The Offense of Terrorism

The 11 September 2001 terrorist attack had highlighted a merger between money laundering and terrorist finance. However, the concept of terrorist finance has to be based on the definition of terrorism and its status under international law. On the other hand, there is a failure in the international community to have a comprehensive definition of terrorism itself.\(^{59}\) The discussion led to a number of regional counter terrorism conventions based on their own regional case assumption. The Arab Convention on the Suppression of Terrorism, 22 April 1998,\(^{60}\) and The Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999,\(^{61}\) have a similar definition on terrorism which is any act of violence or threat which intends to threaten people whether it is their association with honour, lives, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States. Meanwhile, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International

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\(^{58}\) Ibid.


\(^{61}\) The Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999 <http://www.unhchr.org/refworld/docid/3de5e6646.html> accessed 8 April 2013
Significance, 2 February 1971, defines terrorism as an act of kidnapping, murder and other assault against the life or personal integrity.  

A definition given by The Treaty of Cooperation among States Members of the Commonwealth of Independent states in Combating Terrorism (4 June 1999) which defines that terrorism a violation to juridical persons by destroying or damaging and causing substantial harm to lives or property that endanger society or to endanger public figure or statesman or representative of foreign countries or international organizations. Those definitions basically have similar understanding regarding the crime which constitutes terrorism. The main focus of them is a threatening action to harm people or state or organization through violation of their property. However, a clear definition of terrorism is an absolute demand to prevent its abuse.

In addition, terrorism is often associated with human rights violation. A great number of UN General Assembly resolution and the Commission on Human Rights claim that terrorism threatens basic human rights and freedom. This conclusion reaches from the Universal Declaration of Human Rights preamble, The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights preamble which stated that the highest aspiration of the common people is the freedom from fear. Nevertheless, terrorism is various in motives and it follows the evaluation of its criminal responsibility. Regarding various definitions of terrorism, the Resolution of the Security Council seems to be not concerned to the definition of international terrorism even after the awake of 11 September event. Moreover, they seem to be satisfied with the definition given by previous conventions, such as the Ad Hoc Committee and the Sixth Committee which produced the International Convention for the Suppression of Terrorist Bombing.

However, the recent definition of terrorism resembles more to the definition given by various regional conventions, which exclude the consideration of a political, philosophical, ideological, racial, ethnic, religious or of any other similar nature. The main attention of terrorism definition recently is to the human rights aspect which is the freedom from fear. As a consequence the Declaration on Human Right and its protocol could be applied for terrorism activity, although the Rome Statute does not create a jurisdiction for terrorism specifically. The issue arises when there is an absence in defining universal terrorism is that this caused a problem in defining a universal terrorist financing.

Another approach to define terrorism is by integration of the terminology of terrorism into an organized crime action, this collaboration occurred since the 9/11 attack. The connection between those two terminologies is on the fatal evidence of the activity and the connection with financial institution to support their activity. Soon, it is understood that terrorism

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62 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 2 February 1971 <http://www.oas.org/juridico/english/treaties/a-49.html> accessed 8 April 2013
63 The Treaty of Cooperation among States Members of the Commonwealth of Independent states in Combating Terrorism, 4 June 1999 <http://www.unhcr.org/refworld/publisher,CIS,,47fdfb290,0.html> accessed 8 April 2013
64 Ben Saul, ‘Defining Terrorism in International Law’ (2006) 28
65 Ibid 29
66 International Convention for the Suppression of Terrorist Bombings, December 15, 2007 <http://www.unhcr.org/refworld/docid/3b00f34e0.html> accessed 8 April 2013
67 Ibid
endangers world in a wider term, the goal of this activity is to create fear by creating chaos and massive disaster. Due to this matter, States and organizations gives their effort to coordinate more closely to fight against this problem.

**Offense in Terrorist Financing**

The International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 has been the legal statute to criminalize terrorist financing and that the bank secrecy is no longer an adequate justification to refuse cooperation on this matter. However, convictions and evidence are very difficult to obtain. This is as a result of numerous individual actors and collective agency which can be involved. The difficulties will be in distinguishing criminal funding with legitimate charity. Respectively, this will make the law enforcement easier if the combating action done by local government and conducted domestically through banking and financial institution coordination. This action had success in several countries, for examples in United States, the United Kingdom, Sweden and Indonesia.  

The offense in terrorist financing is defined in article 2(1) of The International Convention for the Suppression of the Financing of Terrorism of 9 December 1999. There are two main elements with regards in the offense of terrorist financing. The first is ‘financing’, which define as directly or indirectly as to prevent any loopholes. The second element is **Mens Rea**, which is defines in two ways. First, the unlawfully and willfully criteria in termination of providing the fund have to be obtained. Secondly, the fund have to be collected with the intention that it will be used or knowledge to be used in part of in full to carry out a terrorist activity. In the other hand, even though the money does not reach the terrorist organization, funder could be charge by attempting terrorist finance.

From 2002 until 2013 Indonesia has prosecuted more than 600 terror criminals. Moreover, with the new enactment of Indonesian law number 9 year 2013 on the prevention and suppression of terrorist financing has lays down a legal foundation for implementing the 1999 International convention on the suppression on the financing of Terrorism, as has been ratified by the government of Indonesia in 2006. Furthermore, article 4 of this law has also provide the two main elements with regards in the offense of terrorist financing. The first is ‘financing’, which define as directly or indirectly as to prevent any loopholes. However, this law only focused on terrorist financing and has not indicated a link between money laundering and terrorist financing in the same direction and there is also possibilities that such transaction as diamond trading could be used as substitute of money, thus means the identification through banking system or banking regulation could not be done. Therefore, a further analysis has to be done by the government in order to gain more comprehensive criteria of offences in terrorist financing.

**INTERNATIONAL FRAMEWORK TO COMBAT TERRORIST FINANCING**

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70 Ibid
The scale of the attack in United States on 11 September 2001 led to international awareness to fight terrorism and associated it with money laundering activity to make barrier in terrorist funding.

**United Nation**

In the late of 1990s, terrorism and its funding have been discussed within the United Nation (UN). Further, it was in 9 December 1999 that the UN General Assembly adopted the final text of international Convention for the Suppression of the Financing of Terrorism. The objective of the convention is to oblige the member states to criminalize the act of terrorist funding collection and empower the national legal system to address this issue. After 11 September 2001, UN Security Council called all states to become parties in this convention.³²

The initial concrete action taken by The United Nation to combat terrorism after the bomb attack was the setting three important resolutions by the Security Council. The United Nation Security Council (UNSC) sets up resolution 1368³³, 1373³⁴ and 1377³⁵. Those resolutions determine the UN standing position which affirmed their self defense against terrorism activities and defined it as an activity which threatening international peace and security. The UNSC endorsement on 28 September 2001 of Resolution 1373 was the legal standing to the establishment of Counter Terrorism Committee (CTC) to monitor the implementation of this UNSC resolution. The focus of the committee is to combat terrorism in seven critical areas: legislation, financial assets controls, customs, immigration, extradition, law enforcement and arm traffic.³⁶ Further, this resolution followed by resolution 1390 in January 2002³⁷ which creates an international obligation to combat terrorist financing acts by imposing a universal basis to national criminal basis system.

In addition, the international convention for the suppression of financing terrorism was adopted and entered into force on 10 April 2002 by the United Nation General Assembly in New York.³⁸ To create a terrorist finance considerably a challenge, the consensus supported a creation of new substantive offense of terrorist financing. It reaches a narrow understanding to treat people who finance a terrorist activity as severely as those who conducting terrorist offense.

**FATF**

Preventive action against terrorist financing associated the activity with anti money laundering measures. Thus, it created a great harmonization between anti money laundering and combating the financial terrorism by capturing potential money launderer and terrorist financiers by setting coordination between financial institution and governments.³⁹ This is a

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³² Toby Graham, Evan Bell, Nicholas Elliott, ‘Money Laundering’ (2003) 34
³⁶ Ibid
complex problem, since the financial institutions, such as banks have their own secrecy banking laws which make it difficult to trace funding for criminal activity. This situation led to the emergence of the main actor to overcome this problem, the Financial Action Task Force (FATF), an inter-governmental body to combat the using of financial institution for their criminal activity was formed in 1989 by G-7 summit in Paris. The organization initially formed to examine and develop measures on anti money laundering. However, the focus of FATF started to include the combat of terrorist financing from October 31, 2001.

The FATF first issued forty recommendations in 1996 to set up anti money laundering in international framework. FATF is a policy making body and since 2001 it had issued 40 recommendations and nine special recommendations regarding terrorist financing. Further this recommendation was revised in 2003 into a more comprehensive framework for combating money laundering and terrorist financing. The recommendations remain up to date and the latest recommendations were renewed in 2012. Those recommendations are not binding but it has followed by many countries. The recommendations regarding terrorist finance are as follows:

1. SRII Terrorist Financing offence
2. SRII Targeted financial sanctions related to terrorism and terrorist finance
3. Targeted Financial Sanctions related to proliferations
4. Non Profit Organization

The amendment is become simpler and more targeted related to terrorism, and it also ensures that each country could apply this measures.

**European Union**


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81 Ibid 451
drugs trafficking process. But, after the attack of 9 September, EU response by issuing the 2001 Directive (Directive 2001/97/EC), which amended the 1991 directive by involving a wider criminal offenses as known as ‘serious crime’, such as drugs trafficking, organized crime and corruption. Moreover, the directive also included terrorist financing specifically. Moreover, the analysis in particular also considers the Third Directive on anti-money laundering and combatting terrorist financing (Third AML/CFT Directive), the EU-US Terrorist Finance Tracking Programme (TFTP) and the European Terrorist Finance Tracking System (EU TFTS).

The preventive action in money laundering process which is not change is the directive regulation on the implementation of more detail customer identification and verification procedure. This procedure is to ensure the uniform and manageable implementation. The customer identification and reporting suspicious transaction involve € 15,000 or more or in more than one transaction which the accumulation of the total transaction is € 15,000 or more have to be reported by the bank to the competent national authority.

THE EFFECTIVENESS OF INTERNATIONAL LEGAL FRAMEWORK TO COMBAT TERRORIST FINANCING

The original idea of the objective of money laundering is simply to place money into the financial (banking) system in a way that successfully disguises its origin, whether legal or illegal. Money laundering as a crime was initially established in the US and in Britain. However, most of the regulation was held in bank secrecy rules in banking law. The United Kingdom was the pioneer which incorporated money laundering regulation with anti-terrorism legislation to combat terrorist financing in 1986 legislation. As had been discussed in previous section, FATF was created as a part of international effort to eliminate money laundering.

As financial institutions have put anti-money laundering (AML) measures into place, the risk of detection has become greater for those seeking to use the global banking system to launder criminal proceeds. A particular challenge for researching money laundering / terrorist financing methods that may involve legal professionals is that many of the services sought by criminals for the purposes of money laundering are services used every day by clients with legitimate means. Organisations representing legal professionals and some academics have sometimes criticized claims that legal professionals are unwittingly involved in money laundering. They have questioned whether it is even possible to identify key warning signs which might justify imposing anti-money laundering/counter financing of terrorism requirements on legal professionals and even whether this might be an effective addition to the fight against money laundering and terrorist financing.

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90 CF Alex[n28] 150
92 Ibid.
Aligned with those analysis there is also an evaluation of the EU measures to combat terrorist financing including but not limited to a “European Terrorist Finance Tracking System” (EU TFTS), while also considering the impact on fundamental rights. Two separate sets of developments concerning the EU’s two main instruments to combat terrorism financing inform the request for this evaluation. First, a renewed phase of politicization of the Terrorist Finance Tracking Programme (TFTP) took place due to the revelations from 5 June 2013 onwards in media outlets worldwide on numerous NSA spying programs. These revelations led to the adoption of the European Parliament’s resolution of 4 July 2013 which suggested the possible suspension of TFTP agreements with the US in order to obtain full information on ongoing surveillance programmes and the suspension or revision of any laws and surveillance programmes that might be violating the fundamental right of EU citizens to privacy and data protection, the sovereignty and jurisdiction of the EU and its Member States, and the Convention on Cybercrime.

A second and firmer call for the suspension of the TFTP agreement was voiced by several MEPs from 9 September 2013 onwards, when amongst others the Brasilian channel Globo TV, Der Spiegel and the Washington Post revealed that the NSA was also involved in the surveillance of SWIFT. A written exchange between Cecilia Malmström, European Commissioner for Home Affairs and David Cohen, Under-Secretary of the US Department of the Treasury for Terrorism and Financial Intelligence, followed between 12 and 18 September and led to the start of consultations and an inquiry by the European Commission into this matter. Yet, in following declarations the European Commissioner expressed that the NSA has not had access to the SWIFT data. Deeming the new revelations a breach of the EU-US TFTP agreement, the European Parliament called for its suspension in its resolution of 23 October 2013. The recommendation for suspending the EU-US TFTP was reiterated in the EP report on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs (known as the Moraes report) published on 21 February 2014 and in a resolution taken by the European Parliament on 12 March 2014. Moreover, on 27 November 2013, the European Commission published Joint Reviews on the processing and transfer of Passenger Name Records, on the value of TFTP provided data, on the functioning of Safe Harbour, and a communication on the European Terrorist Finance Tracking System (EU TFTS).

A key concern in EU and all citizens around the world is that of financial privacy. If perhaps account information and financial transaction records offer unprecedented insight into a person’s movements and networks, it also contains sensitive information on an individual’s daily life. Important life events such as weddings, funerals or moving house are often accompanied by significant financial transactions. As the use of debit card payments is becoming more commonplace – instead of bulk cash withdrawals – financial transaction information entails ever more minute insight into an account holder’s preferences and patterns. If click-stream data build a record of one’s interests, financial data show what one actually spends money on. This does not go unrecognised by banks themselves: Dutch bank ‘ING’ has recently launched a plan to share financial transaction data with commercial parties for a fee. ING’s plan caused quite some debate in The Netherlands, and illustrates the necessity for a European-wide discussion on the nature of financial privacy. Unlike with social media, citizens cannot choose to disengage from the financial system. One simply cannot opt out of having a bank account in modern life. This special position of the banking system in citizens’ daily lives has to translate into special responsibilities when it comes to safeguarding clients’ privacy. This is not just a matter of individual privacy, but also of
fostering the conditions of a democratic society. In line with that matter, Indonesian Banking law also regulate about bank secrecy, but it also have to be excluded if there is an indication of Money laundering activity or any criminal activity. Thus, means that bank’s customers could not have any option other than respect the regulation.

Furthermore, the effectiveness of measures to combat terrorism financing remains disputed. A common place complaint from the banking industry is that their substantial investments into compliance departments is not matched by government feedback on the usefulness of their reports in actual criminal investigations. Similarly, though the recent EU-US review report on the Terrorism Financing Tracking Programme (TFTP) describes a number of important case examples, too little is publicly know concerning the way the TFTP has actually worked to help arrest suspects and bring them to justice. As this report shows, the use of financial data within this programme is not fully targeted but potentially exponential. Other questions relate to the transparency, accountability and foreseeability concerning the identification of suspicious transactions and the freezing of funds. Under the risk-based approach, banks have come to play an important independent role in the work of security. Not all banks implements the requirements in the same way, which raises questions of foreseeability for banking clients.

Moreover, the debate often indicate that the Financial Action Task Force (FATF) having the biggest deficiencies in regulating the offence include the incomplete criminalisation of terrorist financing and an incomplete mechanism for freezing terrorist assets. On the other hand, tracing the sources of terrorist financing through money laundering mechanism also bring up problems. Such as diamond transaction which is hard to trace and charity foundation fund sources which even harder to trace. However, suspicious transaction that has to be reported by banking system might cause barriers to such transaction. Subsequently, since the regulation evolved, criminals also evolve and become more aware to their activity. Therefore, law has to accommodate each details and possibilities of the activity.

CONCLUSION

The interest for pursuing terrorist money did not arise from the events of 9/11. From the mid-1980s, the conception of terrorism was progressively and actively reframed and became understood as a crime rather than a political struggle through violent means. Although still considered as a relatively marginal issue, the fight against terrorism financing was given substance in the 1990s via UN economic sanctions against, first, a number of countries suspected of sponsoring terrorism followed by designated entities and individuals. The 1999 UN Convention for the suppression of terrorism financing led to a broadening of the definition and a criminalisation of terrorism financing. In the same period, combating terrorism financing became also part of the follow-the-money strategies against drug traffickers and organised crime. Current CFT measures still embody these dual origins of freezing assets on one hand and monitoring and tracing money trails on the other.

What changed after 9/11 was, first, the political urgency and importance given to measures to combat terrorism financing. Considerations that were more important prior to 9/11 – the deregulation of financial markets, respect for civil liberties, on-going discussions over the insignificance of the amounts of money involved in terrorism and the (in)effectiveness of international sanctions, combined with the absence of major terrorist attacks – were suddenly overshadowed. Second, given the political momentum and the technical possibilities, the adoption of financial surveillance measures based on massive amounts of financial data from
the modern banking and credit industries, ‘smart’ software, public-private cooperation and the promise of prevention, became acceptable.

Immediately after 9/11 combating terrorism financing became a ‘core component’ of the international and European efforts to combat terrorism and its financing. The first public reactions of EU representatives immediately stated that both terrorists and their financiers must be targeted to make an end to terrorism. The investigation of financial flows and banking data is believed to be a powerful tool for tracking mobile suspects, providing reliable information compared to other forms of intelligence, uncovering identities and locations, providing insights in networks before terrorist acts are committed.

The event of terrorist attack on 11 September 2001 had awakened awareness to fight terrorist financing. It is believed that terrorism is an activity that endangers international security. Due to this reason, the funding is an important element to be monitor and materialized as a criminal offense. The source of funding of this illegal activity came from money laundering. Although, the amount of money that involve is not as involve as in drug and gun trafficking, terrorist financing had been the most important substance to be monitor. Initially, it was in 9 December 1999 that the UN General Assembly adopted the final text of international Convention for the Suppression of the Financing of Terrorism. It continues to be adopted by any other international convention and domestic regulation to make terrorist finance into criminal action. In addition, EU had also materialized this through Council Directive 91/308/EEC in 1991, Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 and the European Parliament and the Council Directive 2005/60/EC in 26 October 2005. However, this awareness creates great challenge, because it needs a great intention and commitment from every nations and financial institution all around the world to coordinate and agreed to fights terrorist financing.

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Journals


THE PROTECTION OF PECALANG AS A SECURITY OFFICER
AT CONFERENCES (BETWEEN FUNCTIONS IN THE CUSTOMARY VILLAGE
AND AS AN EMPLOYEE)

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ABSTRACT

Pecalang is a unit of traditional security officers in Bali, who have the authority to maintain
the order and security in the region of customary village. This research is normative legal
research. Legal materials derived from primary legal materials, secondary legal materials,
and tertiary legal materials. Pecalang as an instrument for securing the customary village is
the unity of the traditional safeguards of every customary village in Bali in charge of
maintaining the order in their village. The existence of the pecalang in securing the
conference is a requirement of the event organizer. Pecalang as a non-permanent employee
in securing the conference employed only in a specified period that is prior to and during the
conference. As non-permanent employees then pecalang are entitled to protection.

Keywords: Pecalang, Security, Employee, Protection of employee.

PRELIMINARY

Customary law in Bali94 knows the security system based on a local community. That
security system is conducted by pecalang. Pecalang is a security organization unit that is
structurally under customary village organization95 in Bali. In normative, the existence of
Pecalang is regulated in Bali Provincial Regulation No. 3 of 2001 concerning the Customary
Village. Based on Article 1 paragraph 17 Bali Provincial Regulation No. 3 of 2001
concerning the Customary Village, “Pecalang satuan petugas keamanan tradisional
masyarakat Bali yang mempunyai wewenang untuk menjaga keamanan dan ketertiban
wilayah, baik di tingkat banjar pakraman dan atau di wilayah desa pakraman” (Pecalang is
a unit of Balinese traditional security officers who have the authority to maintain security and
order in the region, both at the Banjar or customary village).

At first, pecalang only served to set the order at religious ceremonies in Bali, but in its
development, pecalang often became involved in activities outside of religious activities. It is

93 Can be contacted by gdewiryawan@yahoo.co.id or bunga8287@yahoo.com
94 Bali is one of the provinces in Indonesia are still using traditional law as a source of law in the
region. The status of customary law is recognized and respected throughout not conflict with national law. This
is confirmed in Article 28 paragraph (2) of the Constitution of the Republic of Indonesia which states “The State
recognizes and respects units of customary law community and their traditional rights of all are still alive and in
accordance with the development of society and the principles of the Republic of Indonesia, the regulated by
law.”
95 Article 1 paragraph (4) the Regional Regulation of Bali Province Number 3 of 2001 concerning the
Customary Village jo the Regional Regulation of Bali Province Number 3 of 2003 concerning the Amendment
to the Regional Regulation of Bali Province Number 3 of 2001 concerning the Customary Village states that a
customary village is ‘a customary law community in Bali Province, which has a united tradition and social
etiquette of Hindu teaching embraced by generations in the bonds of kahyangan tiga or kahyangan desa
(temples of three nirvanas). It has a specific area and its own property as well as its own rights to independently
take care of its domestic affair’.
based on Article 17 paragraph (1) Bali Provincial Regulation No. 3 of 2001 concerning the Customary Village stating that “keamanan dan ketertiban wilayah desa pakraman dilaksanakan oleh pecalang” (safety and order in the customary village is implemented by pecalang). Thus pecalang are involved in various activities carried out in its territory.

Pecalang involvement in securing a region is also done at a conference. For a meeting of national and international scale, pecalang is a synergy for the police in securing the conference area. Pecalang help smooth traffic for conference participants, escort and conduct checks when entering the conference. Security tasks involving pecalang have considerable risks. Security conferences especially international conferences, are often faced with the threat of terrorism. On the other hand, the protection of pecalang as an employee is unclear yet. It is caused due to a view that pecalang can not be categorized as an employee because Pecalang only work within a relatively short time period.

This paper will discuss Pecalang as an instrument for securing the customary village and the existence of the pecalang in securing the conference. The discussion will be followed by research about pecalang as a non-permanent employee in securing the conference, and the policy of pecalang’s protection as an employee. The protection of employees covers the types of the protection of employees, the responsibility of the protection of employees, and supervision of the protection of employees. The study ends with conclusions and suggestions to these problems.

**RESEARCH METHODS**

The type of this research is the normative legal research. This type of research is consistent with the character of law. Legal science has a special character. A characteristic of law is a normative nature. The problem in this research is the norm ambiguity about whether pecalang can be categorized as employees or not. The study was conducted through analytical and conceptual approaches and also the statute approach. Approach to the analysis of legal concepts (analytical and conceptual approach), is done by analyzing the notions and concepts related to Balinese customary law, security system and the protection of employees. The statute approach is done by analyzing the legal issues through legislation.

According to Soerjono Soekanto and Sri Mamudji, a normative legal research relies on the use of primary legal materials (materials that are binding law), secondary legal materials (materials that explain the law of primary legal materials) and tertiary legal materials (materials that provide legal instructions or explanation of primary and secondary legal materials). Primary legal materials include The Constitution of The Republic of Indonesia of 1945, The Act No. 13 of 2003 concerning Manpower, The Regulation of Manpower Minister of The Republic of Indonesia Concerning Non-Permanent Employee and Bali Provincial Regulation No. 3 of 2001 concerning the Customary Village etc. Secondary legal materials were obtained from books, journals, articles that are relevant to the issues discussed. Legal materials were obtained through library research. Analysis of legal materials are by description and argumentation techniques. Description technique is the basic technique of analysis that can not be avoided. Description means the explanation of condition or position of the propositions of law or non-law. The argumentation technique is done by

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giving the reasons that are legal reasoning. In the discussion of legal issues more and more arguments further demonstrate the depth of legal reasoning.

PECALANG AS AN INSTRUMENT FOR SECURING THE CUSTOMARY VILLAGE

The customary village in Bali is inseparable from the customary values and culture. It is based on the Hindu philosophy, Tri Hita Karana. Tri Hita Karana is a philosophy that consists of parahyangan, ie the balance of man and God; palemahan, the balance between man and man, and; pawongan, the balance between humans and the environment.98 The concept of balance is an important part in creating harmony to human life. Therefore, every member of the Village Pakraman shall implement measures aimed at creating a balance.

Customary village is a traditional institution; it has autonomy to organize its government. One characteristic of the right to autonomy is that the customary village can make a special security force, called pecalang. Pecalang has been known by the people of Bali since the days of the Kingdom of Dalem Waturenggong. The history of pecalang’s formation in Bali started in the 10th century, after the arrival of Pancapandita MPU Kuturan. Based on I Nyoman Sirtha’s opinion, the term of pecalang, derived from the word “celang” meaning keen senses, especially the sense of sight, hearing, smell and feeling. Pecalang constable in customary village has the task of maintaining the security of the environment in customary village region. Therefore, in carrying out their duties, pecalang are always watchful and alert to the danger that threatens their village.99

At first, the pecalang were only on duty incidentally in certain moments such as in maintaining order during the religious ceremony. After pecalang mentioned in Bali Provincial Regulation No. 3 of 2001 concerning the Customary Village then each customary village can make pecalang organization a permanent institution.100 Explicitly in Article 17 of Bali Provincial Regulation No. 3 of 2001 concerning the Customary Village it is mentioned:

(1) Security and order in customary village implemented by pecalang.

(2) Pecalang perform the security duties in the region, in relation customary and religious duties

(3) Pecalang shall be appointed and dismissed by customary village based on community meeting.

Pecalang is an organization in customary village which has an obligation to maintain the security. The membership is elected by the members of customary village through the process: first, Prajuru (the committee of community elders in a customary village) based on awig awig (Balinese customary law), customary village sets the number of Pecalang that they must have in accordance with the needs of each village; and second, Prajuru (the committee of community elders in a customary village) set the number of pecalang chosen by each banjar pakraman if in customary village there are more than one banjar pakraman and if customary village consists of one banjar pakraman, pecalang will be selected in accordance

with the requirements of customary village; third, the holding of Paruman (the community meeting) to choose pecalang and; fourth, Prajur (the committee of community elders in a customary village) set pecalang election results that have been approved by the Paruman (the community meeting).

Pecalang are elected from the villagers. The Pecalang election process is not based on personal desire but based on the choice of the entire members of customary village. The member of the customary village who is elected as pecalang, makes pecalang a form of devotion to customary village. In carrying out its duties, pecalang does not earn wages, but they are granted privileges. Pecalang can be compensated for the release of all matters relating to the duties of citizens. Form of compensation is known as luput. The members of pecalang do not have to pay contributions and are not obliged to mutual assistance of others, but with consequences they must be ready at any time to serve if there is a traditional activity in their village. However, in some particular places, the pecalang earn wages that are calculated according to the daily performance. Along with the development pecalang’s function that works out religious activities, then pecalang are entitled to wages for the work done in securing the area concerned.

The problems in the customary village are more complex causing pecalang’s function to be developed. Pecalang’s function is no longer confined to securing the implementation of Hindu ceremonies, but also helps prajuru to enforce Balinese customary law and help the police and also security forces in creating order in the village. This condition becomes pecalang early involvement as a means of securing conferences. Along with the development of pecalang’s function that works out in religious activities, then pecalang are entitled to earn the wages for their work in securing the area concerned.

The Existence of The Pecalang in Securing The Conference

The Bali province is one of the provinces in Indonesia with an area of 5636.66 km2 or 0.29 percent of the total area of Indonesia. Bali province consists of six mainland regions (islands); the largest island is Bali, Nusa Penida island, Ceningan island, Nusa Lembongan island, Menjangan island and Serangan island. In the appendix of Bali Provincial Regulation No. 8 of 2009 on the Medium Term Development Plan of Bali Year 2008-2009 mentioned, administratively, Bali province consists of 9 regencies / city, 57 districts and 701 villages / wards. Based on the relief and topography, in the middle of the island of Bali lies the mountains that extends from west to east and 4 lakes located in the mountains of the Lake Beratan, Lake Buyan, Lake Tamblingan and Lake Batur.

The nature and Balinese culture strongly supports the growth of the tourism sector which has directly led to the rapid development of the tourism industry. The tourism industry in Bali provides employment opportunities for the Balinese people and the people outside Bali. It can be seen that the increase in the population of Bali is quite significant. Based on the results of the population census in Bali, in 2010, the population growth rate has reached 2.14 percent, in the past 10 years. As an island with an area that is not too large, the population of Bali in the 2000 census was 3.15 million, rising to 3.89 million in 2010.

101 “Swadarma dan Sasana Pecalang Perlu Dirumuskan”, Bali Post, Jumat 3 September 2004
102 Badan Pusat Statistik Provinsi Bali (BPS), Statistik Daerah Provinsi Bali 2010, 2010, BPS, Denpasar, p. 1
Measured quantity, the role of tourism is quite evident as the backbone of development in Indonesia.\textsuperscript{104} This industry without chimneys has employee absorption and high income which increases the contribution to the gross domestic product. Since 2001 tourism has accounted for about USD 5.4 billion and Bali contributes 40% and this still increases. In 2004, the tourism sector contributed $ 534,290,000 to foreign investment and $ 312,625,000 for domestic investment. Other tourism contributions may be reflected in Presidential Decree. 7 of 2005 concerning the Medium Term Development Plan (Plan) that the fact that in 2002 tourism has become the second largest foreign exchange earner after oil and gas exports.\textsuperscript{105}

Bali is one of the favorite places to host international conferences. This event is actually classed as one of the trips. Some of the international conferences held in Bali such as the the 29\textsuperscript{th} International Drug Enforcement Conference (IDEC) in Nusa Dua, the United Nations Framework Convention on Climate Change (UNFCCC) in December 2007, the 16\textsuperscript{th} Movement Ministerial Meeting non Aligned in 2011. Currently the Bali Provincial Government is preparing the implementation of the High-Level Conference on Asia-Pacific Economic Cooperation (APEC Summit) XXI of 2013 and will be held at the Bali International Park in Jimbaran, Kuta Bali. Bali also briefly hosted the ASEAN Summit and the East Asian Summit which was attended by several heads of state of member countries of ASEAN and the East Asian Summit. These included the President of USA, Barack Obama, President of China, Hu Jintao, President of Russian Dmitry Medvedev, Prime Minister of Australia, Julia Gilard, Prime Minister of Thailand Yingluck Shinawatra and President of Philippine Benigno Aquino.

The existence of conference will create the employment opportunities both directly and indirectly related to the needs of people. Fulfilment of human needs in the tourism industry has become labor intensive.\textsuperscript{106} This is because the tourism industry not only causes direct employment associated with tourism but also creates employment in areas that are not directly related to tourism.\textsuperscript{107} Conferences which are held in Bali certainly have benefits for the local community, because the conference provides employment opportunities for them. The conferences that are often held in Bali can not be separated from the security factors by the organizers. In the implementation of the conference security systems, organizers involves two components namely the security from the government and from the local community. Security of the government is implemented by the the Police of the Republic of Indonesia and the Armed Forces of the Republic of Indonesia, while the security of the local community by Pecalang. Significantly, organizing a conference in Bali is the momentum of the rise of the image of Bali as a region that has been the target of bomb attacks in 2002 and 2005, with pecalang participate in it.\textsuperscript{108} At the conference, pecalang always have been involved in the security area in the form of co-ordination or in the security directly.

Pecalang not only work on the current customs and religious activities but also on the government’s events. It has become a common phenomenon in Bali. Pecalang involvement in

\textsuperscript{105} \textit{Ibid.}
\textsuperscript{106} R.G. Soekadijo, \textit{Anatomi Pariwisata, Memahami Pariwisata Sebagai Systemic Linkage}, 2000, Gramedia Pustaka Utama, Jakarta, p. 274
\textsuperscript{107} \textit{Ibid}
securing the conference is in accordance with the vision and mission of the pecalang. Pecalang have the vision to maintain social and religious harmony. The mission is to create the harmony in sukertaning palemahan, pawongan and parahyangan (harmony between human relations with God, human relations with human and human relations with the environment). The responsibility of pecalang is expected to be, and gives examples to the villagers. 109

In the extension of pecalang function, then pecalang also have a role in maintaining security at the conference in Bali. The role of pecalang is seen at the security events that are held out door in their customary village, eg outdoor gala dinner. Pecalang must exist at the international conferences to enforce nuisance policy and stop any disturbance to the local community, like fray or congestion. International conferences tend to cause systemic congestion in areas where the conference take place and the areas through which the delegates travel. Therefore, pecalang can help the police to regulate traffic and parking areas at the conferences.

At the conferences, the events are not only in the hotel room, but also in open areas such as a city park. Even delegates also frequently visit directly to work areas which are discussed at the conference such as road construction projects, forest, rice field area, a cultural tourist destination, local handicraft industry center and so on. The organizer of conferences in the area requires permission from the local community in that area. Organizers are also obliged to respect the rules that exist in the customary village. To implement these conditions, the organizers and the police on duty in securing the conference should coordinate with pecalang.

The authority of Pecalang in securing the conference is in line with police coordination. Head of Public Relations of Bali Police, Kombes Pol Antonius Samuel Reniban, Sm.IK. stated that when viewed from the regulations, pecalang should not be used in international security activities. Pecalang involved in such activities always in coordination with the police. The relationship between police and pecalang stipulated in the Act of Republic of Indonesia No. 2 of 2002 concerning the Police. The function of the police is to foster the existing spontaneous security. With the co-operation between the Council of the Customary Village (Majelis Desa Pakraman), pecalang also provide guidance on security standards. How will the traffic be, how to report information to the police, martial and most importantly, how to know people. 110

Formally, the relationship between police and pecalang are institutional relationships in the context of the Unitary of the Republic of Indonesia, where pecalang status as auxiliary police in carrying out police functions. Accordingly, the police are obliged to build pecalang. Informally, pecalang relationship with police seen from the relationship determined by the individual’s personality and abilities related party who then bears the impression of the related party’s influence formal relationship. 111 The evidence of pecalang involvement in


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international conference can be seen in the 29th International Drug Enforcement Conference / IDEC in 2012 involving more than 3,000 security force consisting of police, army and pecalang.  

The existence of pecalang in securing international conference is very easy to recognize. Pecalang have distinctive clothing that uses poleng uniform (black and white motif) and use udeng (traditional headware). They are also equipped with communication devices that aim to facilitate coordination among security personnel. Pecalang is a unit of defense and security of customary villages in Bali which can also be utilized to a greater interest. Pecalang is a security organization that comes from local knowledge, so that the existence of pecalang in securing international conference is in line with the existence of customary villages as government organizations within the framework of the Unitary of Republic of Indonesia.

**Pecalang as A Non-Permanent Employee in Securing the Conference**

Pecalang is an organizational unit owned by each customary village to perform security functions in the region relating to customs, such as religious ceremonies, cremation ceremony, the wedding procession and others. The developments of the function of pecalang are not limited to just securing those ceremonies. This is because many tourism activities conducted in customary village that also affect the security of the customary village in general, although the activity in a short period of time.

A conference in the customary village area which is conducted with the pecalang is done only in a relatively short period of time ie when approaching the conference and at the conference. On average, the pecalang only work about one week. Involvement of pecalang in the conference is usually arranged by the organizers namely by the event organizer. In these conditions then there is a working relationship between pecalang and the organizers. Working relationship as stipulated in Article 1 paragraph (15) of Act No. 13 of 2003 concerning Manpower is “hubungan antara pengusaha dengan pekerja/buruh berdasarkan perjanjian kerja, yang mempunyai unsur pekerjaan, upah, dan perintah.” (the relationship between employers/ laborers under the employment agreement, which has elements of jobs, wages, and orders).

In carrying out the security duties, pecalang have a high risk job. Its presence in regulating traffic and escorts put them at risk of becoming victims of traffic accidents. The conference is also faced with the threat of terrorism, which is also a threat to the safety of the lives of pecalang. However, so far there is no clear legal protection toward pecalang. Pecalang who work at the conference are only given a daily wage, without a written agreement and other protections.

Constitutionally, Indonesia recognizes that every citizen has the right to get a job and a decent living for humanity in accordance with article 27 paragraph (2) the Constitution of 1945. The right to a decent living will be achieved with a fair wage and decent treatment also guaranteed in the constitution. In Article 28D of the Constitution of 1945 mandated that “setiap orang berhak atas pekerjaan dan mendapatkan imbalan dalam perlakuan yang adil dan layak dalam hubungan kerja “ (every person has the right to work and get rewarded in a fair
and decent treatment in employment). To get protection when carrying out the protection in security duty, pecalang should be categorized as employees.

In accordance to Article 1 paragraph 2 of the Act No. 13 of 2003 concerning Manpower stated that "'Tenaga kerja adalah setiap orang yang mampu melakukan pekerjaan guna menghasilkan barang dan/atau jasa baik untuk memenuhi kebutuhan sendiri maupun untuk masyarakat.' (Labor is every person who capable of doing the work in order to produce goods and/ or services, both for subsistence and for society.)" Judging from that sense there are some elements that must be fulfilled in order to regard pecalang as employee that (1) any person (2) capable of doing the work in order to produce goods and/ or services either (3) meet the needs of themselves and to society.

Pecalang fulfill the elements of any person (the member of customary community) who are designated and appointed as pecalang. Pecalang are also capable of doing the job that is the provision of security services. In carrying out this duty, pecalang are given the wage for their family’s needs in organizing security and order. Thus pecalang can be categorized as employees.

Pecalang in securing the conference only works at a certain time. Therefore, pecalang can be classified as a non-permanent employee. Non-permanent employees based on Minister of Labour of the Republic of Indonesia of Per-06/Men/1985 No. 1985 concerning the Protection of Daily Worker is "pekerja yang bekerja pada pengusaha untuk melakukan suatu pekerjaan tertentu dan dapat berubah-ubah dalam hal waktu maupun volume pekerjaan dengan menerima upah yang didasarkan atas kehadiran pekerja secara harian." (workers who working on the employer to do a specific job and can change in terms of time and volume of work with pay based on the presence of workers on a daily basis).

The presence of non-permanent employees is actually found in many employment sectors. But at this time there is an assumption that non-permanent employees are only the construction workers. On the Regulation of Minister of Labour of the Republic of Indonesia of Per-06/Men/1985 No. 1985 concerning the Protection of Daily Worker, then there are many variants of non-permanent employees. In Article 2, paragraph (2) arranged the workers according to the type and nature are:

a. Period of time to get the job done in a relatively short time and not exceeding three months.
b. The work done does not exceed 20 working days in a month and is not tied to office hours that are generally applicable in the enterprise.
c. Work carried out according to certain seasons such as planting, harvesting, milling time and so on.
d. The work of loading and unloading is done is not fixed.

As a non-permanent employee, pecalang has rights as an employee. Basically political employee law wants a good treatment for all workers regardless of their status. Therefore protection of pecalang as non-permanent employees is a legal obligation for the government and the employers who hire him.

The term of employee which is attached in pecalang means that they are entitled to wages. It can be seen from the study of terminology regarding employee The term employee in the
English language is worker. The original meaning employee is a person who works at. According to Black Law Dictionary, the term worker means a person employed to do work for another. The original meaning of the worker is a person who works for someone else to get paid. According to Black Law Dictionary labor terms means to work, with great exertion. Thus, as a non-permanent employees, pecalang, are entitled to wages.

The Policy of Pecalang’s Protection as an Employee

Since the early 1980s, among theoreticians have been developing 2 (two) assumptions. First, that policy plays an important role. That is, the choice of measures taken by the government to determine the success or failure of development. Second, the success or failure of development is caused by the failure of the government (or non-market) to adjust the mechanism of action of the market dynamics. The last argument has then led to the reform of the bureaucracy. In this case, the policy is a public policy, the choices made by the government to do or not do. Dye says that things are set up not to be done by the government as well as public policy is because of something that is not implemented by the government that would have the effect (impact) of the same size with something that does. Toha Mifthah says government policy is the authoritative allocation for the entire community so that all the selected government to do or not do is the result of the allocation of values. If described in detail, the policy includes:

1. The design of objectives and considerations basics of government programs related to the specific issues faced by the community;
2. Regardless government to do or not do, and
3. Complex problems are expressed and implemented by the government.

Government policy is a form of government efforts to fulfill human rights of its citizens. In Indonesia, the concept of human rights is expressly and clearly recognized in the Constitution of Republic of Indonesia of 1945 and implemented by the state in society, one of which is an employee human rights. Human rights are the rights of employees to obtain decent work for humanity that has been recognized in the Constitution of Republic of Indonesia of 1945, which shows employee’s rights as constitutional rights. That means that the state is not allowed to issue policies in the form of legislation (legistative policy) or in the form of implementing regulations (bureaucracy policy) which are intended to reduce the substance of constitutional rights. Even the modern legal state (welfare state) have an obligation to ensure the implementation of constitutional rights. The policy of pecalang’s protection is a political law in the field of manpower law. The protection of the rights to pecalang as employee. The concept of rights according to Robert Audi in his book, “The Cambridge Dictionary of Philosophy” is:

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113 Kamus Besar Bahasa Indonesia (disingkat KBBI), 1990, Balai Pustaka, Jakarta, p. 428
115 KBBI, Op.Cit, p. 139
121 Majda El-Muhtaj, Hak Asasi Manusia dalam Konstitusi Indonesia, dari UUD 1945 sampai dengan Amandemen UUD 1945 tahun 2002, 2009, Kencana, Jakarta, p. 40
“Right, advantageous conferred on some possessors by law, morals, rules, or other norms. There is no agreement on the sense in which rights are advantages. Will theories hold that right favor the will of the possessor over the conflicting will of some other party; interest theories maintain that right serve to protect or promote the interest of the high older.”

The right to protection must be protected and fulfilled by legal subject. Therefore, employee’s protection policy is formulated in the form of law. Protection of employee rights provisions are set out in a number of employment laws at both the international and national levels. According to Manulang, the purpose of manpower law is; 122

1. To achieve/ implement social justice in the field of employment
2. To protect the employee toward the unlimited power of the employer.

International Labour Organization (ILO) as an international labor organization realized that development strategy, especially economic development that had been implemented in many developing countries was unsuccessful in eradicating poverty and unemployment, so that the United Nations (UN) on Conference in 1976 presented the concept of "Basic needs Strategy" which makes the fulfillment of basic needs as the primary goal in the development for justice and welfare. 124

Rationalization of the economists in the World Bank are strengthened by the role of other international organizations. Since the economic crisis, Indonesia asked the IMF to overcome the crisis. At this point the government’s dependence on the IMF is great. Because the disbursement of IMF loans always start with the approval of the LOI (letter of intent), which contains the terms and conditions - to be executed by the borrower. The presence of the Act No. 13 of 2003 concerning Manpower is expected as one legal product that can change the paradigm in industrial relations, in fact inseparable from the interests of the outside world, one of which is the CGI (Consultative Group on Indonesia). CGI is a continuation or completion of the previous organization called the International Governmental Group on Indonesia (IGGG) that aims to provide long-term loans with low interest rate to Indonesia to fund construction.

At the CGI conference in Bali on January 21st, 2003, or two weeks before the Act No. 13 of 2003 was passed, one of the conditions or requirements desired by foreign aid is a change in the structure of employment in Indonesia, from the previous one which is rigid, to become more flexible. Despite of the letter of Intent (LoI) signed between Indonesia and the IMF, there are no explicit points of agreement governing the labor reform in Indonesia. But the IMF continued to press the government to promote economic growth. The claim is then that the government should reform the labor structure to become more flexible through minimum wage as contained in the Letter of Intent No. 21 in item 43 which states that: With the devolution of minimum wage setting to the regions, it has become increasingly important to provide standards to guide the minimum wage setting process to ensure that it is in accordance with the national interest. To this end, we have recently reconvened the national tripartite council comprising government, labor groups, and employers to consider options for developing national guidelines in this area. The council will be a regular vehicle to facilitate a national dialogue on broader labor policy issues.

122 Koesparmono Irsan, Hukum dan Hak Asasi Manusia, 2009, Yayasan Brata Bhakti, Jakarta, p. 130
124 Ibid.
Substantially, the demands for reform in Indonesia which led to a minimum wage policy by the authorities of local government, indirectly affected the interests of the IMF to Indonesia, which led the effort of IMF through the LoI No. 21grains 43 to limit the minimum wage in accordance to the national interest. Therefore, they conducted a national tripartite meeting consisting the Government, Labor’s Organization and Employers’ Association to discuss the national guidelines for the local area to determine the minimum wage. Tripartite is set in order to facilitate a national dialogue on the issue of labor policy in particular the minimum wage policy.

The influence of the ideology of capitalism, the international community regarding employment legislation is one of the most important factors that influence government policy to protect workers. To that end, the government needs to be a regulator in industrial relationship within the framework of the welfare state to protect workers. Paimin Napitupulu said that the problems faced by the bureaucracy today is that no initiative from government bureaucracy, no innovative and overuse of their ability to destroy the new ideas, including a change.125

Industrial relations reform in Indonesia is characterized by the formation of legislation governing the protection of employees’ rights. This began with the amendment of the Constitution of 1945 which has implications for the establishment of the Act of the Republic of Indonesia concerning 21 of 2000 on Trade Unions, the Act of the Republic concerning Indonesia 13 of 2003, the Act of Republic of Indonesia No. 2 of 2004 concerning Industrial Relations Dispute Settlement, the Act Republic of Indonesia No. 3 of 1992 concerning Social Security Workers and the Act of the Republic of Indonesia No 40 of 2004 concerning the System Social Warranty Security.

Actualization of the normative goals of labor law is to protect the employee’s rights stipulated in The Act No 13 of 2003:126

1. Protection of the basic rights of workers to negotiate with employers.
2. Protection of safety and work health.
4. Protection of wages, welfare and labor warranty.

Imam Soepomo as quoted by Asri Wijayanti stated that employee protection covers five areas of labor law, namely:

1. recruitment and placement the employees
2. employment relationship;
3. occupational health;
4. safety at work;
5. social warranty for employees.127

Pecalang as employee have the right to the protection of wages, safety and job security and social security. Employee’s protection can be done, by providing the guidance and with the increasing recognition of human rights, as well as physical and technical, social and economic protection through the norms that apply in the workplace.128 This protection is

126 Ibid
done through the establishment of laws that are responsive to their rights and the enforcement of those rules. Employment protection aspects as written by Zaenal Asikin aspects are:

1. Protection of the law, which can be implemented through the legislation of employment that require or compel employers to act in accordance with the laws and fully implemented by all parties concerned.
2. Protection of the protection, the protection associated with efforts to give workers a sufficient income to meet daily needs for himself and his family.
3. Protection of the social, the protection in relation to the business community that allow the worker received his goal and develop their life as human beings and as members of society.
4. Protection of the technical, protection in relation to the effort to keep the workers from the risk of an accident arising out of or relating to occupational health and safety.

Protection of the employees, pointed out by Zaenal Asikin is similar to what was written by Soepomo. Soepomo as quoted by Abdul Khakim divided 3 (three) kinds of protection to workers / laborers, respectively:

1. Economic protection, the protection of labor in the form of an adequate income, including when labor was not able to work out their will.
2. Social protection, the protection of labor in the form of health insurance, and the freedom of association and protection of the right to organize.
3. Technical protection, the protection of workers in the form of security and safety.

Legal protection through legislation relating to employment and pecalang. The legal protection is provided by the government while the protection of economic, social and technical is provided by the conference organizers.

Economic protection for pecalang is done by giving wages according to minimum wages set by the government. In effect the wage issue can not be separated from the principles of justice and prosperity. Wage system is always perceived by workers as justice because the wage is a means of achieving prosperity. Fairness in wages is not merely related to the magnitude of the amount received but includes also the process of wage determination that must fulfill the justice and eligibility requirements. That analysis shows the existence of wages as part of human right. Human rights are a moral concept in the society and state. It is not a concept that was born immediately. Human rights was created gradually through certain periods in the history of the development of society. As a moral concept human rights is built and developed based on the experiences of human society itself. The experiences of the social groups in society in the state giving the concept of human rights. For the fulfillment of the Pecalang’s right, Pecalang should earn a wage. The wage is calculated from each attendance of pecalang in performing security duties. The Organizer has responsibility to pay either directly or through the event organizer. Social protection is given in the form of health insurance and job training for conference security.

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129 Ibid, p. 76
130 Ibid
Implementation of security duties by pecalang means dealing with accident risk. In Article 1 point 7 of the Decision of Minister of Manpower of Republic of Indonesia No. Kep-150/Men/1999 Concerning Social Workers Insurance for energy Daily Work, Volume and Specific Agreements stated “kecelakaan kerja adalah kecelakaan yang terjadi berhubung dengan tenaga kerja, termasuk penyakit yang timbul karena hubungan kerja, demikian pula kecelakaan yang terjadi dalam perjalanan berangkat dari rumah menuju tempat kerja, dan pulang ke rumah melalui jalan yang biasa atau wajar dilalui” work accident is an accident that occurs in connection with a employee, including diseases caused by employment, as well as accidents that happen on the way set out from home to work, and come home with the usual or normal path traversed.

Pecalang protection as employee has encountered several obstacles, namely the resistance of structural factors. Structurally, the bargaining position of workers is weak. The employee often assumes that the amount of wages is determined solely by employer policy. Other factors that also hinder employee protection are cultural factors. Working as pecalang is considered yadnya. This view is related to the foundation of Hindu philosophy. Yadnya derived from Sanskrit through the job without engaging and sincere act\(^\text{133}\) so yadnya only be done by humans as God’s creation by working or doing that based on dharmal. Work as pecalang has been seen as ngayah (working without expecting anything in return). These things are obstacles of pecalang’s protection.

Influence of the development of the economic system ideology at the international level has further increased the demand for state intervention in industrial relations in the international community that also affect the policy of the Indonesian government.\(^\text{134}\) Industrial relations can not be separated from the work and the relationship between those who manage and those who do. Work and relationship pattern has been ongoing as old as human civilization\(^\text{135}\) but in the last two hundred years it has been the object of social concern and significant government policy.\(^\text{136}\) The phenomenon is the basis for industrial relations that occur in all countries where people work for someone else to do the job with payment.

The relationship between management, workers and the government as the main actors in industrial relations aimed at achieving three things, they are friendly and healthy industry, industrial peace and the development of industrial democracy which described by SM Chockalingam on how to accomplish these goals are:\(^\text{137}\)

1. The cordial and healthy labour management relations could be brought in:
   a. by safeguarding the interest of the workers;
   b. by fixing reasonable wages;
   c. by providing good working conditions;
   d. by providing other social security measures;
   e. by maintaining healthy trade unions;
   f. by collective bargaining.

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\(^{133}\) Ni Made Sri Arwati, *Hidup Itu Kerja, Kerja Itu Yadnya*, 2009, Denpasar, p. 29

\(^{134}\) Pong Herlina, “Transitional Justice atas hak-hak buruh”, Jurnal Dinamika HAM, volume 2 No. 1 April 2001, Pusat Studi Ham Universitas Surabaya bekerja sama dengan Yayasan Obor Indonesia, issn: 1410-3982, p. 76


\(^{136}\) Ibid.

\(^{137}\) SM. Chockalingam, *Industrial Relation*, 2003, Annamalai University, Tamil Nadu South India, p. 7.
2. The industrial peace could be attained:
   a. by setting industrial disputes through mutual understanding and agreement;
   b. by evolving various legal measure and setting up various machineries such as Works Committee, Boards of Conciliation, Labour Courts etc.
3. The industrial democracy could be achieved by allowing workers to take part in management; and by recognition of human rights.

Protection of workers can only be realized if the government can play a role in providing protection for workers. The role of government is clearly visible from the authority in the making, setting and evaluating of regulations in the field of labor. According to Shafritz and Hyde, authority in a policy-making related to the role of government as an agent of the public and regulators as well as the driving agent of social relations. Government as a public regulatory agency has the authority to create policies which are formulated in the legal form. The government’s role as the driving agent of social relations is absorbing the social dynamics within the community that will be a reference of a policy decision that there is a harmonious social relationship system.

In carrying out the basic duties of employment aspects, Bali Manpower, Transmigration and Population Office has the vision of the creation of quality, productive, harmonious and dynamic employment and population, in order to Safe, Peaceful and Prosperous. To achieve this vision they set 7 (seven) mission employment and population resettlement builders, namely:

1. Planning and provide employment information, population and resettlement.
2. Improving quality and productivity of employee, internal migration and population.
3. Improving training, employment placement and expansion of employment opportunities.
4. Improving harmony and dynamic industrial relations and the protection of employee.
5. Increasing population administration discipline.
6. Improving equity, spread and welfare of the population.
7. Improving excellent service to the community.

To achieve the objectives set out in the vision and mission, the government will make policies that:

1. Improve workforce planning with good information.
2. Improve training systems and employee productivity, and population resettlement.
3. Increase employment, encouraging the expansion of employment opportunities and trying to encourage the expansion of transmigration destinations, information and workforce planning.
4. Encourage the improvement of work conditions, increase the quality of the population, institutional functioning industrial relations and labor protection.
5. Increase population and spread evenly.
6. Improve infrastructure quantity and quality of personnel.

Regional autonomy gives the opportunity to the local governments to implement their policies that are deemed necessary for the welfare of the people in their respective areas. This situation could have encouraged local governments to take and enforce policies that arrange

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the situation by issuing a variety of laws and policies such as regional regulations, governor’s rules, the governor’s decision, and so on. Those regulations are legal instruments in the community. Another legal instrument in the form of infrastructure and facilities are used in performing their duties and functions in the administration classified as public domain for the welfare of society.

The authority of local governments to adopt policies to increase the welfare of society as well as the normative set in the Act no. 32 of 2004 concerning Local Governance. Explicitly in the General Explanation of Act no. 32 of 2004 states that:

The principle of local autonomy using the principle of autonomy in terms of area is given the authority to manage and organize all administrative matters outside the affairs of government set forth in this law. The area has the authority to make policy areas to provide services, increased participation, initiative and community development aimed at improving the welfare of the people.

In general, the implementation of the principle of autonomy is done with real and responsibility principles of autonomy. Real autonomy principle is a principle that in order to handle the affairs of government implemented based duty, authorities, and obligations existing actual and potential to grow, live and develop in accordance with the potential and uniqueness of the area. While the principle of autonomy is responsible autonomy principle in its implementation must be perfectly aligned with the purpose and intent of autonomy, which is basically to empower the region to include improving the welfare of the people is a major part of the national goal. In an effort to achieve the objectives of regional autonomy namely to improve the welfare of the people and always attend to the interests and aspirations of society. The local government as part of the Unitary of Republic of Indonesia are obliged to ensure harmonious relations between the regions and the government, that means the local government also should be able to maintain and protect the territorial integrity of Republic of Indonesia.

In philosophy, the granting of autonomy to the regions is to provide more flexibility in running the affairs of local government to grow, live and thrive in the region for the creation of enhanced community service and welfare of the community. The development of democracy and justice should be the basis for the provincial and district / city in Bali, progressively to determine policy on the protection of worker’s wages in line with the policy of tourism development in the province of Bali’s tourism industry.

The issue of workers welfare and well-being of the unemployed is strongly related to local conditions lead to in Article 2 of The Regulation of Government of the Republic of Indonesia Number 14 of 1958 Welfare Workers expressed that:

1. The regions are entrusted the affairs of workers’ welfare.
2. The definition of labor welfare matters is that efforts to promote the welfare of workers inside and outside the company by way of:
   a. Providing assistance in the operation of boarding/ lodging workers, residential workers, laborers resting hall, meeting hall workers, ragaan keolah-workers, entertainment workers, daycare workers kanak-kanak/bayi-bayi, literacy and general education among workers, and other efforts in the field of workers’ welfare, as far as problems with Undang-undang/peraturan not charged to employers;
   b. Giving guidance to workers’ welfare efforts;
   c. Giving lectures and courses on labor welfare.
(3) To carry out efforts to promote the welfare of workers in subsection (2) may be established entities aimed at improving the welfare of organized labor, either by the Region itself and together with workers and employers.

In the explanation of the Regulation of Government of the Republic of Indonesia Number 14 of 1958, a labor welfare efforts is referred to in article 2 paragraph (2), as far as the problems are not charged to employers. It shows that the role of the state was central to the welfare of workers by making efforts for the welfare of the workers to not be charged to employers. But the setting of assignments and responsibilities for the welfare of the worker is not an obligation. Paragraph 6 stated that the delivery of these matters will be carried out by considering the willingness and ability of the area so that the provision implies the right of local governments to the rejection of the delivery of the duties and obligations to make efforts for the welfare of workers.

Government policies to protect the employees and the responsibility of employers to provide protection for employees must be supervised. Monitoring of the implementation of employment law has been a concern since the time of independence which is evident from the provision of employment inspection in accordance with Article 1 Paragraph (1) of The No. 23 of 1948 on Labor Supervision aimed at:

1. Supervising the enforcement of Law and Regulation of employment in particular,
2. Collecting information about a matter of state labor and employment relations in the broadest sense, to make laws and labor laws,
3. Running other work assigned to him by law or other regulations.

In the next period the significance of supervision was also confirmed in the Act Number 14 of 1969 concerning Basic Provisions of Labor, that the explanation of Article 16 stated that the labor inspection system works as follows:

1. Supervising the implementation of legal provisions concerning employment,
2. Provides technical information and advice to employers and employee about the things that can ensure effective implementation of regulations on labor,
3. Reporting to the authorities about fraud and abuse in the field of employment that are not clearly set out in legislation.

A description of the inspection of the implementation of the employment provisions that have been set since the early days of independence, provides an overview of the importance of labor inspection to ensure the running of the rights and obligations of employers and employees in the employment relationship. In the Act no. 13 on 2003 on the basis of preset labor inspectors in Article 176 to Article 181 of Act No 13 of 2003. Inspections performed by employees of labor inspectors, in this case the Department of Employment who technically did his duty with reference to the existing legislation. Technically, labor inspection stipulated in the Presidential Regulation of the Republic of Indonesia No. 21 of 2010 concerning Labour Inspection and in the implementation refers to the Regulation of Minister of Manpower No. Per-03/MEN/1984 concerning Integrated Labour Inspection. There are defined in Article 2 of the implementation of an integrated labor inspection aims to:

1. Supervising the implementation of labor laws and regulations;
2. Providing technical information and advice to employers or labor board or about things that can ensure the effective implementation of the legislation rather than labor;
3. Collecting the information about the materials and labor conditions of employment in a broad sense to the establishment and improvement of labor legislation.
Broadly speaking, inspectors were divided into two specific categories, there are special inspectors and public inspectors. A special inspector is an employee specifically assigned to oversee the implementation of labor legislation both preventively and repressively. While a public inspector only supervises the implementation of employment laws in preventive legislation. The definition of preventive and repressive supervision in accordance with Article 1 Regulation of the Minister of Manpower No. Per.03/MEN/1984 are:

1. Preventive Supervision, the oversight is emphasized in a precautionary measure, before the act was to lead to a breach of the provisions in the field of employment. Preventive supervision is divided into:
   a. Direct supervision
      i. Supervision is done directly to the implementation object of supervision including by:
         ii. Checking the workplace.
         iii. Checking whether oral or written statement to the employer or trustees, trade unions and employee without the presence of a third party.
         iv. Maintaining, supporting and ordering the management and employee in order to comply with employment legislation.
         v. Providing a warning or reprimand to the deviation of legislation that have been determined.
         vi. Conducting technical testing safety and health requirements.
         vii. Defining and solving problems related accidents employment.
   b. Indirect supervision
      i. In this surveillance is not directly under the supervision. Supervision over the terms of the form that must be fulfilled by the employer or trustee business. The nature of this supervision is not as visible as in direct supervision. Examples of this control are:
         ii. Examining all permit companies.
         iii. Providing technical recommendations to the relevant authorities.

2. Repressive supervision

An action only after the occurrence of an act violations and crimes in the field of employment. Repressive supervision has the objective that the perpetrators be afraid to repeat the deed has been done and to maintain the security and order that legal certainty can be achieved.

A labor inspection is done by a visit to the work area to observe and monitor the implementation of the basic rights of workers. Monitoring of the implementation of the law (law enforcement) in the field of labor would ensure the fulfillment of workers’ basic rights. A labor inspection can also educate employers and workers to be always obedient to implement the provisions of legislation in the field of employment, that will create a harmonious atmosphere.

CONCLUSION

Pecalang as an instrument for securing customary village is the paradigm of traditional security in Bali. Pecalang are in charge of maintaining order in the village. At first, pecalang’s sole duty was in securing religious ceremonies, but along with the development of society, pecalang also became involved in conference and other security involvement. The existence of the pecalang in securing the conference is the need of the event organizer. In the implementation of these safeguards the pecalang shall coordinate with the police.
Pecalang as a non-permanent employee in securing the conference only work in a specified period that is prior to and during the conference. Pecalang do the job security at the conference event only as needed. The implementation of the pecalang’s functions in securing conference make pecalang have a working relationship with the organizers. As a non-permanent employees then pecalang are entitled to protection as the labor protection of law, economic, social and technical. Protection of labor is followed by supervision in the field of labor in the form of preventive and repressive supervision.

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