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Fraud Through Online Store

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Abstract
Now times have progressed and technology is also growing. All activities can be completed with technology. Including economic activity. Now the community does not only carry out economic activities directly, but by using technology the community can carry out buying and selling activities online. Consumers no longer have to go somewhere, but can make purchases only from home. Only by capitalizing on the internet network, buying and selling technology activities can already be carried out. Thus one can streamline time wherever and whenever without having to meet face to face. This activity is called E-Commerce. The presence and development of e-commerce transactions certainly cannot be separated from a problem, in e-commerce transactions, there is the potential for fraud from the products offered, so many types of fraud can occur in transactions at these online stores. Therefore this study aims to analyze problems regarding fraud that occurs in online store transactions. It will be found from the results of the research that the form of criminal responsibility for perpetrators of online fraud crimes can only be sentenced using Article 28 paragraph (1) Juncto Article 45 paragraph (2) of Law No. 8 of 2011 concerning Information and Electronic Transactions. It will be found from the results of the research that the form of criminal responsibility for perpetrators of online fraud crimes can only be sentenced using Article 28 paragraph (1) Juncto Article 45 paragraph (2) of Law No. 8 of 2011 concerning Information and Electronic Transactions. It will be found from the results of the research that the form of criminal responsibility for perpetrators of online fraud crimes can only be sentenced using Article 28 paragraph (1) Juncto Article 45 paragraph (2) of Law No. 8 of 2011 concerning Information and Electronic Transactions.

Keywords: Fraud, E-Commerce, Online

1. Introduction

Buying and selling transactions are traditional activities that have occurred since ancient times and in simple forms such as bartering to conventional buying and selling transactions. The process of buying and selling is one of the important activities in society and will always exist and develop. In the past, trading could only be done face-to-face with transactions that occurred directly and were usually carried out at a predetermined place. With the advancing times and increasing public knowledge about technology and the internet, of course, it has positive and negative impacts. By using technology and the internet, one can make work easier. An example is in transacting and trading via the internet (E-Commerce). The online store is an alternative that was born from the times,

The industrial revolution 4.0 has caused the world community to continue to innovate in the trade industry. What's more, with busy activities and limited time, people choose to do things practically and efficiently, which has led

to the predominance of buying and selling transactions in online stores. However, the public's views are divided into two in response to this, there are pros and cons which cause legal phenomena that are less effective in criminal incidents in online buying and selling transactions such as fraud and the initiative from the community to report fraud incidents to the authorities is relatively low. (Fadhlika, Holish, 2019).

*E-Commerce*is one form of technological progress that we can feel now. Almost all groups of people know or have often used e-commerce to shop online. According to Laohapensang (2009), online business has a very significant development from time to time and with unlimited place and time. The internet as a connecting medium and websites or social media as marketing catalogs makes the buying and selling process very practical and efficient. Many entrepreneurs use electronic media to promote their wares online because it is easier and more cost-effective. Ranging from large companies to home sellers have used electronic media to promote the goods or services they sell.

In Law no. 11 of 2008 concerning Information and Electronic Transactions, buying and selling transactions via the internet are included in transactions that use the internet electronic system so that in a legal language they are called electronic transactions. The ITE Law is a manifestation of the responsibility of the Indonesian government by protecting the activities of using information and communication technology in the life of the nation and state, guaranteeing legal certainty, protecting information providers and electronic transactions from potential crimes and abuse (Djoko Agung, et al, 2012).

Criminal law as a tool or means to solve problems in fraud that occurs in electronic transactions is expected to be able to provide the right solution. Therefore, the development of law, especially criminal law, needs to be improved and pursued in a directed and integrated manner, including the codification and unification of certain areas of law as well as the preparation of new laws and regulations which are urgently needed to address all opposition to the increase in crime and the development of criminal acts such as This.

With this very sophisticated and easy-to-understand internet facility, it turns out that it can also easily have a negative impact, namely crime. Crimes that occur on the internet are often referred to as cyber crimes. Online fraud is fraud committed by irresponsible people by providing incorrect information for personal gain. Potential fraud is very possible because it is very difficult to catch. After all, fraudsters carry out their actions using fake identities.

Fraudsters can use various modes through online media. Their actions range from offering lower prices to counterfeiting genuine goods. This causes many people to easily fall asleep when they want to buy something that usually has a high price, but on online media (websites) the buyer can buy it at a low price.
According to research from Sjahputra (2010: 15) states that most victims of online fraud are reluctant to report their losses to the authorities because the transaction value is considered not too large. Actions that can be taken by the government and social media to block fake accounts. However, fake accounts are very difficult to eradicate because when one fake account is blocked, another fake account will reappear. This research is related to my writing because until the time this writing was written, because of the convenience provided by online stores in creating a seller's account it was still relatively easy.

Legal issues that are often encountered in online fraud crimes are related to the delivery of information, communication, or electronic transactions, namely in terms of evidence and matters related to legal actions carried out through electronic systems. The fraud articles in the Criminal Code (KHUP) still cannot accommodate this, because usually perpetrators of fraud through online media also use e-mail to communicate with victims, in this case, can e-mail be used as evidence? legal and can be equated with paper documents that are like conventional criminal acts of fraud in the real world.

Based on the writings of Maskun (2013), the fast-developing world of commerce proposes an innovative and creative form of the trading system following the rapid technological developments in the field of communication and information media. This form is of course understood as a construction of a traditional form of agreement which, although different in form, is still the same in substance.

2. Research Method

This research uses a descriptive research method, which is a study that aims to describe the circumstances or phenomena that occur. In this research, a juridical-empirical approach was carried out, namely as an effort to approach the problem under study with a real legal nature or by the realities of life in society. Sources of data obtained for conducting this research come from literature studies in the form of several pieces of information or facts obtained by studying books, articles, documents, laws and regulations, reports, and so on related to the problem under study.

3. Results and Discussion

World developments have led to progress in all areas of life. One of the changes that are most obvious and have a very large impact is globalization, where distance is now meaningless and neglected by globalization. Globalization also makes all human activities easy and efficient. One area that is highly developed with globalization is the industrial sector. The world's industries have been revolutionized four times. The first industrial revolution occurred in England, then spread to mainland Europe and America in the mid-17th century. Then the industrial revolution 2.0 was marked by the use of electricity to simplify and speed up the processes of production, distribution, and trade. The 3.0 industrial revolution developed in the 1970s, especially in the United States, with the introduction of information technology and computerized systems for production support automation. The industrial revolution 3.0 spread quickly, not only in America but also spread to mainland Europe to Asia. Now the world has entered the industrial revolution 4.0. (Ningsih, 2019: 8)

Now the internet has become a basic need for society. The internet is not only consumed by the upper class, but all people have used the internet. The Internet has also become a tool for earning a living. One example is trading, now buying and selling activities are not only done face to face but anywhere, when someone wants to make a buying and selling transaction it can be done using the internet. Buying and selling transactions via the internet are called E-commerce. Not only buying and selling, basically online shops are part of the Electronic Business (EC). EC is the process of buying and selling, transferring or exchanging products, services, and information through computer networks, including the internet.

In buying and selling online, people can make online buying and selling agreements through an e-commerce company. In Indonesia, there are several leading e-commerce sites such as Shopee, Lazada, tokopedia, Bukalapak, ZALORA, blibli, and so on which are the largest marketplaces in Indonesia that use excellent, safe, and well-structured systems so that fraud incidents tend to be less if compared to online sales that are carried out on Facebook, Telegram, Instagram, Twitter, etc. which are social media platforms not specifically for buying and selling online, but there are also many trading activities that occur on these platforms because they are not specific online buying and selling sites so do not have an adequate and structured system.

This online business has an advantage in terms of time efficiency. No need to queue, or wait, no need to rent a place, no need to have lots of employees, and no need to maintain a shop like most offline shops.
Several factors cause fraud in online business.

a. Economy: poverty, lack of opportunities to find work.
b. Social: social obligations to help the family and help with finances, the desire to be financially independent, and the desire to be on an equal footing with successful neighbors or peers.
c. Culture: consumerism or materialism, desire for easy money
d. Personal/personal: personal traits that like to cheat for personal gain.

The development of information technology including the internet also provides challenges for the development of law in Indonesia. Law in Indonesia is required to be able to adapt to social changes that occur. Social change and legal change or vice versa do not always take place simultaneously. That is, in certain circumstances, the

development of law can be left behind by the development of other elements in society and culture or maybe vice versa (Raharjo, 2002: 59).

Cybercrime is a form of crime that arises due to the use of internet technology. More and more parties are harmed by the actions of cyber criminals if no law regulates it. Before the enactment of the ITE Law, law enforcement officials used the Criminal Code to handle cybercrime cases.

Legal arrangements in Indonesia for access legal crimes are contained in Article 30 of the ITE Law, interference with computer systems (Article 32 of the ITE Law), article 36 of the ITE Law "... deliberately and without rights or against the law commits acts as referred to in Articles 27 to Articles 34 causing harm to others. In general, fraud has been regulated as a crime by Article 378 of the Criminal Code which reads, "Whoever with the intent to benefit himself or others by violating rights, either by using a false name or false dignity, either by will and deception, or by a series of lying, either by fabricating lying words, either by persuading people or handing over something to him, either by making debts or writing off receivables, threatened with fraud.

The ITE Law regulates fake and misleading news via the internet, this fake and misleading news can be equated with fraud as regulated in Article 378 of the Criminal Code. Article 28 paragraph (1) reads:
"Every person intentionally and without right spread false and misleading news that results in consumer losses in electronic transactions."

4. Conclusion

Based on the description of the discussion above, it can be concluded that the form of criminal responsibility for perpetrators of online fraud crimes can only be criminalized using Article 28 paragraph (1) Juncto Article 45 paragraph (2) Law No. 8 of 2011 concerning Information and Transactions Electronic. Article 378 of the Criminal Code regarding fraud cannot be held accountable for their actions, because there are several obstacles in imposing criminal sanctions on perpetrators of criminal acts such as obstacles in the proof where evidence is limited by the Criminal Code, in Article 378 of the Criminal Code only recognizes legal subjects (Naturlijk Person), and whom those who have the right to punish perpetrators for online fraud are included in transnational crimes and cybercrime, one of the characteristics of which cannot be limited by the boundaries of the sovereign territory of a country.

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The Socio-Legal Condition of the Woman in the Work Environment in Cameroon: Factor or Obstacle for Her Empowerment?

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Abstract
This paper examines the socio-legal condition of the woman in the work environment in Cameroon to determine the extent to which it plays in favor of her empowerment. An extensive review of the laws and the literature relating to Labour law in Cameroon has revealed that several Women's Empowerment Principles (WEPs) launched by the United Nations in 2010 (WEP-Booklet, 2010) have been incorporated by the lawmaker. The principle of equality that drives all those principles is very present in the regulation as issues of discrimination in employment are a constant preoccupation of the lawmaker. Unfortunately, it is observed that the cultural context that keeps imprisoning the woman in Africa in general to the role of mother and wife has not eased her empowerment although she has even been given the opportunity to act in the political field. A more effective legislation that neutralises discriminations in employment and provide for a good sanction system against the violation of the principle of equality at work is unavoidable to empower women. But this is not enough as political awareness is the key that will boost their empowerment and thereof contribute to development.

Keywords: Culture, Discrimination, Employment, Empowerment, Equality, Traditions

1. Introduction

In modern industrial society, as apparently in all others, sex is at the base of a fundamental code in accordance with which social interactions and social structures are built up, a code which also establishes the conceptions individuals have concerning their fundamental human nature (Goffman, 1977, p. 301). This influence of gender on social structures in general and on public policies in particular is the reflection of the perception of the role and the position given to the woman in every society. But globally, equality of treatment between genders has been raised to the standard of a general principle of law to fight discrimination against women's rights in various sectors of life (family, politics, employment …).

In the employment sector nowadays, the trend is to empower the woman whether as a self-employed person[1] or an employee. From the Universal Declaration of Human Rights (1948), the Protocol to the African Charter on

[1]It is important to indicate that before the coming of the Organisation for the Harmonisation of Business Law in Africa (OHADA the French acronym is mostly used to refer to the organisation), a married woman could only be trader if her husband had consented as per article 4 of the Code of Commerce. With the coming of article 7 of the OHADA Uniform Act on General Commercial Law, the consent of her husband is no

Human and People's rights on the Rights of Women in Africa (2003 Maputo Protocol), the Convention on the Political Rights of Women (1952), the Convention on the elimination of all sorts of discriminations against women (1967) to the International Labour Organisation (ILO) Conventions, employment is an indisputable right for women. The Constitution of Cameroon[2] provides in its preamble that all persons shall have equal rights and obligations, and especially in the field of work, that every person shall have the right and the obligation to work. After defining the "worker" as any person irrespective of sex, article 2 of the Cameroon Labour Code establishes that the right to work shall be recognised as a basic right of each citizen, and that the State shall make every effort to help citizens to find and secure their employment. The same holds in Decree N° 94/199 dated 07 October 1994 relating to the General Statute of the Civil Service and Public Sector, supplemented by Decree number 2000/287 of 12 October 2000 applying to employees of the public service in Cameroon.

Although these beautiful legal instruments emphasise on an equal treatment of genders in the work environment, discriminations against women are still very perceptible. The International Labour Organisation's (ILO) analysis of 83 countries shows that women in paid work earn on average between 10 and 30 percent less than men (2008). A Report from the Cameroon Section of Women's International League for peace and freedom indicates that in social and economic terms, wages between men and women remain unfair, especially in the private sector where recruitment is often discriminatory against women (2019). In addition, the majority of women work in subsistence agriculture, informal sectors and underemployment. Most of these discriminations take their root from some legal and social hindrances that hamper the process of women empowerment in Cameroon. The observation is that the condition of the woman in the work environment remains problematic, notwithstanding the existence of a Ministry exclusively in charge of Women Empowerment and the Family since 1975.[3] It seems our culture and traditions are in contradiction with the idea of an "empowerment" of the woman.

The feminist movement in the Global South can be credited with the formal appearance of the term "empowerment" in the field of international development (Calvès, 2009), although the term is rarely defined. The lack of definition is particularly striking in "women empowerment," which is the term that has replaced "gender equality" and "women's status" in many policy and programme documents. (Calvès, 2009). However, without engaging into the debate about the various approaches of the notion of empowerment[4], we have opted for a definition given by the work group "*Gender and indicators''* of the Commission "*Women and Developement*" of the Directorate General for Belgian Development (2007) for his inclusion of the various approaches of the concept of empowerment. Close to the notion of "power", empowerment is considered as the process of acquisition of "power" at the individual and collective level. It designates in an individual or a community first of all the capacity to act autonomously, but also the necessary means and the process to reach that capacity to act, to take decisions in one's choices of life and society. The capacity for empowerment is linked to Institutions, to laws: what they allow to be done or not; moreover, this dimension is related to the cultural aspect of the society in which we live.

The concept of empowerment has been formalised by the United Nations Development Fund for Women which has put in place seven (7) Women Empowerment Principles (WEPs) that should guide the empowerment of women around the world: 1. Establish high-level corporate leadership for gender equality; 2. Treat all women and men fairly at work – respect and support human rights and non-discrimination; 3. Ensure the health, safety and well-being of all female and male workers; 4. Promote education, training and professional development for women;

more required for her to be a trader on condition she has a separate business from that of her husband. Women can be self-employed whether in commercial or civil professions.

[2]Law N°96/06 of 18th January 1996 revising the Constitution of 02nd June 1972 as amended by Law N° 2008/001 of 14th April 2008.

[3] The said Ministry has experienced a change of nomenclature over the years. In 1975, it was initially created as the Ministry of Social Affairs, in 1984 it instead became the Ministry of Women Affairs, in 1988 the Ministry of Social and Women's Affairs. It went back to the appellation of 1984 before receiving the current nomenclature of the Ministry of Women Empowerment and the Family.

[4] Amongst the many inspirations on the writings on empowerment, one of the foremost is the conscientisation approach developed by the Brazilian theorist Paulo Freire in his *Pedagogy of the Oppressed*, published in 1968. According to him in every society a small number of people exert domination over the masses, resulting in "dominated consciousness." From the dominated consciousness present in rural Brazil, Freire wants to attain "critical consciousness." He advocates an active teaching method that would help the individual become aware of his own situation, of himself as "Subject," so that he may obtain the "instruments that would allow him to make choices" and become "politically conscious" (Freire, 1974 as cited by Calvès, 2009). It is this approach that the feminist movement in the Global South has always advocated for, although International development organisations have shifted from this vision to an individualist, de-politicised, vertical, and "instrumental" definition of empowerment for the fight against poverty. For more about the approaches of the concept of empowerment, see (Bacqué & Biewener, 2013).

5. Implement enterprise development, supply chain and marketing practices that empower women; 6. Promote equality through community initiatives and advocacy; 7. Measure and publicly report on progress to achieve gender equality. The WEPs is an initiative of the United Nations' Women and the United Nations Global Compact, which aims to promote gender equality and the empowerment of women in the workplace, market place and the community.

States' public employment policies shall nowadays incorporate these principles in order to promote the empowerment of women in the public or private sector although the said principles are initially addressed to corporations. Laws that regulate employment relations in Cameroon[5] cannot ignore these principles. Reason why the objective of this article is to examine the situation of the Cameroonian woman in the work environment to appreciate the extent to which the legislation applicable to employment matters empowers her.

2. Methodology and Results

2.1 Methodology

This research was conducted using the qualitative research methodology based on an extensive review of primary and secondary legal materials. The primary legal materials exploited here have included the various laws that regulates employment relationships in Cameroon whether at the national or international level. National legislation especially involved the Cameroon Constitution and Labour Code (Law N° 92/007of 14 August 1992 governing employment in the private sector); Decree N° 94/199 dated 07 October 1994 relating to the General Statute of the Civil Service and Public Sector and supplemented by Decree number 2000/287 of 12 October 2000 applying to employees of the public service; Law n° 67-LF-8 of 12 June 1967 organising Social Security in Cameroon, Law N°2018/010 of 11 July 2018 governing Vocational Training in Cameroon; Ministerial Decree N°16/MTLS/DEGRE of 27 May 1969 relating to women's work.

At the international level, some ILO conventions where particularly exploited: Convention N°111 of the International Labour Organisation relating to Discrimination in Employment and Convention N° 89 on night work concerning women. These primary legal materials were scrutinised with the aim to analyse their level of inclusion of the WEPs put in place by the United Nations Development Fund for Women. Secondary legal material exploited in this work included: text books, scientific articles and reports discussing gender issues in relation to employment. Besides, empirical research methods were not left out as the researcher also made use of direct observation of the employment sector in Cameroon and one-on-one interview with female colleagues to sample their opinion on the issue. Factual evidence was also obtained from some official reports related to women's employment.

2.2 Results

With the use of the above research methods, findings reveals that the Cameroonian legislation on employment has endeavor to incorporate a good number of WEPs. In fact, there exist favorable legal factors that promote the empowerment of women in the work place and it is important to indicate that most of the legislation had embodied several of the said principles even before they happened to be formalised by the United Nations. However, efforts still have to be done as some aspects of the legal primary materials exploited still drag a lot of obstacles to the empowerment of women. In fact some strong socio-cultural obstacles still have a negative influence on their empowerment.

3. Favorable legal factors to the empowerment of the woman in the work environment

If women's access to work whether in the private or the public sector cannot be contested in Cameroon, the issue is now to see if the legislation is favorable to their empowerment. There is no possibility for empowerment in a context of discrimination and that is the second principle of WEPs, which is equal opportunity, inclusion and non-discrimination. An analysis of the regulation reveals that men and women are recognised as having similar rights

[5] They have been listed under 2.1

(A). Besides, gender considerations even explain the presence within the legislation of specific rights regarding the female gender (B).

3.1 The recognition of similar rights to both male and female employees

The equality at this level is expressed through three aspects: the right to an equal remuneration, same working conditions in general and the possibility to progress in the career.

3.1.1 Right to equal pay

Workers in general without consideration of gender are entitled to a remuneration which is a fundamental element in an employment relationship. The second principle of WEPs stated above, recommends employers to pay an equal remuneration, including benefits, for work of equal value and strive to pay a living wage to all women and men.
Section 61 of the Labour Code defines the wage as remuneration or earnings, however designated or calculated, capable of being evaluated in terms of money and fixed by mutual agreement or by the provisions or regulations or collective agreements which are payable by virtue of a contract of employment by an employer to a worker for work done or to be done or for services rendered or to be rendered. It is the consideration expected by the employee from the employer in the employment contract. Section 61 (2) of the Labour Code provides that for the same type of work and level of proficiency, workers shall be entitled to the same remuneration, irrespective of their origin, sex, age, status and religion. Section 27 of the General Statutes of the Civil Service and Public Sector also recognises the right to remuneration to all civil servants, even if it does not emphasise as the Labour Code on equality of remuneration with regard to gender. But the emphasis is not necessary because a civil servant's salary is fixed according to an index grid determined by the public sector regulation. It applies regardless of gender. According to section 68 of the Labour Code, wages shall be paid at regular intervals not exceeding one month, except the worker chooses to receive at the end of fifteen days a payment on account equal to half the monthly balance due to him which shall be settled at the end of the month.

It is important to mention that the Labour Code has put in place privileges and guarantees of wage claims to protect the worker's wage. Section 70 of the Labour Code indicates that there is a limit on the percentage of wage not liable to attachment and determined by laws and regulations in force. This is established in order to secure the basic needs of the worker and his family. For workers of the public sector, section 28 (2) of the General Satutes of the Civil Service and Public Sector clearly provides that 1/3 of their wage should be free of any deduction.[6] Also, section 75 of the Labour Code stipulates that the employer has no right to do deductions from the employee's wage, except in some authorised circumstances. Firstly, where there is a court order for attachment. Secondly in case of deductions done for payment of ordinary trade union contribution. Thirdly, in case of voluntary assignment to which the worker has subscribed in person and notified for verification with the inspector of Labour of his place of residence. Fourthly, in case of repayment of cash advances made by the employer to the worker, and before the president of the competent court in other cases, and lastly where a friendly community providing for payment of contributions by the workers has been instituted within the framework of the laws and regulations in force.

3.1.2 Right to same good working conditions

Good working conditions include a good and healthy environment, reasonable hours of work and right to rest. The third principle of WEPs is about health, safety and freedom from violence. The Cameroonian legislator has made the health of workers a priority from the moment of their employment. Article 100 of the Labour Code provides that all workers shall undergo a medical examination prior to engagement and shall also be subjected to medical supervision throughout their career. To this effect, section 98 of the Labour Code imposes that, every enterprise and establishment of any kind (public or private, lay or religious, civilian or military, including those belonging to

[6] Except in case of compulsory levies like taxes or contributions for pension rights, deductions on the salary can only be done under two circumstances: court order for attachment or voluntary assignment according to regulations in force.

trade unions or professional associations) shall provide medical and health services[7] for their employees. The functions of such services shall be to supervise conditions in respect of hygiene in the establishment, the risk of contagion and the state of health of workers, their spouses and children if housed by the employer as well as to take the appropriate preventive measures and provide the necessary medical care. If a worker or worker's spouses(s) or child(ren) housed by the employer falls ill, the employer shall provide medical care and the necessary medication and accessories, within the pecuniary limits determined by order of the Minister in charge of Labour issued after consultation with the National Commission for Industrial Hygiene and Safety. This falls in line with an aspect of the third principle of the WEPs which recommends to respect female and male workers' rights to time-off for medical care and counseling for themselves and their dependents. Under the same principle, the employer is also recommended to provide safe working conditions and protection from exposure to hazardous materials and disclose potential risks, including reproductive health.

In fact, no service can be efficiently delivered if the worker does not work under safe and hygienic conditions. According to section 95 of the Labour Code, hygiene and safety conditions at the work place shall be determined by orders of the Minister in charge of labour, issued after consultation with the National Commission on Industrial Hygiene and Safety. The said orders while taking local conditions and contingencies into account, shall be aimed at securing for the workers standards of hygiene and safety in conformity with those recommended by the International Labour Organisation and other internationally recognised technical bodies. They shall specify the cases and circumstances in which labour inspectors or the occupational health doctors shall have recourse to the procedure for serving formal notices to the employer. However, where there is an impending threat to the health and safety of workers, the labour Inspector or the occupational health doctor shall immediately order enforceable measures to be taken. Where safety conditions endangering the safety or health of the workers but not covered by the order of the Minister in charge of labour determining hygiene and safety conditions at the workplace are found to exist, the Labor Inspector or the Occupational Health Doctor shall request the employer to remedy the situation. If he objects, the dispute shall be referred to the National Commission on Industrial Hygiene and Safety which shall give a ruling. In all cases, the labour inspector or the occupational health doctors shall report to the said Commission on working conditions which are deemed to be dangerous, in order that, appropriate regulations may, if necessary be prepared.

Finally, good working conditions also entail reasonable hours of work and rest periods. Section 80 (1) of the Labour Code stipulates that statutory hours of work in all public and private non-agricultural establishments shall not exceed forty hours per week. As for agricultural and related endeavours, the hours of work shall be based on a total of two thousand four hundred hours per year, within the maximum limits of forty-eight hours per week. It is clearly stated by the Code that, provisions concerning hours of work shall apply to all workers, irrespective of age and sex and irrespective of mode of payment.

Work without rest is almost impossible, reason why the law provides for leave so that workers rest for a determined period of time whether from the public[8] or the private sector. No form of compensation in lieu of the right to leave is accepted (Labour Code, section 95(2)). Paid leave at the employer's expense shall accrue to the worker at the rate of one and a half working days for each month of actual service, in the absence of more favorable in the collective-labour agreement or individual employment contract. One month of effective service is equivalent to four weeks or twenty-four days of work. Period of effective service here include among others; a maternity leave[9] and for mothers the leave shall be increased by either two working days for each child under six years of age on the date of the departure on leave who is officially registered and lives in the home, or one day only if the mother's accrued leave does not exceed six days. This specific provision shows that the legislator is very attentive to the status of female employees. The law also provides for unpaid leave whose duration shall not be deducted from the

[7] The medical and health service shall be under the responsibility of medical doctors who shall be recruited preferably among practitioners holding diplomas in industrial medicine and who shall be assisted by qualified paramedical personnel. All persons so employed shall have been previously approved by a decision of the Minister in charge of Labour issued after consultation with the Minister of Public Health, in case of paramedical personnel, consultation with the medical association, in case of doctors. (Labour Code, Section 99).

[8] According to section 33 of the General Statute of the Civil Service and Public Sector, the civil servant shall benefit from administrative leave for sickness or maternity according to modalities determined by a decree of the Prime Minister.

[9] Are also considered to be part of effective period of service: periods of unavailability due to industrial accident or occupational disease, Absences not exceeding six months stemming from illness duly certified, lay-offs as provided under section 32 of the Labour Code.

annual paid leave. It is granted at the request of the worker or apprentice who wishes to attend a course exclusively devoted to the worker's education, or trade union training. Finally, a maximum of ten days per year of paid special leave of absence, not deductible from the annual leave shall be granted to workers on the occasion of family events directly concerning their own home.

All these rights are enjoyed by workers in general without gender considerations, and it is within the same perspective of equality that the law organises the possibility for any worker to grow in his career.

3.1.3 Right to growth in one's career

The fourth principle of WEPs promotes education, training and professional development for women. It encourages employers to invest in workplace policies and programmes that open avenues for the advancement of women at all levels and across all business areas, and encourage women to enter non-traditional job fields. The principle also requires to ensure equal access to all company-supported education and training programmes, including literacy classes, vocational and information technology training. This incitement to devise mechanisms to promote training and therefore the development of women at work is a strong empowerment tool. The Cameroonian legislator has taken this need into consideration as Law N°2018/010 of 11 July 2018 governing Vocational Training in Cameroon newly introduced continuing vocational training among vocational trainings.[10] This law that explicitly promotes equal training opportunities for all and gender equality under article 5 has clearly stated the aims of continuing vocational training: providing further training or retraining to professionals, fostering professional integration, reintegration and mobility on one hand, and on the other hand, upgrading workers' capacities to meet technical, technological and trade-related developments. By so doing the legislator who has covered the silence of the Labour Code on that matter has put in place a strong tool of empowerment for women at work.

Besides, civil servants also have the opportunity to go in for internship and studies according to article 68 of the General Statutes of the Civil Service and Public Sector. As further training, this additional training enables competence upgrade or capacity-building in a given branch of activity. A civil servant admitted for a training internship or an internship for professional improvement is considered to be in position of regular activity. Workers can even obtain sabbatical leave to undertake studies or personal research and if need be, the administration can designate a worker on duty to pursue an internship for specialisation or improvement or to do specialised studies to increase his efficacy and productivity. These opportunities of further training offered to workers in general give to women the possibility to empower themselves at work so long as the code has not instituted any discrimination with regards to who can benefit from such training opportunities. Meanwhile, the law, at the same time, does positive discrimination when specific rights are recognised to women.

3.2 The recognition of specific rights to women (a good policy of empowerment should consider the special status of the woman)

The sexuation of norms has been for a long time the reflection of the assignment of different social roles to men and women (Lochak, 2008). Gender consideration is a primordial issue in the enactment of laws in general. The role of procreation inherent to female nature and eventual natural physical limits of women have not been ignored by the legislator. That is the reason why the Labour Code and the law organising Social Security have attributed specific rights to women, in order to protect their physical and moral integrity.

The Labour Code provides that women shall not be kept on any job which has been so found beyond their strength and shall be transferred to a suitable work. The woman is even given the right to request that an approved medical practitioner examine her to ascertain that the work allotted to her is not beyond her strength. In addition, women, pregnant women and breastfeeding mothers are not authorised to perform certain activities. The latter demands a physical effort that the legislator deems them unfit to do and thus tries to protect their physical integrity. According to article 83 of the Labour Code, an order by the Minister in charge of Labour issued after consultation with the

[10] According to article 10, Vocational training shall comprise: initial vocational training, continuing vocational training and apprenticeship.

National Commission on Industrial Hygiene and Safety provided for under article 120, shall specify the type of tasks which women and pregnant women, respectively, shall not perform. Thus, Ministerial Decree N°16/MTLS/DEGRE of 27 May 1969 relating to women's work points out three categories: work that go beyond their physical strength[11], dangerous or unhealthy work[12], and immoral work[13].

The Labour Code also regulates the daily work period of women in general, in view of giving them reasonable hours of work with regard to their home occupations. With respect to the ILO Convention N° 89 on night work concerning women, section 82 (1) of the Labour Code provides that the rest period for women shall not be less than 12 (twelve) consecutive hours. Night work in industries that is any work done between 10pm and 6am is forbidden for women. But two categories of women are not concerned with the above provisions as per section 82 (3) of the Labour Code: women with executive duties and women in services not involving manual labour[14].

The pregnant woman in particular has been attributed specific rights by both the Labour Code and the Social Security Law. Those rights stretch from: the right to terminate her employment contract in case of pregnancy, the right to maternity leave and some related benefits, the right to daily allowance while on maternity leave and the right to nursing breaks.

Maternity leave has been granted to all women employees as well as apprentices. Maternity leave has been organsised by section 84 of the Labour Code which distinguishes the situation of a woman who intends to terminate her employment contract because of her pregnancy, and a woman who would not like to terminate her contract. [15] Where a pregnant woman does not terminate her contract, she shall be entitled to fourteen weeks of maternity leave starting four weeks before the due date of confinement[16]. Such leave may be extended by six weeks in case of a duly certified illness resulting either from the pregnancy or the confinement and the employer shall not terminate her employment contract during such leave. She is also entitled to a nursing break, following the birth of the child, for a period of fifteen months as per section 85 of the Labour Code. The total duration of the breaks shall not exceed one hour per working day and she still has the right to terminate her contract of employment without notice. Besides, during maternity leave, a daily allowance, equal to the amount of the wage, actually received at the time of suspension of the employment contract is to be paid by the National Social Insurance Fund.

As for the woman who intends to terminate her contract, after the pregnancy has been medically certified she has the right to terminate her contract of employment without notice and without being obliged on that account to pay the compensation due in case of termination of an employment contract of an unspecified duration without notice or without the full period of notice being observed. That right to terminate the contract is unilateral because the law imposes that the employer shall not terminate the employment contract of the woman concerned because of the pregnancy as it will fall under discrimination.

[11] It is a general principle laid down by article 6 of the Ministerial Order and article 7 determines minimum weights that women are authorized to carry, push or drag. It is in the same perspective that article 87 sub 2 of the Labour Code states that a woman cannot be kept on any job which has been so found to be beyond their strength and shall be transferred to more suitable work. In case this is not possible, the contract shall be terminated without notice and without either party being responsible.

[12] Articles 8 to 13 of the Ministerial Order forbids to employ women in Underground works in mines, quarries and galleries, the lubrication, cleaning, repair of machines or mechanisms in motion. It also prohibits to employ women in premises where there are machines operated by hand or by an engine, the dangerous part of which are not covered with an appropriate protective device etc.

[13] According to article 14 of the Order, it is forbidden to employ women in the manufacture, handling, sale of writings, printed matter, poster drawings, engravings, photographs, emblems, images and other objects whose manufacture, sale, display offer or distribution are punishable by penal laws as tending to corrupt morals. Article 265 of the Cameroon Penal Code sanctions with imprisonment from 1 (one) month to 2 (two) years and with a fine ranging from CFA F ten thousand to half a million, whoever manufactures, keeps, imports, transports, or exports with a view to trade or whether or not for game or whether or not publicly exhibits or distributes any picture or object liable to corrupt morals.

[14] If this provision protects the role played by women at home (care for the house and the children), and caters for their security against nocturnal assaults, it nevertheless institutes a discrimination in access to industrial jobs. Besides, it even places the categories of women exempted in a situation of discrimination against others as if they too do not have to care for their home or their security.

[15] For women working in the public sector, see section 66 of the Civil Service Code, maternity leave is granted at her request after presentation of the pregnancy certificate of 6 months with payment of full wage. The leave is granted for 14 weeks of which 4 before the presumed date of confinement and 10 from the date of confinement.

[16] If confinement delays or happens before, it does not negatively impact the fourteen weeks period. The law indicates to this effect that where confinement occurs before due date, the rest period shall be extended so that the worker receives the full fourteen weeks of leave and it occurs after the due date, leave taken before may be extended to the date of confinement without such extension leading to the reduction of post-natal confinement (Labour Code, Section 84.3 and 4).

Besides these rights, the legislation in matter of social and family welfare entitles the woman to various social benefits. It is of importance however to indicate that these benefits can only be given to women that are working for entities that have registered with the National Social Insurance Fund[17]. The social security provides various types of cash benefits before and after childbirth: pre-natal allowances, maternity allowances[18] and daily allowances for salaried workers when they stop working to give birth.

This special consideration given to women by the law couple to similar rights they have with men at the work place is proof that the lawmaker is willing to empower them, even though some legal and socio-cultural obstacles persist.

4. Legal and socio-cultural obstacles to the empowerment of women in the work milieu

One cannot contest that Employment law in Cameroon has considerably empowered the woman in the work environment from the moment it makes the right to work a fundamental human right and puts equality of rights at work at the center of the labour law regulations. But notwithstanding these laudable efforts, some elements within the legislation are still plaguing the status of women at work. This is not to ameliorate their condition in a context where the level of empowerment of women deeply reflects our culture and traditions.

4.1 Legal obstacles to the empowerment of women

WEP's main objective is to completely eradicate discriminations against women in the work environment. Despite the appreciated level of presence of the said principles in the legislation, discrimination remains present as all its aspects have not been considered. This situation is aggravated by an insufficient system of sanction against discrimination which renders weak the status of workers in general.

4.1.1 An insufficient enunciation of discrimination criteria in employment

Notwithstanding efforts put in place in the Cameroon legislation to fight against discrimination in the employment of women, the phenomenon is still to be completely eradicated. There is an insufficient enunciation of discrimination criteria in employment, coupled with the fact that women are still being excluded from access to certain jobs.

Convention N°111 of the International Labour Organisation relating to Discrimination in Employment and Occupation has established seven (7) forbidden criteria of discrimination. Article one provides that discrimination includes (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The domestic laws do not conform to all these seven criteria. The preamble of Cameroon's Constitution does not make mention of colour, political opinion, national extraction or social origin. The Labour Code of 1992 lacks the criteria of race, colour, political opinion, national extraction and social origin. The Penal Code[19] and article 11 of Law N° 2001/005 of 16 April 2001 on the orientation of Higher Education do not include colour, political opinion, national extraction and social origin. Decree N° 68-DF-253, of 10th July 1968 to lay down the general conditions of employment of domestic workers and house-helps, amended by Decree N°76/162 of 22nd April 1976 has only mentioned sex. The Civil Servant Code without listing any particular criterion just states that access to public function is opened to any person with Cameroonian nationality

[17] Section 4 of Ordinance n° 73-17 of 22 may 1973 organising Social Security as amended by Law n° 84-006 of 4 July 1984 makes it an obligation that every person natural or corporate body who employs one or more workers under the Labour Code must register with the National Social Insurance Fund.

[18] Pre-natal allowance is regulated by sections 13 to 16 of Law n° 67-LF-7 of 12 June 1967 instituting the Family Allowance Code and maternity allowance by sections 17 and 19.

[19] It is important to indicate that before 2016, article 242 of the Penal Code that sanctions discrimination in employment was only mentioning race and religion. In 2016 with the reform, two other criteria were included: Sex and medical status that do not endanger any person.

without any discrimination. However, the Cameroonian lawmaker has recently improved the status of women at work with the institution of two new criteria of discrimination in the Penal Code: Sex and the health status[20].

All these domestic statutes need to conform with ILO Convention N° 111 in order to ensure that workers regardless of their gender do not face discrimination in seeking for a job or in the course of their employment because there is no possible empowerment where discrimination reigns.

4.1.2 An insufficient system of sanctions against discriminations

The status of women in the work environment in Cameroon is impacted by the numerous insufficiencies that plague the legislation where discriminations still persist regardless of gender. Any worker whether man or woman who is the victim of discriminations in employment has the right to seize the courts to put an end to that. But this is difficult to achieve in practice because it is observed that the sanction system put in place is not appropriate to fight against such discriminations. Two major factors act in favour of that: the presence of too many deficiencies in the sanction system and the freedom of the employer in the exercise of his powers.

The system of sanctions against discriminations is weak for at least four reasons. Firstly, the practical impossibility to seize courts whenever faced with a discrimination. It is not a secret that the powerful economic position of the employer is the cause of the disequilibrium observed in an employer-employee relationship. It is difficult to imagine in practice that an employee who is a victim of discrimination from his employer files a case in court. That action is naturally neutralised by the fear of potential reprisals from the employer and especially the fear to lose their job. Nothing within the legislation guarantees their protection against the reaction of their employer once they introduce such an action, in a context where getting a job has become very difficult. Coupled with this, the worker cannot provide proof that he has suffered some discrimination.

In addition to that, although the law encourages workers in general to go for continuous training in order to perfect their skills, there is no obligation on the employer with regards to vocational training as it was rightly observed that the 2018 law remains weak since it did not make vocational training an obligation for employers (Monkam, 2020). This exposes employees to the goodwill of the employer, who in some cases will voluntarily deprive workers of professional progress when we know what continuing training is to empowerment. For instance, no employer will explicitly justify denial to employ, promote or allow access to vocational training to a worker on the basis of national extraction, sex, religion or social origin. Neither will he commit the imprudence of motivating an employee's dismissal by his religious or political opinions or his membership to a syndicate of workers (Miendjiem, 2011). Except the case of dismissal where article 30 sub 3 of the Labour Code clearly stipulates that it shall be up to the employer to show that the grounds for dismissal alleged by him are well-founded, discrimination is difficult to prove in other instances. Since there are no specific Labour law rules to guide the matter, it is ordinary law rules on evidence that shall apply. In this context, it is the principle *actori incumbit probatio* that shall apply, meaning that he who alleges a fact shall prove it. How will the worker prove the discrimination of the employer? It is a difficult exercise and one can already predict the failure of his action.

Furthermore, the system of sanctions is deficient because of the inexistence of sanctions to protect against discriminations in general. When article 61 sub 2 of the Labour Code provides that for the same type of work and level of proficiency, workers shall be entitled to the same remuneration, irrespective of their origin, sex, age, status and religion, it does not proceed with sanctions that shall apply in case of violation. This observation also applies in the case of the woman who after giving birth must be given the right to a nursing break as per article 85 of the Labour Code.[21] No sanction exists in case of violation by the employer of that legal prescription. This lack of sanction is also observed at the international level where there also exists no sanction attached to the rules of non-discrimination in employment in the International Labour Organisation

[20] Article 242 of the new version of the Penal Code (2016) sanctions whoever excludes another from an employment by reason of his race, religion, sex, or health status, where such status does not endanger anyone with a prison term from one (1) month to two (2) years and with fine of from CFAF 5000 (five thousand) to CFAF 500.000 (Five hundred thousand).

[21] According to article 85 (2) of the Labour Code, the total duration of the breaks (granted 15 months after the child is delivered) cannot exceed one hour per working day.

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Finally, the sanction in case of discriminative dismissal is not appropriate. In fact, article 39 of the Labour Code provides that any wrongful termination of a contract may entail damages. In particular, dismissal effected because of the opinions of the worker or his membership or non-membership to a particular trade union shall be considered to be unlawful. Payment for damages does not bring back the worker to his position, it is a mere compensation for the fact that he suffered from discrimination. He loses his job with no possibility of reintegration.

4.2 Socio-cultural and political obstacles to the empowerment of women

The second principle under WEPs which promotes equality of opportunity, inclusion and non-discrimination recommends to appoint women to managerial and executive positions and to the corporate board of directors and to ensure sufficient participation of women – 30% or more – in decision-making and governance at all levels and across all business areas. In the African context where women still suffer from the weight of tradition and culture, it is difficult to expect such an empowerment of women in the decision-making process in Africa in general and in Cameroon in particular. Besides the fact that the law still allows a discrimination in the employment of women, it appears that the society itself has placed women in a position of dependence towards men. In Cameroon like in most African states, women are seen as weak, feeble-minded with limited reasoning faculty, incompetent to assume leadership positions and incapable of devoting more of their time in demanding jobs because of their family responsibilities (*EKO* and *Serah Mbole Ngome*, Suit N°28/86-87 C.R, BK. 1/86-87, p.55, Bojongo Customary Court, unreported, as cited by Ngaoundje & Frii-Manyi, 2021). As a result of such vision, the woman is traditionally considered as a mother, a house wife or a house keeper and the jobs they exercise can only fit into this range. This special place which is granted to women necessarily leads to their domination by men, to prejudices that are unfavorable to them, the labour market and to occupational segregation (Miendjiem, 2011). Even though Cameroonian women are more and more emancipated and educated, a good number of them are still relegated to domestic work and farming as a result of a lack of evolution of traditions.[22] The legislator himself allows that superiority of men as the Labour Code still forbids women to perform night jobs. Article 212 of the Civil Code in Cameroon makes the man the head of the family and gives him authority over his family. Even the coming of international instruments proclaiming the rights of women have not been able to eradicate that domination of men. If it is visible at one point that it is the protection of the family which guides the intention of the legislator, it produces a negative effect on the status of women at work. In this context, women leadership is hardly in progress especially as a majority of them do not even show interest in politics.

In Cameroon, the marginalisation of women takes several forms: numerical invisibility, in the sphere of power, low mobility for those who exist at strategic positions and confinement to less strategic and symbolically marginal positions (Biwole, 2021, p. 10). Their level of implication is very low meanwhile they constitute the majority of the population. They do not show enthusiasm for politics whether for participation as citizens[23] or candidates for an election, meanwhile the Electoral Code does not discriminate them for whatever positions they are interested in.[24] There are currently only two women presidents of political parties in Cameroon: Edith Kah Walla of the CCP and Hermine Patricia Toumaino Ndam Njoya of the UDC, and this attests to the lack of interest women show in politics. For instance, in 2013, out of 291 political parties registered, only 13 had a woman at its head (Abessolo, 2019, p.33).[25]

The presence of women in the decisional process in Cameroon is very weak. Appointment to the post of minister is at the sole discretion of the Head of State and at the statutory level, there is no commitment to positive discrimination that will ensure a good representation of women in this high responsibility (Biwole, 2021, p. 36). It has been rightly observed that positions offered to women are generally described as 'non-technical industries''

[22] The North Region of Cameroon is more affected by these traditions as the girl child is exposed to early marriages in general.

[23] Article 45 of the Electoral Code (Law N° 2012/001 of 19th April 2012 laying down the Electoral Code as supplemented by Law N° 2012/017 of 21st December 2012) which establishes electoral capacity, does not exclude women. Every Cameroonian aged 20 years old and registered on an electoral list has the capacity to vote.

[24] The position of President of the Republic, parliamentarian, municipal council and even senator is not exclusive to men. See respectively article 116, 156, 175 and 120 of the Electoral Code.

[25] It is important to observe that women are hardly accepted to hold the position of political leaders in Cameroon; one can point out the recent case of Michelle NDOKI member of a political party called Movement for the Rebirth of Cameroon (MRC) who has been extensively criticised to have announced her will to present her candidacy for the MRC headed by Maurice KAMTO.

and concern health, education and well-being. They are rarely offered an executive decisional power in more powerful domains or associated to traditional domains of masculinity as finance and defence (Noukio, 2020 p. 244). But though poorly represented, one cannot say women are left behind in the public sector in Cameroon. In fact, a couple of them are Ministers, Directors General, Chairpersons of Boards of Directors, Secretaries General, Technical Advisers, Deans and Vice-Deans (Biwole, 2021, p. 51). The public sector plays an essential role in Cameroon's economic policy due to its size and its intervention in areas of sovereignty (Biwole, 2021, p. 51) and women involved in the said public sector therefore have a heavy responsibility in the development of the State. As for the private sector, women's promotion also depends on the employer and this exposes women to all sorts of abuse.

5 Conclusion

An analysis of the employment law in Cameroon has revealed that so many aspects of the legislation are still discriminatory when it comes to workers in general and to women in particular. Discrimination can take place from the recruitment process, in the course of the employment contract and at the termination the contract. The lawmaker should be more efficient in the fight against discrimination at whatever stage in the employment chain. Domestic laws should conform to the seven criteria of discrimination of the ILO Convention (race, colour, sex, religion, political opinion, national extraction or social origin) as it was noticed that all of them did not capture them fully. The draft bill of the OHADA Uniform Act relating to the labour law contains all these criteria under articles 8 to 10, even though it contains the same lacuna for the regime of proof of discrimination and the ineffectiveness of sanctions. The law should clearly provide sanctions against discrimination at all stages of the employment chain although the proof of discrimination remains complicated as no employer will explicitly motivate his refusal to employ or his decision to dismiss a worker.

This study also decried the lack of interest in politics by women in Cameroon even though this does not explain why they are not appointed in numbers and in strategic managerial positions in the government. WEPs number two on equal opportunity, inclusion and non-discrimination recommends that women be appointed to managerial and executive positions and to the corporate board of directors[26]. To empower women also means to give them the opportunity to actively participate in the management of the country. The electoral code recognises both their rights to vote and to even present themselves as candidates at the different elections. But to render this feasible, cultures and traditions that keep sustaining inequality in the society should be abandoned because they prevent women from being actors of economic development, in a context where women contribution to the development is no more questionable. For this purpose, women should be conscious of the fact that they should get involved in politics. Networks like *More Women in Politics*[27] that sensitises women on the importance of politics should be multiplied in Cameroon so as to create political awareness in women.

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[26] In France for instance, a Law n° 2011-103 of 27 January 2023 has imposed that 40 percent of the board members of companies that list stock on the stock exchange should be women.

[27] The Non-Governmental Organisation More Women in Politics was created in 2006 in Cameroon and is regulated by Law n°90/053 of 19 December 1990 on freedom of association in Cameroun. It is made up of associations, Non-Governmental Organisations and individuals working for civic education and civic engagement, the enhancement of women's skills, the promotion of women's leadership in public and political life, in the socio-professional and economic fields.

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Validity of Agreement by Limited Liability Companies that Have Not Registered in the Business Entity Administration System Based on Law Ministry of Regulation Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships in terms of Legal Certainty Aspects

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Abstract
This study was conducted to analyze the legal consequences of agreements made by CVs that have not been registered in SABU, legal certainty regarding adjustments to existing CVs prior to the enactment of Law Ministry Regulation Number 17 of 2018, as well as legal protection for parties who have already bound themselves in an agreement made with a CV that in fact has not been registered in the SABU. This research is a normative legal research. In this research, it uses a statutory and conceptual approach. The data obtained are primary data and secondary data, the two data are combined and analyzed qualitatively in order to obtain a solution to the problem. The results of the research are poured into a discussion that is arranged systematically and then described descriptively. Based on the results of the study, the legal consequence of an agreement made by a CV that has not been registered in SABU is that the agreement made has no validity/legality as long as the CV has not registered using SABU. Regulatory legal certainty regarding adjustments to existing CVs prior to the enactment of Law Ministry Regulation Number 17 of 2018 is that all CVs that have been previously registered based on the provisions of laws and regulations as contained in the KUHD have no legal certainty and legal standing as a business entity. as long as it has not re-registered with the Ministry of Law and Human Rights in accordance with Law Ministry Regulation No. 17 of 2018. As legal protection for parties who have already entered into an agreement made with a CV which in fact has not been registered in the SABU, it is the legal responsibility of the partners to the parties related to the deed of establishment and the deed of amendment to CV's articles of association after the enactment of Law Ministry Regulation No. 17/2018 provides legalization to provide legal certainty for parties who have binding, namely a Certificate Registered in SABU issued by the Directorate General of General Legal Administration, where one of the purposes of registration carried out in SABU is so that the Business Entity can be protected by law in Indonesia.

Keywords: CV, Registered, Administration System

1. Introduction

Commanditaire vennootschap or CV, which is commonly referred to as a limited liability company, is a company founded by one or several persons who are responsible for all or are responsible in solidarity, with one or more people as moneylenders (geldschieter). Furthermore, referring to Article 19 of the KUHD, Widjaya stated that a CV is a partnership consisting of one or more ordinary partners and one or more limited partners, who are personally responsible for all debts of the partnership. The silent partner only contributes capital for the partnership, and is responsible only for the amount of his contribution.

The establishment or formation of a Limited Liability Company or Comanditaire Vennootschap which is often abbreviated as CV has been regulated in the KUHD. Based on Article 22 of the KUHD, the Limited Partnership or Comanditaire Vennootschap, hereinafter referred to as CV, is established using a notarial deed. Then Article 23 of the KUHD states that essentially the Notary deed is then registered with the local District Court where the CV is located. Thus it can be concluded that the process of establishing a CV is not only limited to the making of a Notary deed regarding the establishment of a CV, but furthermore the deed of establishment must be registered with the Court.

Over time, the government issued Government Regulation Number 24 of 2018 concerning Electronically Integrated Business Licensing Services which in Article 15 paragraph (2) and paragraph (3) it is stated that in essence the deed of establishment of CV, amendment of CV's articles of association, and dissolution of CV. must be registered with the government agency that carries out government affairs in the field of law (Minister of Law and Human Rights) and the arrangements will be set forth in the regulations made by the government agency. With this provision, the Minister of Law and Human Rights issued Regulation of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships which in Article 3 in conjunction with Article 10 paragraph (1) of the Ministerial Regulation states that in essence the establishment of a CV must be registered with the Business Entity Administration System.
The KUHD stipulates that it is enough for a CV to be registered with the District Court, while the Ministerial Regulation stipulates that CV registration is carried out in the Business Entity Administration System. In practice, CV registration is carried out by a Notary who is authorized by the applicant to be registered with the Business Entity Administration System.

The problem that then arises is regarding the existence of a CV that already existed before the enactment of the Ministerial Regulation. Of course, the CV that existed before the enactment of the Ministerial Regulation only knew and registered with the District Court. However, the provisions of Chapter VII Article 23 paragraph (2) of the Ministerial Regulation provide tolerance for the previous CV that already exists to make adjustments by registering the company to the Business Entity Administration System (SABU) with a note that it must be registered within 1 year from the enactment of the Ministerial Regulation. the. This provision is quite confusing because actually if a regulation is said to be mandatory, then there should be sanctions if the provision is not carried out but in fact there is no provision regarding sanctions if the CV registration to the Business Entity Administration System is not carried out so that there is a possibility that until now there is still CV that has not registered its company to the Business Entity Administration System and may continue to run its business activities by entering into various agreements with other parties.

This paper discusses and analyzes legal issues, namely regarding the legal consequences of agreements made by CVs that have not been registered in the Business Entity Administration System, legal certainty regarding adjustments to existing CVs before the enactment of Regulation of the Minister of Law and Human Rights Number 17 2018 concerning Registration of Limited Partnerships, Firm Partnerships and Civil Partnerships, as well as legal protection for parties who have already bound themselves in agreements made with CVs which in fact have not been registered in the Business Entity Administration System. Seeing that there are no similar articles that discuss the registration of CVs that have not been registered in SABU and CVs that already existed before the enactment of the Minister of Law and Human Rights Regulation Number 17 of 2018, it is hoped that this can add information and knowledge in the field of notary, especially related to registration. CV and in particular are expected to be a guide for Notaries and people who want to establish a CV.

2. Research Methods

The research specifications used to discuss this issue are normative juridical, namely research based on laws and regulations related to the Regulation of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships. The approach in this research is the statutory approach and the conceptual approach. According to Peter Mahmud Marzuki, the statutory approach is carried out by reviewing all laws and regulations related to the legal issues being handled. While the conceptual approach (conceptual approach) departs from the views, doctrines that develop in the science of law.

3. Result and Discussion

3.1. Legal Consequences of an Agreement Made by a CV Not Registered in the Business Entity Administration System (SABU)

Legal consequences are consequences caused by law, on an act committed by a legal subject. Legal consequences are a result of actions taken, to obtain a result expected by legal actors. The intended consequences are those regulated by law, while the actions taken are legal actions, namely actions that are in accordance with applicable law. From the explanation above, the legal consequence of an agreement made by a CV that has not been registered in the Business Entity Administration System (SABU) is that the agreement made does not have validity/legality as long as the Limited Partnership (CV) has not submitted a recording of the deed of establishment and the deed of budget amendment. electronic basis to the Ministry of Law and Human Rights by using the Business Entity Administration System (SABU).

Then the company agreement that is obligatory on a contractual basis (de contractuele basis), as stipulated in Article 1320 of the Civil Code, and has legal consequences in accordance with the principles set out in Article 1338 of the Civil Code. If based on the explanation of the contents in these articles, it can be said that without a deed of establishment of a CV, the business actor can run his business based on an agreement made by the business actor with a third party. Where the agreement made by the parties has legal force as law, so that the parties concerned can make it in the form of a company agreement according to the wishes of each party as long as it does not conflict with the law, decency, and public order.

Article 22 of the KUHD explains that "every firm company must be established with an authentic deed, but the absence of such a deed is not stated to be detrimental to third parties". Then Article 14 paragraph (1) of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships stipulates that the minister issues a registered certificate if the CV registration application has been received.

The registered certificate is proof that the CV is legally established and fulfills the company's legal principles, namely the principle of publicity so that the public can easily access and know the location of the company so that it can support the compliance of the obligations of the founders of the company to the public or third parties related to the company. the. So other legal consequences if the establishment of a CV is not registered with SABU, then the CV is declared not legally standing and does not meet the principle of publicity, which means that the CV can be said to be a public company that runs its business in general and the period of time is not limited and the articles of association are not binding on the parties. partner, which means that the line of business carried out by the CV is not specifically determined and the person authorized to represent the CV is not specifically determined so each partner has the right to represent the CV and if one of the partners enters into an engagement with a third party that is contrary to the articles of association, the responsibility is still carried out jointly and severally by the partners, not only the responsibility of the individual who commits a mistake that is contrary to the articles of association.

As well as related to the legality of the establishment of a CV or the legality of a CV that if it does not have a registered certificate in accordance with article 14 paragraph (1) then the CV can be considered a general company whose shareholders have the same responsibility jointly and severally up to their personal assets to other parties.

third and each company can represent the firm to do the signing. This is the same as the consequences regulated in Article 29 of the KUHD regarding not registering and announcing a CV at the district court clerk.

If the registration of the CV's deed of establishment is not registered through SABU, then the business actor who runs a business in the form of a CV cannot make adjustments to his company's permits, and the CV also cannot cooperate with third parties, so that this causes the CV to have no identity. and also has no public legality.

Legal risks for third parties if the CV's deed of establishment has not been registered, then the legal consequences that arise are as described in Article 29 of the KUHD. As for the legal risk for third parties (in this case including financial institutions (banks) against CVs that have not been or are not registered, then this is related to the unclear collection of debts to debtors. In CVs that have been registered, collections are only made to active partners/ While for CVs that have not been or are not registered in SABU, the legal status of the CV becomes like an ordinary civil partnership, this causes that debt collection can be done to every partner, both active and passive, has the same responsibility in the CV.

This is in accordance with Article 1643 of the Civil Code, which explains as follows:
The limited liability companies can be sued by the debtors with whom they have acted, each for an equal amount and share, even though the share of one company in the company is less than the share of the other company; except if at the time the debt is made, it is expressly determined that the obligations of the companies to pay the debt are in proportion to the size of their respective shares in the company.

So with the promulgation of Law Ministry Regulation No. 17/2018, automatically every business actor who has a business entity in the form of a CV, firm, and civil partnership must be registered in the Business Entity Administration System (SABU). In practice, a financial institution (bank) that will provide credit to a debtor in the form of a CV should already be able to know about the status of the business entity in the form of a CV, whether there is a deed of establishment and the changes have been registered in the SABU.

3.2. Legal Certainty Regulations Regarding Adjustments to Existing CVs Prior to Enactment of Regulation of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships and Civil Partnerships

For limited partnerships that existed prior to the enactment of Law Ministry Regulation Number 17 of 2017 their existence was still recognized with the provision that within one year the limited partnerships were required to register their business entities in the Business Entity Administration System, but in this provision it is not clearly stated what legal consequences will be obtained by the Agency. Businesses that do not register within that time period. Based on Article 23 paragraph (1) Law Ministry Regulation No. 17/2018 for CVs that have been established before the enactment of the regulation are required to register registration within 1 (one) year after it is enforced. And based on Article 23 paragraph (2) Law Ministry Regulation No. 17/2018 that the registration of the registration is allowed by using a name that has been used legally by a CV that has been registered in SABU. Therefore, if within a period of 1 (one) year a CV, Firm and Civil Partnership that has been established does not register and register its CV, Firm and Civil Partnership in the SABU, it can be considered that there will be consequences in the future that the name of the CV, Firm and Partnership The Civil Code has been used by CV, Firms and other Civil Guilds. Then as determined in Article 4 of the Minister of Law and Human Rights No. 17/2018 that the application for registration of the CV, Firm and Civil Partnership begins with the submission of the name of the CV, Firm and Civil Partnership to the Minister.

It is appropriate if the establishment of a CV is carried out with an authentic deed, because it provides legal certainty for each of the partners concerned, as well as for third parties to be able to know the rights and obligations of the partners who established the CV. Then after the deed of establishment of the company is completed, then as a form of legality of a company, the company must be registered with the Business Entity Administration System (SABU) to obtain a certificate issued by the Directorate of General Legal Administration. Enforcement of the online registration system through SABU based on the Regulation of the Minister of Law and Human Rights

of the Republic of Indonesia Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships promulgated since August 1, 2018.

Currently, whatever is done to the CV deed, whether in the form of a deed of establishment, a deed of amendment to the articles of association and a deed of dissolution of CV, all of them must be reported to the Minister of Law and Human Rights, so that a statement is issued by the Minister online through SABU. So that all track records of CV legal actions can be registered and tracked. This aims to be able to realize the orderly administration of CV data so as to provide legal certainty for business actors and third parties as well of course.

If you pay attention to the regulations governing the registration of CV's deed of establishment, it provides more clarity than the previous one, because the Regulation of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships and Civil Partnerships requires checking and ordering names in advance, so that it can be ascertained that this avoids the similarity of business names run by business actors, and the name can indicate the identity of the CV that was established. In addition, the current regulations governing the registration of CV's deed of establishment provide more legal certainty than in the past. This is because all CV registration links are synchronized between the online system of the Directorate General of General Legal Administration under the auspices of the Ministry of Law and Human Rights, and the online single submission system under the Investment Coordinating Board (BKPM).

So, for partnerships, whether limited partnerships (CV), firm partnerships, or civil partnerships, that already existed and were established before the entry into force of electronic registration (online) through the Business Entity Administration System or SABU, it is regulated in the transitional regulation of the Minister of Law and Human Rights Regulation Number 17 of 2018, namely that: At the time this Ministerial Regulation comes into force, Limited Partnerships (CVs), Firms and Civil Partnerships that have been registered with the District Court based on the laws and regulations, within 1 year after the enactment of this Ministerial Regulation are required to register the registration is in accordance with the provisions of this Ministerial Regulation. Registration of registration as intended is allowed to use names that have been used legally by CVs, Firms, and Civil Partnerships that have been registered.

Therefore, if within a period of 1 (one) year a CV, Firm and Civil Partnership that has been established does not register and register its CV, Firm and Civil Partnership in the SABU, it can be considered that there will be consequences in the future that the name of the CV, Firm and Partnership The Civil Code has been used by CV, Firms and other Civil Guilds. The provisions of this registration record are intended to record registration for CVs, Firms, and Civil Partnerships that have been registered in the District Court. The purpose of recording registration is the recording of registrations that have been carried out at the time of establishment, namely at the Registrar's Office of the local District Court. As has been the case so far, it is based on Article 23 of the KUHD that the registration of the establishment of a Partnership of Firms and Limited Partnership is carried out at the Registrar's Office of the District Court.

3.3. Legal Protection for Parties Who Have Already Bind themselves in Agreements Made with CVs that in fact have not been registered in the Business Entity Administration System (SABU)

As regulated in the Civil Code as well as in the KUHD, especially for Firm Partnerships and Limited Partnerships, that the establishment of a Partnership is required to be made with an authentic deed in this case a notary and registered at the Registrar's Office of the local District Court (Articles 22 and 23 of the KUHD). This provision is not followed by sanctions if a partnership is not established with an authentic deed. Even in the next provision it is stated that the absence of an authentic deed may not be presented to the detriment of a third party. This provision is intended to provide legal protection to third parties, that parties who engage in business activities with third parties using the form or name of a firm partnership or limited partnership cannot escape their responsibilities as partners, even if there is no deed. So the absence of a deed of establishment of the Firm or Limited Partnership cannot be used by partners/members to prove that the firm does not exist, with a view to liberating its responsibilities to third parties.

After the deed of establishment is drawn up, the deed of establishment must be registered at the Registrar's Office of the District Court, in the jurisdiction where the Firm Partnership or Limited Partnership is domiciled (Article 23 of the KUHD). The obligation to register contains a sanction, that as long as the registration and announcement have not been made, third parties may regard the firm partnership as a general partnership. The provisions regarding the sanction of not registering a Firm Partnership or Limited Partnership in Article 29 of the KUHD, so that the deed of establishment of the Firm Partnership or Limited Partnership must be made in writing, namely by deed, because if it is not written, of course it cannot be registered and announced. Then in its development the government issued Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships, which stipulates that registration for the establishment of Limited Partnership, Firm Partnership and Civil Partnership business entities is carried out electronically or online. through the Business Entity Administration System (SABU) at the Ministry of Law and Human Rights.

The birth of Law Ministry Regulation No. 17/2018 has set aside the provisions of Article 23 of the KUHD, so that the registration process for the CV establishment deed does not need to be registered again with the District Court in accordance with the legal domicile of the CV where it was established. The application of online CV registration through SABU is expected to provide convenience for business actors, and can avoid the practice of illegal fees and can help the government to tidy up data and supervise every business entity in Indonesia.

However, if it is seen and understood that Law Ministry Regulation No. 17/2018 concerning Registration of Limited Partnerships, Firm Partnerships, and Civil Partnerships has many weaknesses, one of which is the absence of regulations governing the legal consequences that occur if a business entity is not a legal entity in the form of a CV that was established before Law Ministry Regulation No. 17/2018 has not been enacted or has not registered its business online through SABU. However, after 2 (two) years the enactment of Law Ministry Regulation No. 17/2018, the Minister still provides opportunities for business actors who have businesses in the form of CVs that have been established long before Law Ministry Regulation No. 17/2018 was promulgated, to be able to register and register the deed of establishment online through SABU.

Due to the absence of strict legal sanctions related to the registration of the establishment of CV, Firms and Civil Partnerships in the SABU system, it has actually proven that Law Ministry Regulation No. 17/2018 cannot enforce legal certainty in society. As protection for parties who have already entered into an agreement made with a CV which in fact has not been registered in the Business Administration System (SABU), it is the legal responsibility of the partners to third parties related to the deed of establishment and the deed of amendment to the CV's articles of association after its promulgation. Law Ministry Regulation No. 17/2018 that the form of legalization to provide legal certainty for third parties is a Registered Certificate and a Change Registration Certificate from SABU issued by the Directorate General of General Legal Administration.

As stated by Satjipto Rahardjo regarding the concept of legal responsibility, that legal responsibility is closely related to the concept of rights and obligations, meaning that he is responsible for a sanction if his actions are contrary to the applicable regulations. If it is related to the responsibility of the partner in a company in the form of a CV, then they have responsibility for the legality of their business, both in terms of business registration, business licensing, and so on, to be used as evidence that provides legal certainty for third parties who are collaborating. with the company. In current practice, if CV partners want to cooperate with third parties, then the SKT of CV's deed of establishment and SKPP on CV's deed of amendment to the articles of association are one of the administrative requirements. However, there are several private institutions that still allow the SKT or SKPP from SABU to follow to be completed. However, if a CV partner wants to make a permit adjustment, then the One Stop Integrated Licensing party requires that SKT or SKPP must exist and become an absolute requirement for making or adjusting permits through OSS, because the system in OSS is data retrieval, meaning that everything is inputted by the OSS. notary through SABU, then the inputted data will automatically be recorded in the OSS system.

Then in addition to that for business actors, the application of Law Ministry Regulation Number 17 of 2018 is also useful because in addition to being able to be done online and transparently, and furthermore there are several

other benefits related to the purpose of registration carried out in the Business Entity Administration System (SABU), which is wrong. one is that the registration of a Business Entity is carried out so that the Business Entity can be protected by law in Indonesia. The form of legal protection for a Business Entity is not only related to protection in conducting business activities, but also the protection of its allies.

4. Conclusions

The legal consequence of an agreement made by a CV that has not been registered in the Business Entity Administration System (SABU) is that the agreement made does not have validity/legality as long as the Limited Partnership (CV) has not submitted an electronic filing for the registration of the deed of establishment and the deed of amendment to the articles of association to the Ministry. Law and Human Rights using the Business Entity Administration System (SABU).

Legal certainty regarding the adjustment of an existing CV prior to the enactment of Regulation of the Minister of Law and Human Rights Number 17 of 2018 concerning Registration of Limited Partnerships, Firm Partnerships and Civil Partnerships, must be re-registered by registering at the Ministry of Law and Human Rights, one years since the regulation was promulgated or effective as of August 1, 2018 and the company must adjust the line of business it runs with the line of business listed in the Indonesian Standard Classification of Business Fields (KBLI) 2017, by changing its articles of association and registering electronic registration (online) through the Business Entity Administration System (SABU) of the Ministry of Law and Human Rights at the Directorate General of General Legal Administration to issue a Certificate of Registration. All CVs that have been previously registered under the provisions of the laws and regulations as contained in the KUHD have no legal certainty and legal status as a business entity as long as they have not re-registered with the Ministry of Law and Human Rights in accordance with Permenkumham regulation No. 17 of 2018.

As legal protection for parties who have already entered into an agreement made with a CV which in fact has not been registered in the Business Administration System (SABU), then it becomes the legal responsibility of the partners to third parties related to the deed of establishment and the deed of amendment to the CV's articles of association after the promulgation of Permenkumham No. 17/2018 that the form of legalization to provide legal certainty for third parties is a Registered Certificate and a Change Registration Certificate from SABU issued by the Directorate General of General Legal Administration, in addition to registration carried out in the Business Entity Administration System (SABU), one of the objectives is so that the Business Entity can be protected by law in Indonesia. The form of legal protection for a Business Entity is not only related to protection in conducting business activities, but also the protection of its allies.

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Social Media and Violence Against Women in Terms of Human Rights Perspective (HAM)

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Abstract
Social media can be a means of emergence of violence against women. The purpose of this study is to examine and analyze social media and violence against women from a human rights perspective. The research method used in this study is normative juridical, the approach used is a statutory approach and a conceptual approach. The sources of legal materials used are primary legal materials, secondary legal materials and tertiary legal materials. The technique of collecting legal materials is through library research, and is analyzed qualitatively. The results of the study show that social media is a means that can lead to violence against women. Because women are a community that uses social media a lot. Even though the impact caused by violence in cyberspace (social media) is very contrary to human rights. Likewise, a woman's freedom and sense of security to access the internet through the use of social media is no longer safe. There needs to be a firm and clear legal umbrella related to regulating the use of social media so that women feel protected. Likewise, there must be a clear understanding from law enforcement officials regarding online gender-based violence so that the law enforcement process can run well too.

Keywords: Social Media, Violence, Human Rights

1. Introduction

Violence against women is an interesting social phenomenon to study. Violence against women occurs both in public and private spheres. One of the public spaces that gets a lot of attention by women is social media. Based on data from the Ministry of Communication and Informatics (Kemenkominfo), internet users in Indonesia currently reach 63 million people. Of these figures, 95 percent use the internet to access social networks. The most accessed social networking sites are Facebook and Twitter. Indonesia is ranked the 4th largest Facebook user after the USA, Brazil and India. Ranked 5th largest Twitter user in the world. Apart from Twitter, another well-known social network in Indonesia is Path with 700,000 users in Indonesia. Line has 10 million users, Google has 3.4 million users and LinkedIn has 1 million users (MCI, 2013).

Most social media users are women with various ages and education. The development of social media has also affected the social life of everyday people (Asiati, 2018). Based on research conducted by Juwita et al., regarding the influence of social media (Facebook) on lifestyle changes for high school students in Bandung, it shows that

social media has a significant impact on the lifestyles of high school students, especially for female students (Juwita & Nurbayani, 2014).

Social media not only has a positive impact on the advancement of science and technology. However, the existence of social media also contributes to the emergence of violence against women. In his research, Bambang Arianto explained that social media is a new space for gender-based violence in Indonesia, especially with the Covid-19 pandemic, which has greatly increased the use of social media (Bambang, 2021).

Social media has a negative impact on the emergence of violence against women, both in the form of virtual harassment, threats to spread personal documentation, defamation and so on. Whereas women have the right to obtain/access information. Whereas in the 1945 Constitution of the Republic of Indonesia Article 28 letter F it is stated that everyone has the right to communicate and obtain information to develop his personality and social environment, and has the right to seek, obtain, possess and store information using all types of available channels. The same thing is regulated in Article 14 paragraphs (1) and (2) of Law No. 39 of 1999 concerning Human Rights, which emphasizes that every person has the right to communicate and obtain information needed to develop his personality and social environment. Everyone has the right to seek, obtain, possess, store, process and convey information using all available means.

The Universal Declaration of Human Rights has guaranteed that everyone has freedom of expression, but their right to privacy is also recognized and protected. Using social media is everyone's right. Everyone has the right to communicate (through social media) and obtain information. Everyone is free to express himself (through social media), but his privacy is still protected because it is his right as a human being. Thus, the author is interested in studying and analyzing more deeply the relationship between social media and violence against women from a human rights perspective.

2. Method

Legal research is a series of activities with a scientific method in seeking the truth in a systematic, complete and consistent way [5]. This type of research is normative juridical. Aziz states that normative legal research is research that examines the reciprocal relationship between legal facts which are independent variables and social facts which are the dependent variable. So that the law functions as a tool of social order (Noor, 2012). The approach used in this study is a statutory approach and a conceptual approach. The statutory approach basically examines legislation that is related to the problems being faced (Peter, 2013) [7], while the conceptual approach is an approach that refers to legal principles that can be found in the views of scholars or legal doctrines (Budiono, 2016). The data collection technique used in this study was a literature study. Data analysis technique is descriptive analytical. It is descriptive analytical in nature because this research is intended to provide a detailed, systematic and comprehensive description of the influence of social media on the emergence of violence against women from the perspective of human rights.

3. Discussion

3.1. Social Media and Violence Against Women

Technological developments have had an impact on the lifestyle of women. Social media such as Facebook, Twitter, WhatsApp, Tik Tok, Line as a result of advances in information and communication technology have become the main choice for women. Indonesian women are internet users by 76% when compared to men who are only 72%. Women use the internet more in urban areas which are dominated by working/professional women and followed by housewives (Evawani, 2014).

Social media is online media that supports virtual social interactions of its users and can easily participate in interactive dialogues. Types of social media can be a) video sharing applications consisting of YouTube, Vimeo and DailyMotion; b) microblogging applications such as Twitter and Tumblr; c) social network sharing applications such as facebook, google plus and path; d) professional network sharing applications such as

LinkedIn, Scribd and Slideshare; e) photo sharing apps like pinterest, picasa, flickr and Instagram (Liefdray, et al. 2022).

Indonesian women, before getting to know social media as a means of sharing information and communication, they were already familiar with mass media such as television, radio, magazines and newspapers. Through the mass media, women have been exploited by displaying their faces and bodies on magazine covers, television advertisements and various acts of violence against women that are deliberately perpetrated in various films or television soap operas. Along with the development of technology that creates social media as a means of communication and information, it also has an impact on women as the main users when compared to men.

Women as part of society, also enjoy technological developments through the use of social media which has an impact on themselves as a woman and also on the surrounding environment. One of the negative impacts caused by the development of social media is the existence of violence against women through social media which is increasingly prevalent. Based on the results of research in Indonesia, social media such as Facebook, WhatsApp, and Instagram are the platforms that most often become media for online gender-based violence (Mauliya & Noor, 2021).

Violence against women through social media can take the form of sexual harassment, threats, grooming, defamation, and so on. giving obscene comments or questions, both sexual and explicit, to someone, solicitation of pornographic acts, and using indecent images to demean a woman. In the virtual world or social media, perpetrators of violence against women are more free to carry out their actions, plus they are getting bolder because they use anonymous accounts which of course will be difficult to trace the perpetrator's real identity. This shows that with the trend of violence on social media, victims, especially women, feel that they no longer have a safe and comfortable space. In fact, everyone has the right to feel safe and comfortable in social life and on social media.

3.2. Relations between Social Media and Violence Against Women from a Human Rights Perspective

The development of technology is like a double-edged sword which not only has a positive impact on improving information and communication but also has a negative impact on women as the most users of social media. Women are victims of violence in the public sphere, especially in terms of using social media. Even though the impact is very contrary to human rights. There are no clear rules, social media is not in favor of women's rights in using social media and law enforcement officials are still not concerned about a gender perspective, thus weakening the law enforcement process.

A survey conducted by Plan International in 22 countries targeting 14,701 female adolescents and young adults stated that more than half of respondents (58 percent) had experienced violence when interacting on social media. Most accept more than one type of violence in virtual space. There are various forms of violence experienced. However, the acts of violence that were often received were in the form of insulting and harassing words (59 percent), intentional humiliation (41 percent), threats of sexual violence (39 percent), body shaming (39 percent), and sexual harassment (39 percent). 37 percent). Based on the respondents' information, the media that became the means of this action were Whatsapp (60 percent), Instagram (59 percent), and Facebook (53 percent). Respondents also admitted that the perpetrators were not only strangers and anonymous, but also relatives, friends, and even spouses (Debora, 2022).

In its research on Online Gender-Based Violence (KGBO), the Association for Progressive Communications (APC) explains that violence in the digital realm, such as the collection and distribution of personal data, photos or videos, violates the right to privacy. including violations of human rights. The types of human rights violations resulting from acts of violence in cyberspace are the same as those caused by physical violence. In addition, victims also lose the right to determine their fate (self-determination) and body integrity (bodily integrity). This right is the culmination of human rights where a person has the right to regulate and control his own body and destiny. This occurs when the perpetrator of sexual violence forces and threatens the target so that the perpetrator's wishes are carried out.

This was followed by the loss of the right to freedom of expression. Sexual violence, intimidation, sexist comments, surveillance, to threats and physical actions originating from online media make women limit their participation in online activities. It could be that they have completely withdrawn from the digital world. With an insecure online environment, women cannot freely express their opinions or show their existence in certain campaigns or activities. This often happens to journalists, activists, artists, figures, or women's rights defenders.

Violence against women in cyberspace is included in the discussion of the protection of human rights. World institutions, such as the United Nations and the United Nations Human Rights Council (UNHRC), have included this issue in world-level discussions since 2006. The 2017 United Nations High Commissioner for Human Rights Report has discussed digital gender issues from a human rights perspective. The report states that online violence against women needs to be resolved within the broader context of offline gender-based discrimination and violence. Countries need to take legal action to investigate and provide compensation or assistance to victims.

4. Closing

Based on the description that has been explained above, it can be concluded that women are a group of people who are very vulnerable to the development of social media. Because women are quite high users of social media when compared to men. Violence against women can occur on social media such as sexual violence experienced by women through social media. Various content that seems to demean women's dignity, calls for pornographic acts, and various actions that demean a woman. Even though women also have the right to obtain information and be able to communicate while still feeling safe and comfortable. With violence against women through social media, it is necessary to have legal rules or legal umbrellas for the use of social media that can provide protection or a sense of security for women as the most users of social media.

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A Comparative View and Brief Analysis at the New Right to be Forgotten: The European And American Privacy Law

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Abstract
The purpose of this research is to make an analysis of the moment when the privacy of an individual became a sensitive element which could be internationally protected and limited to public accessing. The research tends to start by showing the current perspective of the privacy understandings, based on sounded cases of celebrities which allowed Courts to make and establish positions to direct the treatment of the privacy right; after, it seeks to make an overview of the scenario when privacy is highly controversial: internet and social networks. Then, the study of the European and United States legislations in the subject will open the door to bring the analysis of the new right to be forgotten and how this new concept is being treated and has developed in the last years.

Keywords: Privacy, Privacy Law, Privacy Right, Social Media

1. Introduction

A photo of Clarence W. Arrington appears on the front page of the New York Times magazine in an article entitled "*The Black Middle Class: Making It*." (Arrington v. New York Times Co., 1982). Across the Atlantic, in the UK, the famous model Naomi Campbell was photographed leaving a rehabilitation clinic for drugs consumers (Campbell v. MGN Ltd., 2004). Those two pictures published without the permission of the photographed: Arrington, a stranger; Campbell, a lavish and famous model. To the demands of both against newspapers and photographers privacy breaches, the US Court (New York) in Arrington rejected the existence of any rights against the New York Times, while the European Court in Campbell ordered the defendants to pay compensatory remuneration for the violation of the privacy of the model.

The list could go on and on to be endless: Princess Caroline of Monaco is photographed with their children without their consent (Von Hannover v. Germany, 2004); president of the International Automobile Federation is slandered by a British newspaper which provided a hidden camera to a prostitute to take pictures during sadomasochistic sex acts with supposed Nazis issues or Lorena McKennitt, a famous Canadian singer, is threatened by the publication of a book about his private affairs written by an old friend and employee, as stated in court case McKennitt v. Ash (2007).

Cases like this happen all over the world and because of them, the courts have reacted in dissimilar ways. Such reactions are often the product of the notions of privacy that the legal system has accepted.

Conversely, and not far away from an imminent proposal, people tagged want to recover their lives after harmful publications regarding their past acts; this arguing their rights to continue in a normal way of living and, in concrete, their *right to be forgotten*, as extracted and mentioned for the first time in the *Google Case* (Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos. 2014).

2. The Problem: privacy, internet and social networks

Arrington and Campbell cases, expressed the adoption of two cornerstone models and systems of protection of the right to privacy.

Arrington

In what apparently could be understood as an association praising the published history and Arrington figure, it proved to be an insult to the statements in the article and baseless implicit connections between the visions of the young man and those expressed in the text. Mr. Arrington did not consent to publish that photo (1982), much less in a national magazine. The photo was taken by a photographer linked to the newspaper and presented Arrington as an example of the expansion of professional black middle class in American society. The author of the article concluded that "this group has been growing much more uprooted from their less fortunate compatriots" (1982).

By contrast, Arrington, a young financial analyst who began his career at General Motors at first and then at the Ford Foundation, understood the text not only as controversial, but as expressing ideas that he did not share. He and the readers who read the article found "insulting, degrading, distorting and reprehensible" (1982). The facts indicated that this article meant to Arrington that society associate him with ideas that were not his and insinuated that he had changed his way of thinking, thus betraying his "social class" (1982). Some theories that Arrington brandished in his claiming were: i) Arguments based on violations of New York state statutes for the protection of civil rights; ii) Arguments based on violations of the common right to privacy, and iii) Violations of the constitutional right to privacy.
The three were rejected. In interpreting the Statute the Court decided that "a photograph published in a newspaper and associated to a public interest article is not considered a" commercial use "or for purposes of marketing and / or advertising, as if the statute forbids" as stated by The Court (Murray v. New York Magazine Co., 1971).

The Court mentioned that the claim pursued by Arrington will not succeed (1982), being the only exceptions that this photograph had no actual connection with what has been published, or that the article and the photograph were a commercial disguised promotion. These exceptions were not present in the case, as the relationship between the published text, the photo and Arrington undoubtedly existed.

The Court also decided that there was no support in the judicial precedent for finding a violation of the common right to privacy and, finally, that there was no state action or a violation by the State or any of the organizations, institutions or state entities, as the New York Times is a private newspaper.

Campbell

In Europe, the well-known Naomi Campbell rejected more than once the overture of been dealing with addiction to drugs. Campbell was photographed coming out of rehab and pictures were published in a newspaper run by MGN Limited. In this case the model demanded monetary compensation to the English courts, receiving a favourable decision. Under the doctrine of breaking confidences and Article 8 of the European Convention on Human Rights, which protects the right to privacy and family life, Campbell argued that disclosure of the location of the meetings of drug addicts was a violation of privacy and that the published photographs exposing this private information (Campbell v. MGN Ltd., 2004).

In these two cases there can be interpreted two points on which rotate the notions of privacy. The first is the notion of control and the second the notion of privacy as the right to the private life or the dignity, according to Levin Avner & Sanchez Abril Patricia. (2009).

2.1 Notions of privacy on the internet

There is not a unique definition of privacy. Certainly, the concept reflects the relationships among members of society and between governments and individuals. Different companies adopt a notion of another, and that notion informs the public about policies, legislation, and even academic discourse.

The two prevalent notions, as evidenced by modern Western laws and legal discourse, are those mentioned above: Privacy understood as control and privacy and dignity. American jurisprudence grants a position to the notion of privacy as control over personal information and therefore the autonomy to decide with whom to share it. By contrast, European courts take the notion of privacy as dignity, that is, as a human right to privacy, a right and substantive value of first order.

2.1.1 Privacy as control of the personal information and freedom

This notion represents individual freedom to control personal information. In other words, it is the freedom to choose who has access to such information. Two of the manifestations of this notion are the Fair Information Practices (FIPs) and the tort of liability of American common law for public disclosure of private facts. The first practice provides the individual control over information that is disclosed. In turn, the individual has the necessary information about data collection mechanisms that are implemented, which means that this individual takes many more responsible and informed decisions about whether or not disclose such information.

The aim is for the individual to make an informed and knowledgeable decision when it comes to disclose your information. Also, fair information practices provide the subject of control over their data: from the supply thereof, the monitoring on the use, disclosure and retention of such personal information. Protection systems based on the FIPs distinguish between information collected by an organization because the same individual provided it, and the information collected or provided by third parties. The control of information, not surprisingly, is evident in its fullness when the information is provided by the individual directly.

- As freedom

In "The Two Western Cultures of Privacy: Dignity Versus Liberty," James Q. Whitman (2004) has curious questions: Why do French people evade talking about their salaries, however, they do take off their bikini’s top? Why Americans undergo extensive credit reports without rebelling themselves? The author agrees with the two notions outlined above and argues that privacy is understood by Americans, essentially, as the freedom to decline government interference in their private sphere. He continues mentioning that this freedom is expressed with high intensity, for example, in protecting the sanctity of the home against governmental actors 18 and attenuated in the field of media invasions.

2.1.2 Privacy as dignity

This is the prevailing notion in Europe. Notable academics, lawyers and American philosophers have addressed this notion of privacy and dignity, although the country's laws do not reflect it. This is the aspect of privacy defending by Samuel Warren and Louis Brandeis in their article on the Harvard Law Review (1890). Threatened by "the intensity and complexity of life" and "the recent discoveries and methods of conducting business”, these authors noted that “seclusion and privacy have become indispensable for the individual”. Also, they said that it was imperative for the law to protect privacy under the principle of "inviolability of personality". All private

interests share a value: respect for individual dignity, integrity and independence. The moral personality of someone defines the essence as a human being. A violation of privacy leaves the person at the mercy of the complaint and the public scrutiny. This nudity to the outside world, gives people and their sense of self vulnerability in an offensive way to their human dignity.

A look to the privacy focusing on the aspect of human dignity inevitably involves the reflection of personality development *per se* and the "inner me". From this point of view, privacy involves the right to keep certain aspects of private life away from others and, therefore, the right to build different "situational personalities." In doing so, the individual discloses aspects of their privacy in different environments and in different contexts. The biggest risk is the lack of ability to freely manage which private information was disclosed and in what context, which leads to catastrophic social consequences.

Originally developed this notion in France and Germany, the right to protection of privacy proposes the creation and maintenance of a personal identity, intimacy, and a community. Thus, European countries follow one way or another this notion focused on the protection of human dignity and, consequently, see it as an inherent right of personality.

The supreme legislative consecration of that notion appears collected in the European Convention on Human Rights, Article 8.1. This article presents under the protection of the right to respect for private and family life that: *"Everyone has the right to respect for his private and family life, his home and his correspondence"* (1950).

2.1.3 Privacy in the internet and social networks

How these ideas are manifested in the internet networks? The article *"Two Notions of Privacy Online*" (2009), Professor Sánchez Abril from the Miami University, USA, and Professor Levin from Ryerson University, Canada, conducted studies on the protection of personal information and expectations of Privacy on Social Networks (OSN-Online Social Networks). The study aimed to investigate how to explain that users of social networks tended to disclose such personal information and still retain somehow any expectation of privacy. How do users of these websites define their expectations of privacy? Is this always an unreasonable expectation? These were the two key areas of a socio-legal research.

The researchers of this global project interviewed approximately 2,500 young people who use the Internet. Ages ranged between 18 and 24 years old. The theoretical assumption of this research effort were the two dominant and competing notions of privacy on the Internet: the idea of privacy as a control and the idea of privacy as dignity.

Until the date of publication of the article, the idea of privacy as a control was predominant. The article focused on an analysis of two leading social networks in the internet market (Facebook and MySpace), and concluded that these networks propel a notion of privacy and user control over it.

However, social networks present a unique challenge in modern times: extreme control on privacy does not prevent Internet users, in an effort to socialize, disseminating personal information to third parties users or no-users that can be catalogued as unwanted, defamatory and many times available to any undetermined number of participants. Many of those participants disclose information without caring, apparently, of losing control over it. Nevertheless, there are well known reactions of indignation when personal information is disclosed, used, or accessed by unauthorized users belonging to another network or simply individuals outside this.

The article, therefore, presented an idea of privacy in social cyberspace that states the following: participants in social networking sites have a legitimate expectation of privacy online, the privacy that network provides itself and the one that is expected from the network. This notion projects the two symbolic aspects that have been discussed academically and practically understood to privacy: the sphere of control and of dignity. According to this notion raised by Abril and Levin, the information is considered by the participants in social networks as "private" as it will not be disclosed outside the network in which it was initially released, if it was originated from

or within they; or if the information does not affect the character of the Internet user, if the same one was originated by others.

2.2 The new manifestation of privacy rights in the digital environment: the right to be forgotten in Europe

In this sense and with the statements just made, it will be a step opening-not a new notion of privacy-but rather a retrospective right to select and organize those personal data likely to undermine the pure personal rights: honour, privacy and image. But, how and why to establish that right? Troncoso admits society does not understand what happens when everything is available, ready to be known and stored indefinitely. (Troncoso Reigada, Antonio, 2012).

It is highly possible that has already passed the time when we all had absolute power of control over our intimacy; it is probably that one of the side effects of the trivialization of the information published on the Web is one unpardonable loss of privacy that has not ceased to belong to us only in part, but when we want to recover -that probably, be already recorded in indelible ink on any computer over the world: with these parameters, can we expect a right to forget or to be forgotten (right to oblivion, as well) by making a selective deletion of some of the online information that has been submitted and is detrimental for us?

On the 28th of February, 2012, it was opened by the Vatican, Roman Capitoline Museum, an exhibition that, under the interesting name of Lux in Arcana, - Light on the Mystery-, sought to leave at the general view declassified documents from the Vatican Secret Archives which had been and remained hidden or secret for centuries, so far away from information, curiosity and, what is worse, to popular culture; In summary, hidden from the freedom of opinion and information, as Weber comments (Weber, Rolf H., 2011, pp 120-130). It is clear what are the dangers that lurk under the decision, usually arbitrary, to determine what information is accessible and what information has to evade to the healthy or unhealthy interests from other people. It is therefore not easy, from a dogmatic point of view, and not easy from a legislative point of view, to shape a so sensitive profiles right and limits.

Special mention needs to be done regarding the processing of personal data which are of historical interest. In this case, similar to what happens when there are other legitimate reasons such as information finalities or the cited public access sources, the right to be forgotten in the internet media can easily decay, because the data of historical and cultural character must be preserved in the way as the objective to be achieved with its conservation and management does not expire or lose intensity by the simple passing of time.

The study in comparative perspective can be of special interest on this last point. In Italy, the *Garante per la protezioni dei dati personali* approved a code of conduct that sets rules and limits on the use of personal data collected in independent historical research and the right to education and information. Therefore, it is warranted that access to documents and files is respected in light of people's dignity and specially the right to personal identity. And, also, it states that the collection of data archives for historical research should be encouraged and treated as a valid form of data retention given the operating profit of them. In a specific legislative context, the Spanish one for instance, such provision provides legal security and, given that the legal system lacks a code of conduct similar, is not insignificant to note here the benefits of it and the more desirable future action of the Spanish authorities to protect data in a similar way, comments Simón Castellano (Simón Castellano, Pere, 2011).

What is undeniable is that this right has entered into force, at least in Europe. It suffices to go to a very recent article made by Jef Ausloos (2012) to draw conclusions in this regard. Meanwhile, its definition in the European legal texts themselves: "The right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes". This is undoubtedly a broad and vague concept, but a good start (at least to define it). The limitations or, in the words of the article, the disadvantages arising from own eventual regulation of the right to be forgotten, can be condensed into the following sections:

a. *Limited Scope*. In the sense that it gives the feeling that the limited scope of the right to be forgotten has to be disturbed by a previous "contractual" relationship, that is, in which the affected has previously consented (this is

not always the case and, as an example, there are cases where the interest of the affected- as happened in Spain- to delete the information displayed online is derived from information appearing in the search tools that had been pardoned by the government after it had served part of the penalty imposed). As Ausloos says, the concept is not adequate to address privacy issues in which the data is obtained legally without the consent of the person. It is also important to remember that the law only provides a solution subsequent to privacy issues.

b. *Anonymized Data*. That is, the individual cannot claim the data separation or selection in regards anonymous information. It does not exist or is not known who could be asserted against this law. The reason for this argument is subtle: the counterweight of anonymity of information posted on the Internet is the lack of credibility.

c. *Subtle Censorship*. It is also one of the most sounded arguments against the establishment of the right to be forgotten: to enable people to eliminate the data that affect them, relevant information can be incomplete, inaccessible or wrongly representative of reality. That is, as we shall see in detail, the establishment of this right could pose an insurmountable friction with the freedoms of expression and information. In short, it could open a door to other forms of censorship.

d. *Practical Difficulties*. It can be analysed and possible explained just with a question: how do we proceed to eliminate harmful data (and only these) for people who are in ubiquitous and opaque multi-platform?

e. *The Illusion of Choice*. It is, perhaps, a "fantasy" or an illusion. The "right to be forgotten" is certainly insufficient to address privacy issues in the internet network. The introduction of a "right to be forgotten" only postpones the illusion of choice. Additionally, it may aggravate the situation of the individual and offers a wildcard for more privacy intrusive applications. They might be created a certain degrees of frustration at not seen made a right that has been granted.

3. The legal nature of the right to privacy in the United States

The term "privacy" in the United States attracts a wide range of legal doctrines, philosophical and political debates. Thus, the American right to privacy has found its manifestation in dissimilar legal institutions, including constitutional rights, laws or special statutes, and own actions of common law.

The United States Constitution enumerates through a system of *numerus clausus* rights and powers of the federal government. Many of the civil rights guaranteed to Americans are established in the first 10 amendments to the Constitution, which is known as the Bill of Rights. Interestingly, the word "privacy" does not appear in the Constitution or in the Bill of Rights. It was the Supreme Court which found that both the Charter of Rights and the Fourteenth Amendment of it, protect the right to privacy related to freedom of association, physical integrity, and individual decisions about education, life family and sexuality.

In this line of thinking, the development of American constitutional right to privacy has focused on understanding it as a right to physical, information, decide freely, to property and freedom of association. As it is right and at the same time constitutional warranty, privacy can also be described as the right of individuals against government interference in their private lives.

The legal framework in which the right to privacy was generated started from the interpretation of freedom as a fundamental value in American society. That is why privacy and freedom are intertwined terms yet come alive. Some examples of the various types of legal and social problems described under the umbrella of privacy in the United States are: laws governing the right to refuse care, or the unlawful registration of a personal residence (right to physical privacy -spatial), the right to monitor computers in the workplace (data privacy), the right of same-sex couples to choose marriage (privacy option-selection), and the right to include or exclude third parties (privacy of association). Despite the literal absence of the term "privacy" in the Constitution, certain rights to privacy are doctrine established through judicial precedent.

The privatizing dimension of the right to privacy is reflected in the reaction of the American civil system to attack this right from an individual's hands. This reaction involves the granting of compensatory actions with non-contract binding, for instance, common law private actions aimed at protecting the privacy of the individual concerned. As stated in Court, perhaps for the constitutional silence and the many aspects that are generated, the US rightfully been difficult to define the right to privacy. (Griswold v. Connecticut,1965, pp 479- 509).

While some legal theorists as Allen (Allen, Anita, 1988) define privacy as a function of accessibility to the person others like Fried (Fried, Charles, 1968, pp. 475-482) have defined it in terms of control over information or in the case of Solove (Solove, Daniel J., 2002, pp.1087-1094 as the person and its privacy.

Despite so many contradictory formulations, the most accepted interpretation in American law is privacy as "the right to be let alone," translated as the individual's right to be left in peace, tranquillity and solitude, the way how Cooley mentions (Cooley Thomas, McIntyre, 1888). Thus, privacy tends to be formed to protect the autonomy of individuals against interference above anything else.

American legal philosophers, since ancient times, have conceived autonomy as the central value of privacy. In the words of Stanley Benn (1971), philosopher and theorist of law, the individual is both a product and a promoter to choose his being. Their decision to keep certain things private and do other public is fundamental for the development of their identity as an autonomous person who freely elects their own projects in life. Professor Richard Parker (1974, p 281) described privacy as the control over when and by whom the various facets of our lives can be perceived by others. The legal philosopher Alan Westin (1968, pp 166-170) described it as all these actions of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.

Some philosophers have confronted this approach of autonomy with central values in other jurisdictions. For example, the continental European model of privacy protection values individual dignity above all and this value, in practice, means that individual dignity is equally balanced against freedom of expression. By contrast, in the United States, freedom of expression, also based on the autonomy, overrides individual privacy needs, resulting some power from freedom of expression versus privacy.

3.1 Approach and history

Since the late nineteenth century, the concept of privacy is progressively took over the American consciousness. Historians have attributed that awakening to the increase in the density of population in cities, the number of literate population and dissemination of information. All these factors contributed to a social approach to privacy and the inevitable question of how the law might respond to it.

Privacy as a civil action was introduced for the first time in American jurisprudence in 1890 with the academic article "The Right to Privacy" by Samuel Warren and Louis Brandeis (1980), published in the Harvard Law Review. Warren, from a prominent family in the society of Boston, and Brandeis (1980), who would become a renowned judge of the Supreme Court of the United States, were at that time partners in the practice of law. According to the legal legend, Warren proposed Brandeis write the first article on privacy in the United States after the Boston Press published intrusive facts about the wedding of his daughter.

This highly persuasive essay, promoted the creation of a new civil law to protect the personal space of the individual against unauthorized disclosure to the public. The article began with a detailed statement of the contemporary state of privacy law in the late nineteenth century. In those years, the American press embraced what later became known as "yellow press", these marked by sensationalism and gossiping. This press, according to the authors, was "surpassing in every direction the obvious bounds of propriety and decency".

Warren and Brandeis also blamed the technology for providing such intrusions into private life. For the authors, the new mechanical instruments like the camera "threatened to bless the prediction that what is whispered in the

privacy is trumpeted from the rooftops". The authors concluded with a novel suggestion: the creation of a new action liability to protect the "sacred confines of private and domestic life".

Seventy years after Warren and Brandeis established the conceptual framework of this action arising from liability, William Prosser (1960, pp 383-389) cemented his place in American jurisprudence. Prosser wrote another very influential article where he categorized and coined the right to privacy in four different aspects of liability. Two of these actions are related to the dignity, invasion of privacy by intrusion and public disclosure of private facts. The other two actions are closely related to the publication and property rights: "false light privacy" and invasion of privacy by appropriation. These four classifications of Prosser are presently incorporated in the *Restatement (Second) of Torts*, published in 1977, an official compilation that brings together the state of the US liability laws and forms the legal foundation on privacy in many American states, as Keeton informs (Keeton, W. Page, 1984).

The jurisprudence in this area has not been homogeneous. Several states have rejected the implementation of the four actions and the relative paucity of legal precedent in this area suggests that demands for violation of privacy rarely go to trial. This, because a claim for public disclosure usually requires the introduction of embarrassments facts in the public media and the admission of the truth of these facts, it is likely that the increased risk of exposing to light the same facts has deferred to potential applicants.

A product liability case product of an action for violation of privacy, like any other civil case, requires enough substantial damage to warrant demand given the legal costs of the process. It also requires translating the damage to dignity in a quantifiable compensation, which is not impossible but, is an arduous exercise. MCClurg (MCClurg, Andrew J.,1995, pp 1000-1001) insists that it is for this reason that the actions for breaches of privacy are often rejected prematurely, resulting in perhaps the Courts often do not know these cases.

3.2 Four categories of invasion of privacy

The four civil actions for violation of privacy recognized in US law are, as mentioned before, intrusion upon seclusion (private sphere), the appropriation, the false light privacy and publicity given to private life. Each one of these actions covers the legal treatment to detriments related to privacy.

3.2.1 Intrusion upon seclusion

Civil liability for intrusion or invasion into seclusion bring together data collection practices. It requires the plaintiff to show that the defendant (a) intentionally interfered, physically or in different way, (b) in seclusion or solitude of another or in their private affairs or problems, (c) in a manner highly offensive to a reasonable person. This civil action applies to situations where information is discovered in a furtive manner in a private place. This action gives the injured party the right to recover monetary damages (compensation) for invasion into seclusion and solitude. The action clearly includes non-physical invasions like those that are "sensory unjustified intrusions such as telephone and electronic invasions and spying eye or photographically".

3.2.2 Appropriation of the name or likeness

The action by appropriation is widely understood only as a violation of the property. The action is not directed against intrusive means of collection of information or embarrassing publications. Rather, it focuses on the commercial use of unauthorized identity of a person and their consequent damage to the dignity. The claim in a civil suit covered in this action is based on the recognition that an individual has an interest or right of ownership of their name or figure. The action applies when the information of the defendant or his or her image are used without consent for commercial purposes of the defended.

3.2.3 Distortion of image

This action product of the violation of privacy is similar, *mutatis mutandis*, to the action for defamation. While defamation laws protect the reputation of the individual, the action for distortion of image focuses on repairing the harm caused to the individual's peace of mind. The action includes the situation in which false or misleading information is published on an individual. The information must have been disseminated with knowledge of their falsity and must be considered highly offensive.

As it is greatly summarized in Court case (Cefalu v. Globe Newspaper Co., 1979) as with other civil actions for violation of privacy, an action for image distortion must involve inherently private matters. As such, any matter that has been disclosed to others or is visible from a public place is not protectable no matter how offensive are its implications.

3.2.4 Publicity given to private life

The civil action by public disclosure of private facts applies when highly offensive and private facts are unjustifiably publicly disseminated. The action requires the plaintiff to show that the defendant (1) was publicized, (2) to a private matter, (3) which is not of legitimate public interest, where (4) such disclosure is highly offensive to a reasonable person. The action of public disclosure of private facts give rise to compensation for the wrongful publication of true facts but informative, private value, and offensive.

However, the law adopts a stricter position with the understanding that there can be no reasonable expectation of privacy once the information has been disseminated or exposed publicly. In this regard and in order to accommodate the concerns that can generate the constitutional guarantee of freedom of speech, public affairs with informative meaning or value are not covered by this action, even though they are private in nature. These requirements mean a significant barrier to the plaintiffs and the obtaining of damages in lawsuits arising from violation of privacy actions.

3.3 Limits

The law has placed barriers to compensation after damages for privacy intrusions in the area of torts or liability. The information released must be completely private and secret, without informational value, and offensive.

3.3.1 The reasonable expectation of privacy

Before moving on a trial on privacy, US courts must first determine whether the information to protect is private according to its original nature. This is determined by applying an objective standard. That is, if there was a reasonable expectation of privacy. Such expectation of privacy is reasonable if a person of ordinary sensibilities might have felt it or experienced it in the same context.

American jurisprudence, in many occasions, relates this criteria with the place (space) where the invasion of privacy occurred, inquiring if the applicant had a reasonable expectation of privacy there, in that place, regardless the own expectative context, the environment, or cultural sensitivities that might exist. Areas such as house, a hotel room, a tanning booth and a shopping bag have been recognized as private under certain circumstances arisen on each case. Information that is not entirely unique or secret is rarely protectable. For example, an individual cannot enjoy privacy in a public place.

In one case (Duran v. Detroit News, Inc., 1993), a Colombian judge sued a newspaper for invasion of privacy by releasing her identity. The judge, whose participation in the prosecution of drug lord Pablo Escobar put at risk in Colombia, sought safety by moving to Detroit, Michigan. The court denied compensation on the basis that her actions, while remaining in the United States, revealed its identity "openly to the public eye". As she ate in

restaurants and bought articles in shops and using her real name, the court affirmed that the information disclosed was not private and thus, denied the action of privacy reasoning that these daily actions were visible by human or mechanical means.

Other US courts (Arrington v. NY Times Co., 1982) have decided that activities occurring in front of a class full of students, in the doorway of a house and in a congested city are not protectable under the protection of privacy, even when the injured underwent damage in their dignity.

US courts usually deny concept of privacy protection if the object of the violation is not absolutely secret. The New York court in *Nader v. General Motors Corporation* concluded that the information disclosed must have been completely secret to maintain an action for privacy. In that case, a well-known activist for the protection of consumer rights sued General Motors claiming that the cars company violated his privacy. The plaintiff complained that representatives of GM interviewed their colleagues about racial and religious opinions, sexual orientation, personal habits, and political trends of the plaintiff. The court refused to grant the remedy sought by the activist because the information that Gm pursued was not secret. In the reasoning of that court, the fact that the applicant previously spread the information to their friends and colleagues destroyed the secret criteria and, therefore stripped from the protection of the law.

In another case (Wilson v. Harvey, 2005), a humiliated college student sued three fellow students because they distributed a pamphlet that included his photo, email address, telephone and falsely showed him as a gay looking for a couple. The Court concluded that the fact that his contact information and photo were accessible to all students and teachers through the website of the university and, therefore, no secret, was determined to not consider any privacy violation.

The requirements of detention and concealment limit privacy protection: this is that, once that information is visible or reported or disseminated, somewhere, it can legally be collected and disseminated to anyone and anywhere.

3.3.2 Absence of public or media interest

The First Amendment to the United States Constitution prohibits the government from silencing the expression of true information, either by direct regulation or through authorized private lawsuits. Scholars in the field have argued that legal action by public disclosure of private facts, given the direct threat to freedom of speech, is unconstitutional. Some states have refused to recognize the action by public dissemination for this reason as in Court case Hall v. Post. (1988). But legal analysts maintain that the action by public disclosure only protects information that does not have informative interest or that does not belong to the "legitimate public interest". The *Restatement* (Restatement (Second) of Torts 652, 1977) defines these flexible and docile concepts as follows:

> *"Included within the range of legitimate public interest issues are the type commonly understood as 'news'. To a considerable extent, according to the moral community, publishers and broadcasters have defined the term (...). Authorized advertising includes publications concerning homicide and other crimes, arrests, police records, suicides, marriages and divorces, accidents, fires, natural disasters, death by the use of narcotics, a rare disease, the birth of child from a 12 years old girl, the reappearance of someone who had been killed years ago, [and] police report concerning the escape of a wild animal and many other similar matters of genuine, whether more or less deplorable, popular interest"*

Contrasting this, "with no informative value" is defined as one who becomes a morbid and sensational prying into private lives, so that a reasonable member of the public, with decent standards, would say that does not concern him.

3.3.3 Requirement of "opprobrious information"

The US right to privacy, and its civil actions arising from tort liability for violation thereof, judge whether privacy is deserved based on the content of the disclosed and, therefore, do not focus on the context of social relations or cultural or interpersonal understandings. In addition to check the spread to see if it was hidden enough to justify protection, courts look to the content to determine whether a reasonable person has a right to be highly offended by diffusion or discovery. Although the law provides little indication of what information is inherently opprobrious, Courts and legal analysts have offered some guide to what is marked as such as the *Restatement* (Restatement (Second) of Torts 652, 1977) indicates:

> *"Sexual relations, for example, are normally and entirely private matters, such as family disagreements, many humiliating or embarrassing or unpleasant diseases, many of intimate personal letters, details of the life of a person at home, and details of their past history would rather forget".*

US courts tend to find difficulty in determining whether the information disseminated is sufficiently offensive to a reasonable person. Lacking a consistent and contextual analysis framework, judges are forced to make uncomfortable and incongruous leap over whether such things as a mastectomy as in Court case *Miller v. Motorola, Inc*. (1990), plastic surgery as in Court case *Vassiliades v. Garfinckel's*. (1985), the romantic life as in Court case *Ben z v. Wash. Newspaper Publ'g Co*. (2006). and sexual orientation as in Court case *Sipple v. Chronicle Publ'g Co*. (1984) are private and highly offensive if they are widespread. These questions are almost impossible to resolve in a definitive manner without taking into account the circumstances of each applicant, due to the fact that they are highly dependent on historical moment, class, culture, education, and other sociological variables.

4. Discussion, privacy and the right to be forgotten: a brief conceptualization and panorama from Spanish and comparative law

No author has even tested a notion of the right to be forgotten; who have given any approach seem to be orientated towards the idea that we have a subjective right to delete from the online universe any trace that affects or may have affected some relevant aspect of privacy, honour or image of a subject. Looking deep inside, the problems caused by the abolition of that trace seems to be more of a technical nature rather than conceptual, but in no case it would be possible affirming the right to be forgotten if from the legislative bodies is not enabled a regulatory body that contains the legal consequence that the affected can do the removal of the reference to his personality in any field.

It does not seem easy to address a legal or legislative option such sensitive to ideological content and as difficult practical coverage as the right to be forgotten. It is worthy to mention that the Internet is first and foremost a huge network of insecurity. It is not just a matter of privacy of information, but rather the power to dispose of privacy. The right to be forgotten is an atypical figure in the sense that, to date, there is no legal formulation or dogmatic proposal, it is not indexed in any article at any stage, internal or international jurisdictions, the very only precise manifestation is included in a Spanish law disposition: Article 7 of the Organic Law of Protection of Personal Data, 15/1999, 13 December, hereafter, LOPD).

One of the first papers that from a scientific point of view but without any systematic effort and a more than tangentially way, referred to the right to be forgotten is owed to Xavier O'Callaghan (1991) who, in summary, and having an anticipation to the mentioned LOPD 1999, wrote:

> *"the assumptions may be substantially consistent with the definition of the right to honour. This happens in the dissemination of the contents of a judgment or process data, or data contained in public files. However, if these points were unknown in the circle in which the subject moves, because of the distance in time or place (for example, a conviction for many years is reported or disclosed in where the subject is, very far from that in which it occurred) may be interference in the right to privacy. It is what has been called (and been treated) as the 'right to be forgotten'. There is still an exception to the exception: if the*

> *subject has a public screening activity, the disclosure of such facts will not constitute interference with their privacy, precisely because of the nature of the subject."*

However, originally, the same author places the birth of this new and eventual subjective right in a case of American jurisprudence, which he realizes in a work of 1989 by Pablo Salvador Coderch, where it says:

> *"a young prostitute who came to be tried for murder, she left this life, he married and leads an exemplary life; years later, a film that recounts her life with her real name and saying that was a true case; the interested sues the producer of the film and wins the lawsuit; she had the right to be forgotten. Which is nothing but the right to privacy, which has been injured by that film, if not the right to honour, because of the certainty of the facts".*

4.1 Technical issues

As an introduction, referring to the privacy control technical options in the digital environment, most of these technologies pursue "invisible treatments", for example, data processing operations and especially personal, limiting or even cancelling at maximum, not only consent, but also the information concerned to the affected person, which either cannot know, or is ensured that in practice will be known as little as possible the processing of their personal data.

Invisible treatments, done by any mean, even though they can sometimes lead to a formal agreement, in any case they meet the requirement of free and informed consent to the processing of personal data, which requires EU legislation on protection of personal data.

In the Spanish case, Álvarez Marañón, researcher at the National Research Council (CSIC), has highlighted the full difference that exists between the relatively easy operation of deactivation of an account or profile from the removing or total deleting of that profile, which can be definitely impossible. This expert in cryptology and information security at the Institute of Applied Physics of the CSIC, has observed that disabling an account does not have "the slightest impact" and that usually becomes active again when a user re-enters their passwords; but in the case of the complete "elimination" of a profile, the complexity can become a handicap of such a nature that precludes such removal or deletion of information.

4.1.1 Technical issues in the case of search engines

Singular attention deserves the growing interest shown by citizens so that their personal data will not appear in the index or results offered by Internet search engines from the information identifying a person. In recent times the generalization of the benefits and use of these services is demonstrating important consequences when activating and allowing access to anyone into personal data which before were difficult to locate, because of being information stored on websites that allows its capture and access through indexing performed by search engines.

As already it was mentioned in relation to those who make information available on the network, although the treatment of user data may be legitimate in origin, for example the exercise of fundamental rights linked to freedom of speech, that does not mean to be guaranteed, at the request of the owner, the exercise of the rights conferred by the LOPD. Troncoso (Troncoso Reigada, Antonio, 2012) implies that technologies that do not prevent personal data indexing on search engines: we cannot forget that search engines only reflect partially what is published on websites and this to the extent that websites itself permit or deny totally or partially by scheduling of their websites so they cannot be crawled by search engines and, when appropriate, indexed for later appearing in searches of Internet users. Technology to websites do not appear on search engines has long existed, another thing is that websites do not implement it for whatever reason, but certainly the websites have the opportunity to appear or not appear in the search engines.

Therefore, when a person, having performed a search on a search engine, see your data appear on the Internet, should direct your request for deletion of data not to the search engine, but the responsible owner of the website,

who must attend such a request in accordance with data protection legislation which recognizes the right to cancel the data. After deletion of personal data in the relevant website, such data will no longer be accessible on the website, nor appear in search engines, who may no longer index deleted data when tracking the contents of the mentioned website. However, the exercise of this right in the Internet environment has a peculiarity in the case of search engines: to not appear in a search engine, first is to disappear from the website in which the data is showed, because search engines are limited to reproduce what is openly published on websites (social networks), as stated by Rallo Lombarte, Artemi (2010, pp 104-108).

4.1.2 Technical issues in the case of social networks

Briefly, it is important to mention that social networks currently provide users the ability to define their profiles. This capability allows users to graduate with some precision the visibility of their personal data in and out of the network. Indeed, the user can at any time and without the need for any request to change the visibility of your profile, such changes having an almost automatic reflex in search engines, is to appear or disappear. In this regard it should be noted that social networks already have a mechanism for social network users can exercise the right to be forgotten with effects in and out of the corresponding social network, thus also with effect on search engines.

Perhaps one of the most outstanding aspects of analysis is the one which refers to whether the user profile that social networks are configured by default must be publicly or may be closed or open, but in any case, the users would be able to configure to his or her liking at the time of registration.

An additional problem arises when the supplier of the data or user of social networks has died and their relatives try to control their digital memory. Every day more often the web and social networks have to manage digital posterity of its users and many already have established protocols for that purpose, but in the network is still difficult to control certain contents. In these cases, explains Guillermo Vilarroig, "nothing can be done but take legal actions". The media, he adds, will not change the archives that are indexed by Google. Search engines will not stop indexing contents.

5. The tension between privacy and the right to freedom of speech

In the current scenario in which we find ourselves, and after taking the pulse of the rules and sensitivity legal, which puts us in the area of Common Law, we can reach a consideration that allows us to mention that the main sticking point, the axis of the conflict on the right to be forgotten, arises in the tension between privacy and freedom of speech.

It seems logical that the right to be forgotten has entered in fight. In the words of Franz Werro (2009, p 292), referring to American law: "As a result of it, the development of a right to be forgotten in the United States, does not come, as in Europe, resulting from a balance between two rights recognized in the Constitution, but rather a series of attempts by various states to create for their citizens a sphere of inviolable privacy with respect to the media (...) ". In complete harmony with what manifests Professor Werro, and *contrario sensu*, we must agree that the starting point in the new configuration of the right to be forgotten is, at least in the European legal context, the confrontation between freedom of speech and information and the right to privacy.

Reaching an approach to the very recent and second last sentence of the Spanish Supreme Court on the matter. It is primarily to mention that in the conceptualization, regulation and dogmatic argumentation of the privacy protection, has longer beat and beats finding a constitutional basis for the right of privacy. This has deep consequences in the way of understanding this right.

As the main idea an conclusion from the sentence, it was deducted "as it pertains to the problem of collision between the fundamental right to honour and personal privacy, on one side, and freedom of information and speech, on the other, it is to be assumed that it is not possible to exercise absolute and unconditional withdrawal of the latter, since the Constitution in Article 20.4 provides that freedom of speech and information are limited by

respect for the rights recognized in this Part, by the precepts of the laws that develop it and, especially the right to honour, privacy and reputation". That is, without resorting to more dogmatic support, because the clarity of the text and context is indisputable, constitutional freedom of speech is not an absolute right; it finds one of its limits on the protection of privacy.

6. Prospects for the implementation of the right to be forgotten

After what has been exposed so far, it feels that a right that aims to break through just in retrospective, is find itself with the paradox that perhaps will only be possible to adopt it "hereinafter" from the moment when it will be legislatively collected and go into force and towards the future.

6.1 Technical resources and possibilities

We have to go back to the alternatives offered in the well-studied article by Jef Ausloos (2012) which provides three mechanisms which he grouped under the name *codes*.

- *Expiry Date*: One possibility is that the data shared online are born with an expiration date, so that come the day when the information decay. However, as acknowledged by the author, the viability of this theoretical principle is far from obvious. Alternatively, a deeper technical protection could be inserted in the data, similar to the DRM protection (referred to Digitals Rights Managements, access protection system for protected works) of intellectual property. Although the interesting research being carried out seems to throw encouraging results, however, the idea that a person will have to give an expiration date each time personal data is being collected seems unrealistic. In addition, you run the risk of becoming merely a pro- forma requirement that no one really pays attention to. And what is worse, nothing would prevent someone copied or decipher the data for as long as they are accessible.

- *Reputation Managers*: This possibility, described as interesting trend is characterized by the appearance of the managers of reputation in the Internet, websites that offer themselves to control all information circulating about a person, the defence of its technical reputation and legally, for example, through the removal of harmful information or making it inaccessible; and even define their image. This clearly illustrates the potential threats of censorship and embezzlement and distortion of information on the Internet.

- Alternatives: Refers to search for alternatives that arise with privacy protection as a standard of normal operation of the online communications. These projects are usually open source, allowing entry worldwide. One of the most notable and recent examples in this regard is "Diaspora". It is a social networking platform built from scratch with the protection of privacy in mind and is fully developed by a global community of volunteers. It will be interesting the success of a service with that difficult market penetration. The large amount of privacy and security of the files that are developed (mostly by volunteer) for web browsers also offer individuals the opportunity to have greater control over their personal data.

7. Conclusions

It is impossible to clarify whether we are far from establishing an effective system of privacy protection through the so-called right to be forgotten, although it appears that it is. We have seen that the only two legislative realities at European level indisputably in a shy way, enable the right to be forgotten are Directive 95/46 / CE of the European Parliament and the Council of October 24, 1995, on the Protection of Individuals with regard to the processing of Personal Data and the free movement of such data and Directive on the protection of privacy in the digital environment 2002/58 / CE of the European Parliament and of the Council of 12 July 2002.

We turn again to the aforementioned article by Professor Ausloos, for whom there is still a blind spot in the current context of the right to be forgotten; the scope of the right of application should be limited to cases where the owner of the data provided his or her unequivocal consent, that demonstrates a sense of privacy as a control, not dignity.

All other situations that legitimize data processing involve "need" and are out of the free wish of the interested person.

And, as a security measure against censorship and deleting of unwanted data, the "right to be forgotten" must be limited by a "public interest". This exemption would cover, but will not be limited to the issues of freedom of speech. This author, whom we are following, introduces two interesting correcting concepts, making known that to decide in their application, it could have a standard of "substantial importance" (with respect to personal data) and a proportionality test (with respect to the application for removal). But ultimately, will be the judges and national authorities of data protection who decide on the exact scope of the exception. The providing of the evidence has to be done by the data controller.

So to conclude, it can be brought up again a quote from Professor Troncoso, for who deserves specific mention of respect for the principle of quality in the processing of personal data for journalistic purposes or literary or artistic expressions. In fact, the balance between freedom of speech and the right to data protection should be primarily done from the principle of quality, not from the principle of consent which implies an uncritical automation, nor from the information principle because it will carry the implementing bureaucratic solutions.

The principle of quality is the most important within the substance of the fundamental right to protection of personal data in the areas where there are exceptions to consent, keeps within itself: the principle of adequacy and prohibition of excess, which requires that released data is suitable and relevant for journalistic purposes and not excessive data is published, preventing freedom of speech will be exercised in an excessive and outrageous manner that does not serve for the political debate; the principle of legitimate aim, which demands that the processing of personal data are exclusively journalistic or artistic or literary expression purposes, having to keep the interference with data protection consistent with the purpose of formation of free public opinion, which is what justifying its preferential protection; the principle of accuracy of the information, which requires it to be true, and correct and to cancel erroneous or inaccurate data, which is particularly applicable to the publication of media on the Internet, given the permanence of information and easy location via search engines.

The quality principle best explains the constitutional jurisprudence ponders freedom of information and privacy and is clearly applicable in this area. Thus, most of the criteria for the weighting of rights, the public interest, the truth or accuracy of the information, the essence of the information, data sensitivity, etc., have no place within the principle of quality. There are issues that, because of being of public interest, may be disseminated and may justify the collection and processing of personal data, even affecting the privacy of individuals or even involve a limit on their right to control their personal information.

The individual cannot object the publication of that information or the processing of personal data by the media, but affect the private sector. There is no chance to protect the intimate details of a person of public relevance when there is public interest, especially when their private behaviour contrasts with their public speech, for example, Berlusconi’s photos in private parties, and this can be measured by public opinion be criticized and encourage political change, something essential in the procedural value of freedom of speech.

If we conclude by protecting the right to privacy based solely on the principle of consent, we have adopted the philosophy of American privacy and we have abandoned the idea that privacy is based on human dignity, binomial, on the contrary, in which it has traditionally been based the privacy protection in Europe. The quality principle can however, correct the system leaks.

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Legal Strategies to Enforce Military Discipline for Personnel of Indonesian Armed Forces at the Army Aviation Center

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Abstract

It is compulsory for Indonesian Armed Forces at Army Aviation Center (AAC) to demonstrate military discipline and uphold military ethics pursuant to *Sapta Marga* and *Sumpah Prajurit* (Oath of Enlistment). The law of military discipline is governed by several laws in Indonesia to maintain and enforce the professionalism of privates. However, in the armed forces at AAC, there had been at least 28 violations of military disciplines from 2017-2022. This research aims to analyze the causes of these violations and formulate the proper strategies to help improve law enforcement in military discipline for the armed forces at AAC. The research results reveal that nine factors have triggered the violations of military discipline among privates in AAC, including poor understanding of the law, poor organizational culture, socio-cultural factors, personality, motivation, psychological conditions, a shortage of natural resources, inadequate sanction, leadership, family problems, and economic burdens. To tackle all those factors causing violations of military disciplines, this research formulates 7 strategies to enhance law enforcement in military discipline for armed forces, consisting of strict law enforcement, training and education, administrative sanctions, enforcement of rules and regulations, strong organizational cultures, reinforced focus on career building, openness, and transparency.

Keywords: Legal Policy, Enforcement of Military Discipline, Indonesian Armed Forces, Army Aviation Center

1. Introduction

Indonesian Armed Forces are a military organization established to protect and maintain the security and the sovereignty of the Republic of Indonesia (Yogo, 2016). To execute related tasks, the armed forces, especially those based at the Army Aviation Center (henceforth referred to as AAC, are required to strongly adhere to and uphold military discipline and ethics according to *Sapta Marga* and *Sumpah Prajurit* (henceforth referred to as oath of enlistment) (Tentara Nasional Indonesia, 2023). The enforcement of military discipline is considered vital among the armed forces, considering that it ensures that privates comply with existing regulations and standards and that they professionally perform their tasks (Dewan Perwakilan Rakyat Republik Indonesia, 2009).

According to Law Number 34 of 2004 concerning the Indonesian Armed Forces (henceforth referred to as Law No 34/2004), professionalism serves as one of the primary criteria for the armed forces, involving: (Hadisancoko, 2019) 1. Expertise and competence: a. The privates in the armed forces must demonstrate expertise and competence relevant to the tasks and responsibility in training, skill development, and application of technology, 2. Integrity and responsibilities: the privates in the armed forces must fully demonstrate integrity and responsibilities and act according to appropriate norms and ethics and perform responsibilities in executing tasks and governmental tasks. 3. The ability to establish coordination and cooperation: the privates of the armed forces must demonstrate the ability to establish coordination and cooperation appropriately with several parties including governmental institutions, mass organizations, and society in general, 4. The ability to adapt and ride and drive: the privates of the armed forces must be able to adapt to environmental changes and changing situations, and they must demonstrate the ability to ride and drive and establish coordination appropriately to support their tasks and governmental tasks. 5. Openness and transparency: the privates of the armed forces must demonstrate openness and transparency in executing their tasks and governmental tasks and ensure that information and reports delivered to the public are accurate and accountable.

To meet those criteria, the legal policy and enforcement of military disciplines become vital instruments to ensure that the tasks and responsibilities are appropriately performed by the privates of the armed forces in the domain of AAC (Pusat Pendidikan Markas Besar Tentara Nasional Indonesia, 2006). The legal basis of the military discipline is set forth in Law Number 25 of 2014 concerning Military Discipline Law (henceforth referred to as Law No. 25/2014). Law No. 25/2014 governs disciplinary law among the members of the armed forces, highlighting the conduct that leads to the imposition of disciplinary sanctions and the procedures and mechanisms of the enforcement of disciplinary law in the Indonesian Armed Forces. Several main points were made in Law No. 25/2014, including 1) the legal standing and tasks in Indonesian Armed Forces, 2) the types of conduct that can be given sanctions among the members of the armed forces, including standing against disciplines, the conduct that harms the armed forces, conduct that harms public, and any conduct contravening the norms existing in society, 3) the procedures and mechanisms of the enforcement of disciplinary law involve investigation of the conduct, sanction imposition, and follow-up of judicial decisions, 4) the elections and the tasks of disciplinary judges, 5) the protection of the members of Indonesian Armed Forces and Indonesian National Police serving disciplinary sanctions; this protection should protect their rights during the investigation, sanction imposition, and follow-up.

Law No. 25/2014 is expected to enhance the disciplinary norms among the members of the armed forces and Indonesian National Police and to further reinforce the integrity and professionalism in executing the tasks and responsibilities as the protectors of the public (Upe, 2011). To some extent, the enforcement of military discipline also helps ensure that privates understand their responsibilities as members of the public and uphold the national value and ethics in society. This also maintains the reputation of the Armed Forces and ensures that the privates receive respect from the members of the public (Chandra, 2020).

In order to enforce military discipline, the Indonesian Armed Forces adhere to strict procedures and mechanisms, including the sanctions enforced for the privates who violate rules and norms. It ensures that privates understand the importance of discipline and cooperation and that the armed forces are a professional and respected military organization.

However, Law No. 34/2004 and Law No. 25/2014 cannot accommodate all the issues faced by the armed forces, especially at AAC. Thus, a more operational policy that fits the need and the current development is required. Moreover, more strategic changes in the environment relevant to the dynamic, complexity, and heavier challenges in the future highly require the privates or personnel Armed Forces at AAC to keep improving the credibility, professionalism, and productivity to build a more effective, efficient, and measurable work system.

Departing from the above introduction, this research aims to study the legal policy and the enforcement of military discipline among the members of the Armed Forces at AAC.

2. Military Disciplinary Law: An Introduction

Article 1 point 2 of Law Number 25/2014 defines the definition of military discipline as "awareness, compliance, and adherence to implementing statutory regulations, official regulations, and the life of military people". Meanwhile, the law of military discipline can be understood as "regulations and norms governing, training, enforcing discipline and the life of of the military personnel".

Furthermore, the law of military discipline is responsible to provide organizational and personnel training to help improve the military discipline and to enforce the law of military discipline by considering merit and justice according to *Pancasila* and the 1945 Constitution of Indonesia as governed in Article 4 and Article 5 of Law No. 25/2014 (Wulansari, n.d.). The law of military discipline also serves to a. assure legal certainty and legal protection for military personnel and to avert the likelihood of the abuse of power to punish (commonly referred to as Ankum); and b. enforce the community life of military personnel in performing their tasks and obligations. To implement the law of military discipline, several principles need to be taken into account: a. justice; b. training; c. equality before law; d. presumption of innocence; e. hierarchy; f. commander unity; f. military interest; g. obligations; h. effectiveness and efficiency; and i. merit.

Privates are subject to military disciplinary punishment if they violate laws and/or military disciplinary rules and/or take actions contravening military life regulated in *Sapta Marga* and Oath of Enlistment.
The severity levels of the violations of disciplinary rules among the privates of the Indonesian Armed Forces range from mild, medium, to serious. The first category refers to violations only affecting a small military unit, the second category refers to violations leaving negative impacts on the whole institution of the Armed Forces, while the serious violations refer to infringements causing serious impacts on the government and the state (Herawati et al., 2014).

Disciplinary military punishment is imposed by the top official on the subordinates under their command. The violations subject to military punishment involve: a. all conduct mentioned in related law with three-month imprisonment as the minimum punishment or six-month imprisonment as the maximum punishment; b. ordinary cases that do not require complex evidence; c. criminal offenses that do not hamper military interest and/or public interest; d. criminal offenses caused by the absence of a person without consent within a four-day resolution period.

Article 9 and Article 10 of Law No. 25/2014 elaborate on the types of punishment imposed on privates committing violations: 1. Warning; 2. Mild disciplinary restrictions for 14 days; or 3. Serious disciplinary restrictions for not more than 21 days; military disciplinary law imposition followed by administrative sanctions according to the provisions of rules and regulations.

However, the punishment as in Article 9 and Article 10 can be aggravated if the cases concerned fulfill certain conditions by adding 7 more days of restrictions. These certain conditions involve: 1) a state in an emergency as specified in legislation, 2) a military operation to support the execution of main tasks of the Indonesian Armed Forces, including military operation for battles or other matters other than battles according to the legislation, 3) the prepared unit to execute the military operation for battles and military operation for matters other than battles according to the legislation, 4) military matters involving repeated violations of military disciplines in six months after the imposition of military disciplinary law.

In terms of organizational scope, the top military officials (Ankum) are authorized to punish subordinates under their commands. In terms of the enforcement of disciplinary law among privates of the armed forces, *Ankum* hold three categories of authority: (a) Ankum are fully authorized to impose all kinds of punishment to subordinates under their commands, but not including serious disciplinary restrictions imposed on commissioned officers, and (c) Ankum have restricted authority to issue a warning for and impose mild restrictions on non-commissioned officers and enlisted personnel under their commands. Thus, military disciplinary punishment is principally related to restrictions and implementation of order within the internal scope of disciplinary violations committed by the privates of the Armed Forces, in addition to the violations settled at Court Martial and public courts.

3. Cases and Factors causing Disciplinary Violations in Indonesian Armed Forces at Army Aviation Center

Army Aviation Center (AAC) serving as an organ of the Indonesian Armed Forces is a central implementer in the aviation of the Indonesian Armed Forces positioned under the Chief of the Staff of Indonesian Armed Forces (commonly referred to as KSAD). The AAC is responsible to organize flight operations in the armed forces to back up the main tasks of the armed forces.

Article 7 of Law No. 25/2014 states that military personnel must comply with the law of military discipline. That is, the personnel of the armed forces are required to abide by their top officials and they must protect the reputation and avert any conduct that can defame the reputation of the army and its units. The military personnel violating rules are subject to punishment with no particular treatment involved, and judicial investigation is carried out according to the procedures of court martial as governed in Law Number 31 of 1997 concerning Court Martial.

A private or a member of the armed forces is required to follow stricter disciplinary rules compared to civilians, and this particular condition sets particular legal principle as relevant to the principle of *Lex Specialist Derogat Legi Generale*, meaning that certain rules (Military Penal Code) will rule out the laws that apply to civilians (the Penal Code) (Saputra, 2019).

There are several grounds leading to specific and stricter sanction imposition for privates or personnel of the armed forces following the violations committed (Haryo Sulistiriyanto, 2011): a) Some conduct considered as violations committed by the personnel of armed forces but this specification does not apply to civilians such as desertion, refusing to perform official tasks, insubordination, and others, b) conduct that is considered severe but when the criminal sanctions are imposed, this is deemed too lenient.

If all those matters were to be set forth in the Penal Code, it would be hard to implement since these matters only apply to certain members of the community, and the violations are only settled at court-martial.

The Regulation of the Commander of Indonesian Armed Forces Number Perpang/45/VII/2008 concerning Master Guidelines of Training of Personnel and Military Manpower of Indonesian Armed Forces in Annex Chapter III regarding Privates Training in Indonesian Armed Forces, especially regarding disciplinary training, social order, and law state that the discipline and order are the main pillars in the enforcement of army life reflected in the mentality and attitude in the conduct and services. The objectives of disciplinary training, order, and law are to 1) produce responsible privates complying with the current legislation, provisions, and rules and with the command given by commanders, 2) to shape privates and their families as examples of the society, which is intended to foster harmonious conditions of the community, 3) to assure good order/peace stemming from the legal awareness of privates and their families and to ensure that tasks are fully addressed to the interest of the Armed Forces.

Indonesian Armed Forces are required to have their role in the training for the subordinates according to the authority set forth in Article 69 of Law Number 31 of 1997, implying that high military officials as enquirers authorized to impose sanctions are assisted by Military Police as enquirers in the scope of Indonesian Armed Force. This stage is given a follow-up by Military Prosecutors and a commander of the unit with double main functions: (a) Ankum and (b) case officers (commonly referred to as Papera). Therefore, a unit military commander can hand in the criminal cases of the military members concerned to court-martial, while military police serve as enquirers. As Ankum, a unit commander is only responsible for the tasks given in the unit, and security is handled by the military police department. (Pusat Penerangan Tentara Nasional Indonesia, 2014). therefore, military discipline represents military vigor to protect and support military discipline in a wider definition, enabling the Indonesian Armed Forces to execute tasks and obligations appropriately. It also means that both military members and civilians intending to spoil military discipline are subject to military law and both are judged under military judicial systems (Tambunan, 2005).

In the last five years (2017-2022), there had been several violations of military disciplinary law at AAC, ranging from personal-related cases such as domestic violence or other matters related to official affairs such as desertion. The following Table shows violations of disciplinary law among privates and enforcement at AAC.

Table 1: Violations of Private Disciplinary Law and its Enforcement at AAC

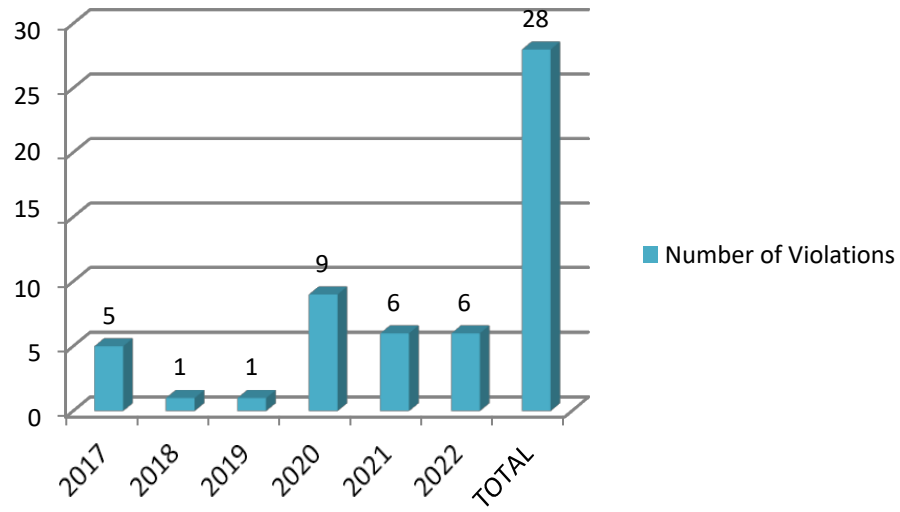
No	Name	Official Position	Unit	GAR/ Case	GAR/Case Detail	TMT	Additional Information
I	IAFAAC						
1.	1. Mayor Cpn F. F. T, S.T.	Kabagbinkual & Kesbangan Sdirbinslambangja	AAC	Immoral conduct	- Delayed judicial decision at Court Martial II Jkt	23-11-2020	- Litigation
2.	2. Mayor Cpn F. F. T, S.T.	Kabagbinkual & Kesbangan Sdirbinslambangja	AAC	Domestic violence	- Delayed judicial process at appeal	01-12-2020	- Litigation
3.	3. Mayor Cpn F. F. T, S.T.	Kabagbinkual & Kesbangan Sdirbinslambangja	AAC	Defamation on social media	- Three-month imprisonment, five-month probation - *Tunda Dik* for 1 period and *tunda KP* for 3 periods since eligible	01-12-2020	- administrative sanction
4.	4. Lettu Cpn M. A. P.	Pama Puspenerbad	AAC	Fraud	- Process of Military Prosecutors Office II-08 Bandung	22-11-2021	- Litigation
5.	5. Lettu Cpn K. P.	Pama Puspenerbad	AAC	Desertion	- BHT 5-month imprisonment	31-10-2017	- delayed due to sickness
6.	6. Letda Cpn M. P. K.	Pama Puspenerbad	AAC	Road accident	- 2-month and 15-day imprisonment - *Tunda Dikcabpa* 1 period & *tunda KP* 3 periods since eligible	21-06-2018	- case closed
7.	7. Letda Cpn M. P. K.	Pama Puspenerbad	AAC	Desertion	- 11-month imprisonment	15-4-2021	- delayed administrative sanction
8.	8. Letda Cpn K. W.	Pama Puspenerbad	AAC	Immoral conduct	- Returning the case to Papera for settlement according to disciplinary law of privates	17-4-2021	- Ankum Process
9.	9. Serda A. P. R.	Ba Puspenerbad	AAC	LGBT	- 5-month imprisonment and Dishonorable discharge	10-12-2020	- delayed definitive decision of the Chief of Staff of the Indonesian Army

II	**PUSDIKPENERBAD**						
10.	Serka A. S.	Batitih Engine Depharsabang Pusdikpenerbad Puspenerbad	AAC (education center)	Desertion	- 5-month imprisonment - *Tunda Diktukpa* for 2 periods & *tunda KP* for 4 periods since eligible	06-09-2020	- Administrative sanction process
11.	Prada R. D. Y.	Taban Navrat Ton Demlat Kima	AAC (education center)	Desertion	- Denpom process IV/Dip	06-06-2022	- Litigation
III	**LANUMAD A. YANI**						
12.	Pratu M. A. R.	Ta Lanumad A. Yani Puspenerbad	Lanumad A. Yani	Immoral conduct	- Denpom process IV/Dip	2022	- Litigation
IV	**BENGPUS PENERBAD**						
13.	Letkol Cpn Y. H.	Kabengjatlisira	Bengpus penerbad	Torture	- the imposition of disciplinary sanctions	12-04-2019	- case closed
V	**BALAKADA PUSPENERBAD**	**NONE**					
VI	**LANUDAD GATOT SOEBROTO**	**NONE**					
VII	**SKADRON-11/SERBU**						
14.	1. Peltu N. A. S.	Basiter Siintel Skadron-11/Serbu Puspenerbad	Skadron-11/Serbu Puspenerbad	Accident causing death (road accident)	- - *Tunda Diktukpa* for 2 periods	17-10-2021	- Proses Sanktif
15.	2. Serma R. D. A. S. B.	Batihar Jatlisira Sihar Jatlisira Flitehar Dron-11/Serbu	Skadron-11/Serbu Puspenerbad	Desertion	- Denpom process IV/Dip	18-05-2022	- Proses Hukum
VIII	**SKADRON-12/SERBU**						
16.	Serda N. A. G.	Ba Skadron-12/Serbu	Skadron-12/Serbu Puspenerbad	Absence	- 4-month and 11-da imprisonment	23-7-2021	- case closed
17.	Serda N. A. G.	Ba Skadron-12/Serbu	Skadron-12/Serbu Puspenerbad	Desertion	-1-year and 6-month imprisonment preceded by dishonorable discharge	30-1-2022	- case closed
18.	Serda Q. A.	Ba Skadron-12/Serbu	Skadron-12/Serbu Puspenerbad	Desertion	Dishonorable discharge	5-6-2020	- case closed
19.	Prada I K. D. P.	Ta Skadron-12/Serbu	Skadron-12/Serbu Puspenerbad	Desertion	Dishonorable discharge	01-04-2020	- cased closed
IX	**SKADRON-13/SERBU**						
20.	Prada W. S.	Tamudi Tonkes Dron-13/Serbu	Skadron-13/Serbu Puspenerbad	Theft	- 7-month - Lapbangpri R/440/IX/2019	30-01-2017	- Case closed

					tanggal 02 September 2019		
21.	Pratu R. S. E.	Taops Dron-13/Serbu	Skadron-13/Serbu Puspenerbad	Theft	- 8-month imprisonment - Lapbangpri R/437/IX/2019 dated on 02 September 2019	30-01-2017	- Case closed
22.	Pratu D. D. P. U.	Ta Provost Dron-13/Serbu	Skadron-13/Serbu Puspenerbad	Theft	- 7-month imprisonment - Lapbangpri R/438/IX/2019 dated on 02 September 2019	30-01-2017	- Case closed
23.	Prada B. A. Y.	Ta Kima Operator Dron-13/Serbu	Skadron-13/Serbu Puspenerbad	Theft	- 7-month imprisonment - Lapbangpri R/439/IX/2019 dated on 02 September 2019	30-01-2017	- Case closed
24.	Lettu Cpn N. T. I.	Pabang Siud I Flite C Heli Serbu Dron-13/Serbu	Skadron-13/Serbu Puspenerbad		- Pomdam process VI/Mlw	01-08-2022	- Litigation
X	**SKADRON-21/SENA**						
25.	Praka D. P.	Ta Skadron-21/Serbu	Skadron-21/Serbu Puspenerbad	Desertion	Dishonorable discharge	04-01-2021	- litigation
26.	Pratu N. M.	Talisari Siud 1 Sabang Sena	Skadron-21/Sena Puspenerbad	Immoral conduct	- Court martial process II-07 Jakarta	17-06-2022	- Litigation
XI	**SKADRON-31/SERBU**						
27.	Lettu Cpn M. A. P.	Pabang Siud II Flite A Heli Serbu	Skadron-31/Serbu Puspenerbad	Absence	- Closed	26-5-2020	- case closed
28.	Prada I G. S. S.	Ta Skadron-31/Serbu	Skadron-31/Serbu Puspenerbad	Desertion	- Dishonorable discharge	8-5-2020	- case closed

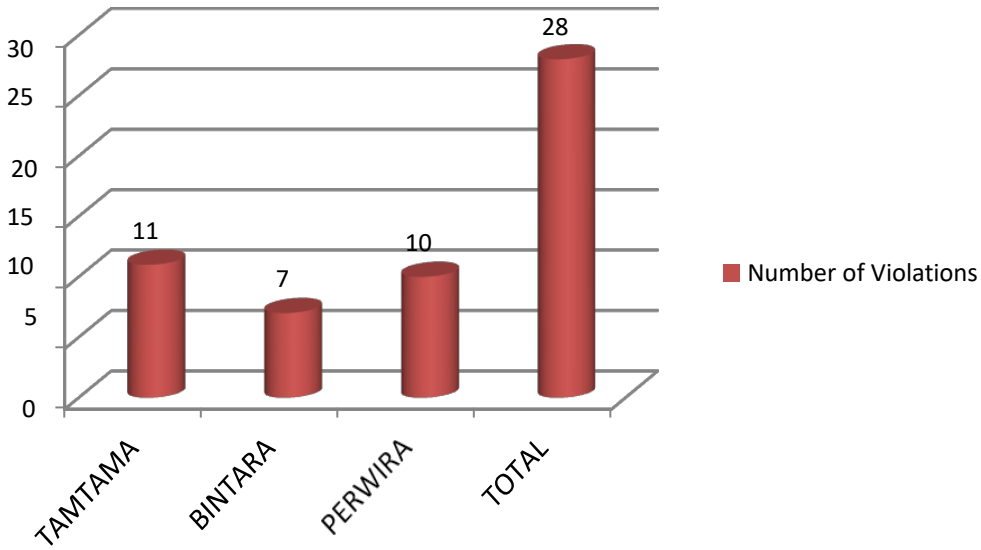
Sources: processed data

The above secondary data indicates that violations committed by the personnel of the Indonesian Armed Forces at AAC are across all levels ranging from enlisted personnel, non-commissioned officers, and commissioned officers with varied violations of military discipline and the severity of the violations. From 2017-2022, there had been 28 violations of military disciplinary law at AAC with the distribution of violations as shown in the following graph.



Graph 1: The number of violations on an annual basis

The total number of the personnel at AAC accounts for 372 members ranging from the lowest official rank, enlisted to the highest rank, consisting of 196 commissioned officers (lower-ranked officers, middle-ranked officers, flag officers), 92 non-commissioned officers, and 84 enlisted personnel. Of the total of 28 violations at AAC, the distribution of the violations committed by the personnel with varied official ranks ranging from enlisted personnel, non-commissioned officers, and commissioned officers (lower-ranked officers and middle-ranked officers) is presented in the following graph.

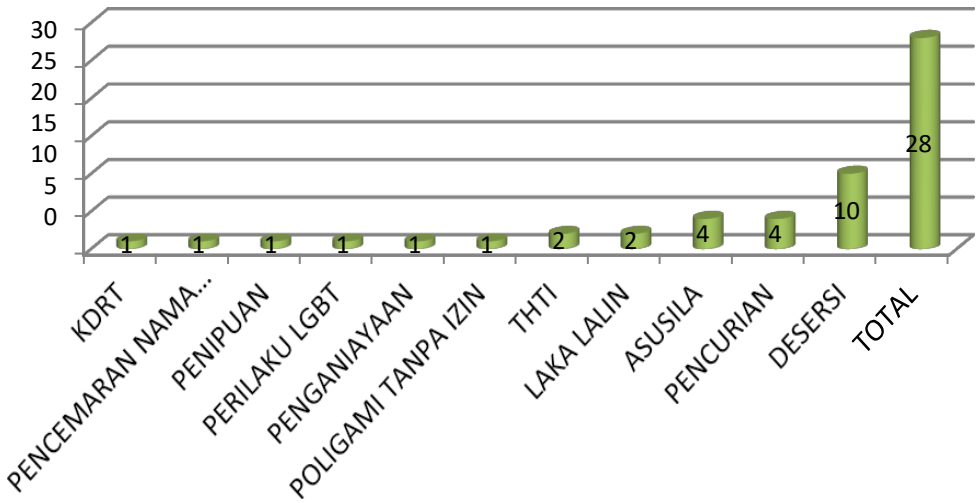


Graph 2: Distribution of violations according to official ranks

Compared to the number of personnel at every official rank with the number of violations within 6 years from 2017 to 2022, the highest percentage of the violations was found at enlisted rank, accounting for 84 members with 11 violations (13.09%), 92 non-commissioned officers with 7 violations (7.61%), while the lowest percentage of violations were found at the level of commissioned officers, accounting for 196 members with 10-time violations (5.10%).

The types of violations of military discipline and order commonly committed by the personnel at AAC vary but the desertion is dominant, accounting for 10 violations, followed by immoral conduct (4 violations), theft (4 violations), absence without any notification and road accident involving other persons as victims (2 violations),

and other categories (1) such as domestic violence, defamation, fraud, LGBT, torture, polygyny without consent of higher officials. The following graph provides the types of violations of military discipline and order at AAC from 2017 to 2022.



Graph 3: Number of Violators

Of the 28 violations of military discipline at IAFAAC from 2017 to 2022, almost half of the cases (13 cases or 46%) had been settled, while the rest were under litigation processes (9 cases or 32%), administrative sanctions (3 cases or 11%), and the rest was 1 case: *ankum* process, decision issuance process, and in-waiting for execution. The enforcement of military discipline for the personnel at AAC to help perform the tasks and functions in a general scope has been implemented according to the provisions of the legislation and the order applying to the domain of the Indonesian Armed Forces and specifically in the unit of AAC. This implementation can be measured through planning performed yearly along with a set of tasks and functions of the Central Implementing Body of AAC. Departing from this planning, each working unit of AAC executes the tasks and functions according to the domains and their authorities. The AAC embraces several working units within this scope: AAC headquarter, Army Aviation Education Center as an education unit stemming from Army Aviation Center right under Kodiklat TNI AD, Bengkel of Army Aviation Center, Procurement Agency at Army Aviation Center (Balakada Puspenerbad), Main Military Air Base Ahmad Yani Semarang, Military Air Base Gatot Subroto, headquarters detachement (Denma Puspenerbad), Squadron 11, Squadron 12, Squadron 13, Squadron 21, and Squadron 31.

The primary tasks and functions embedded in every unit are well implemented under the control of the Commander of AAC assisted by the Vice-Commander of AAC, the Inspector of AAC, and 2 (two) Directors of AAC. The measurement of performance can also be given by enforcing discipline to realize the enforcement of the law of military discipline and order within the domain of AAC.

What is interesting in this research is the high percentage of violations committed by the low-ranked personnel, where the violations committed by the enlisted personnel were as much as 13% of the total enlisted members of this rank. This significant percentage of violations can be triggered by several factors (Ramdani, n.d.): 1) Poor awareness of the law; in some cases of violations regarding discipline, insubordination, and other crimes committed by privates, it was found that most privates demonstrate a poor understanding of the law. They (privates) understand themselves as first-class citizens with superiority in law over civilians, undermining the rules of law represented by related institutions, police department, prosecutors, and courts. There is still a likelihood that privates only comply with their commander, and they even threaten police and other law enforcers in case of revealing the crimes they committed, 2) poor organizational culture may lead to practices harming discipline and professionalism, 3) social and cultural factors can affect the behavior of the members of the armed

forces, causing violations of discipline, 4) personal factors related to personal and emotional issues or personal problems can trigger the members of the armed forces to violate discipline, 5) poor motivation and psychological conditions can affect the behavior of the members of the armed forces causing disciplinary violations, 6) shortage of resources such as lack of supervision and control can lead further to disciplinary violations committed by the members of the armed forces, 7) inadequate, ineffective, and unjust sanctions will not deter military personnel from disciplinary violations, 8) leadership factor involves the absence of integrity and credibility, causing disciplinary violations in an organization, 9) family problem and economic burden may lead further to domestic violence or the condition where privates may be found to build other (illegal) careers outside the military scope such as those involved in gambling, serving as bodyguards, involved in a theft, robbery, and other criminal offenses due to unstable mentality of the privates.

Those are some of the myriad factors causing military disciplinary violations within the domain of armed forces, especially in the scope of AAC. Thus, some measures aiming to maintain and improve the discipline and professionalism of the personnel of the armed forces are required.

4. Measures to Improve the Discipline of Indonesian Armed Forces at AAC

Discipline is paramount for the success of the Indonesian Armed Forces. The law of military discipline helps form the structure ensuring that every member of the armed forces appropriately performs tasks and responsibilities. Furthermore, the enforcement of military discipline also ensures that the organization concerned can appropriately function and maintain security. Discipline can improve the professionalism of the members and guarantee that they behave accordingly and comply with professional standards. This is expected to bring positive impacts to help improve the trust of the members of the armed forces and to build a positive image and trust in an organization. In other words, the discipline in armed forces especially in the domain of AAC needs to be improved to guarantee that the organization can appropriately function and establish responsibilities and professionalism of the members and fulfill the tasks and obligations accordingly.

Several steps can be taken to help enforce military discipline within the scope of the Indonesian Armed Forces, especially at AAC: 1) strict law enforcement: the discipline among the personnel of the armed forces can be improved by strictly enforcing and imposing law on privates who commit violations. This approach will set an example implying that inappropriate conduct will lead to serious consequences and deterring effects, 2) consistent and sustainable training and education from the start can help build discipline and character of the privates. This can help ensure that privates understand the value and standards set for them, 3) administrative sanctions such as demotion, salary reduction, or transfer can be given to motivate privates to comply more with rules and standards and also help minimize violations, 4) the enforcement of rules and regulations must be consistently and justly applied to all privates since it will help ensure that equal standards apply to all and it is to imply that no discrimination is involved, 4) strong organizational culture should be based on disciplinary value and professionalism, which can help build the discipline among privates and to ensure that privates will adhere to their responsibilities and be dedicated to their tasks. Leaders can also provide incentives and rewards for privates who demonstrate a good disciplinary attitude and to set them as an example for others, 5) focus on career development will leave a chance for privates to adequately develop their career and education, and it is expected to motivate them to maintain the discipline and professionalism. A good career will help cut economic burdens as an issue causing disciplinary problems among privates. Career development of privates can take into account skill development, training in technology, management, and leadership, b) facilitating the participation of the personnel of the armed forces in internship programs and professional certifications to improve skills and open job opportunities after retirement, c) providing financial support and connectivity for those planning to set up a business after retirement, d) maintaining good relationships with companies and private institutions to help strengthen professional relationships and enhance job opportunities for the personnel of the armed forces after retirement, d) providing incentives for personnel involved in development projects aiming to enhance national economy, 6) openness and transparency in decision-making and actions must be implemented to ensure that privates are equally treated and feel recognized. This will also help build their career and grow solidarity among privates and serve as an essential factor in building discipline. The above measures are expected to create

harmonious, disciplinary, professional, and deterring conditions for the armed forces, especially in the scope of AAC.

5. Conclusion

Indonesian Armed Forces are a military organization strongly adhering to military discipline and ethics pursuant to *Sapta Marga* and the oath of enlistment. Thus, specific military traits deal with military disciplinary law serving as an instrument to ensure that the tasks and responsibilities of the armed forces, especially at AAC are performed professionally and accountably. Law Number 25 of 2014 concerning Military Disciplinary Law comprehensively governs the following matters: (1) the positions and the tasks of military disciplinary law in the Indonesian Armed Forces; (2) conduct that is subject to the imposition of disciplinary sanctions; (3) procedures and mechanisms of the enforcement of military disciplinary law; (4) elections and the tasks of disciplinary judges; and (5) protection for the personnel of Indonesian Armed Forces on whom disciplinary sanctions are imposed. Although legislation has set comprehensive regulations concerning the enforcement of military discipline, from 2017 to 2022 there had been at least 28 cases of disciplinary violations committed by privates within the domain of AAC. Some factors triggering violations involve poor awareness of the law, poor organizational culture, social and cultural factors, personal factors, motivation and psychological conditions, shortage of resources, adequate sanctions, leadership, family problems, and economic burdens. Thus, this research aims to formulate 7 strategies to improve the enforcement of disciplinary law among privates of the Indonesian Armed Forces at AAC; these strategies involve (1) strict law enforcement, (2) training and education, (3) administrative sanctions, (4) enforcement of rules and regulations, (5) strong organizational culture, (6) focus on career development, and (7) openness and transparency. Maximizing these strategies is expected to establish a harmonious environment for Indonesian Armed Forces, especially within the professional and disciplinary domain of AAC.

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Waivers of Constitutional Court Decisions by the Supreme Court Regarding Manpower Laws

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Abstract
The judicial review of Law Number 13 of 2003 concerning Manpower (UUK) has been granted by the Constitutional Court in 11 (eleven) requests for UUK testing. Of the 11 (eleven) decisions there were 3 (three) decisions whose follow-up was regulated by the Supreme Court Circular Letter (SEMA), namely SEMA Number 4 of 2014 and SEMA Number 3 of 2015, and gave rise to injustice and legal uncertainty in labor law. This legal research uses normative legal research methods. The data were analyzed qualitatively and are prescriptive. The approach used is a statutory approach (statute approach) and a case approach (case approach). This research is important to do to explain SEMA's position in labor law and the Constitutional Court's decision regarding UUK is erga omnes, the decision is final and binding. The results of the study show that SEMA has no legal standing to further regulate the Constitutional Court's decision because SEMA is not a statutory regulation.

Keywords: Labor Law, Constitutional Court Decision, Supreme Court Circular Letter, Abandonment

1. Introduction

Since the Constitutional Court (MK) was established, there has been a judicial review of Law Number 13 of 2003 concerning Manpower (UUK) 23 (twenty-three) times. Of the 23 (twenty-three) requests for judicial review, 11 (eleven) requests were granted by the Constitutional Court. Of the 11 (eleven) decisions granted by the Constitutional Court, there were 3 (three) decisions whose follow-up was regulated by a Supreme Court Circular Letter (SEMA).

First, the decision of the Constitutional Court Number 12/PUU-I/2003, the judicial review case for testing several articles of the UUK and the Constitutional Court in its decision granted the petition against Article 158, Article 159, Article 160 paragraph (1) as long as it concerns the clause ".... not on the employer's complaint…"; Article 170 insofar as it concerns the clause ".... except Article 158 paragraph (1), ..."; Article 171 insofar as it concerns

the clause "…. Article 158 paragraph (1)…"; Article 186 is all about the clause "…. Article 137 and Article 138 paragraph (1)…"; contrary to the 1945 Constitution of the Republic of Indonesia(Sitompol, 2021).

After the Constitutional Court's decision, there were differences in interpretation by the Supreme Court for actions that qualify as in the provisions of Article 158 of the UUK regarding termination of employment (PHK) on the grounds of committing a serious mistake. The Supreme Court issued SEMA Number 3 of 2015 in the Special Civil Code section letter e stating that layoffs can be carried out without having to wait for a criminal decision that has permanent legal force.
The decision of Constitutional Court Number 12/PUU-I/2003 essentially stipulates that layoffs as a result of a worker's gross mistakes must be based on a court decision that has permanent legal force, which means that this authority is not on the employer's side. (Sonhaji, 2019). There is a fundamental difference between the Constitutional Court's decision Number 12/PUU-I/2003 and SEMA Number 3 of 2015.

Table 1: Differences in Norms of Layoffs Due to Serious Mistakes

MK Decision Number 12/PUU-I/2003	SEMA Number 3 of 2015
Layoffs due to serious employee mistakes must be based on a court decision that has permanent legal force	Termination of employment can be carried out without having to wait for a criminal decision with permanent legal force

Source: The data is processed by the researcher.

Second, MK decision Number 37/PUU-IX/2011. The judicial review case was filed with the Constitutional Court for reviewing Article 155 paragraph (2) of the UUK. Article 155 paragraph (2) reads:
"As long as the decision of the industrial relations dispute settlement institution has not been stipulated, both employers and workers must continue to carry out all their obligations"

The Constitutional Court decided that the phrase "has not been stipulated" in Article 155 paragraph (2) of the UUK is contrary to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) as long as it does not mean that it does not yet have permanent legal force. (Farianto, 2018; MK Decision Number 37/PUU-IX/2011 Regarding Processing Wages, Sitompol, 2021). With the issuance of this MK decision, Indonesian workers welcomed the process of wages. Layoffs are paid until they have permanent legal force. Process wages are wages received by workers during suspension by employers. There is a very basic difference in the terminology of process wages from the side of employers and workers. The entreprenthinksnion that the process of preprocessing paid for 6 (six) months because the entrepreneur reasoned and refers to Law Number 2 of 2004 concerning Industrial Relations Case Settlement (UUPPHI), namely the bipartite deadline is 30 (thirty) working days, the mediation process is 30 (thirty) working days and during the process at the Industrial Relations Court (PHI) for 50 (fifty) working days. Meanwhile, on the part of the workers, the process of wages is paid until the layoff case is ongoing until it has permanent legal force because the layoff process is a series of processes ranging from bipartite to no further legal remedies. Because the opinion of this worker is the result of the Constitutional Court decision No 37/PUU-IX/2011.

The Constitutional Court's decision stating that process wages during the suspension period must be paid until the decision has legal force is still deemed unfair and burdensome to the entrepreneur(Farianto, 2018). On the other hand, workers who do not comply with the provisions of the Constitutional Court's decision, create confusion, and legal uncertainty and do not do fulfilling justice for workers.

The discourse on process wages between employers and workers took a very long time so the Supreme Court had to resolve the differences of opinion by issuing SEMA Number 3 of 2015, the special civil section letter f stated that after the decision of the Constitutional Court Number 37/PUU-IX/2011, dated 19 September 2011 regarding wages process, the content of the ruling is to punish the entrepreneur to pay process wages for 6 months. Excess time in the PHI process as referred to in UUPPHI is no longer the responsibility of the parties.

Third, MK Decision Number 100/PUU-X/2012 cancels Article 96 UUK, namely:

"Demands for payment of workers' wages and all payments arising from work relations expire after a period of 2 (two) years since the rights arise."

The review of Article 96 UUK which was decided by the MK on 19 September 2013 with its decision granting the petitioner's request entirely and stating that Article 96 UUK is contrary to the 1945 Constitution of the Republic of Indonesia and no longer has permanent legal force(Decision of the Constitutional Court Number 100/PUU-X/2012 Regarding Expiration of Wages Payment). The Petitioner argued that Article 96 UUK impairs his constitutional rights as a citizen because Article 96 UUK impedes his right to prosecute wages and all payments arising from layoffs(August 2020).

In its ruling, the Constitutional Court decided that Article 96 of the UUK was contrary to the 1945 Constitution of the Republic of Indonesia and had no binding legal force. The legal consequence of this MK decision is that demands for payment of wages and all payments arising from work relations do not have an expiration date.

To respond to the Constitutional Court's decision regarding the expiry of the demands for wages under Article 96 UUK, the Supreme Court issued SEMA Number 4 of 2014 which stated "that Article 96 UUK which has been conducted a judicial review based on the Constitutional Court Decision Number 100/PUU-X/2012 dated 19 September 2013 is not issuing new norm. Therefore, deciding on expiration does not reduce the freedom of the judge to consider the sense of justice based on Article 100 of UUPPHI junto Article 5 of Law Number 48 of 2009 concerning Judicial Power.

Article 100 of the UUPHI states that:
"In making a decision, the panel of judges took into account the law, existing agreements, customs, and fairness."

Article 5 of Law 48 of 2009 states that:
“(1). Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society. (2) Constitutional judges and judges must have integrity and personality that is beyond reproach, honest, fair, professional, and experienced in the field of law. (3) Constitutional judges and judges are obliged to comply with the Code of Ethics and the Code of Conduct for Judges.

Article 82 UUPPHI states that a lawsuit by workers for layoffs can be filed only within 1 (one) year of receiving or notifying the decision the employer. There is a phenomenon of legal uncertainty regarding the demand for expired wages as mandated by the Constitutional Court decision Number 100/PUU-X-2013 after the publication of SEMA Number 4 of 2014.

As for some of the findings resulting from other research that has related issues such as research from Antoni Putra (2022) with the title "Final and Binding Nature of Constitutional Court Decisions in Reviewing Laws" which has conclusions related to the implementation of Constitutional Court Decision Number 34/PUU-XI / 2013 which states that a review can be carried out many times. First, at the implementation level, problematic, the application of the Constitutional Court Decision Number 34/PUU-XI/2013 occurred because the Supreme Court preferred to deny this decision by issuing SEMA number 7 of 2014 to limit a review to only be carried out once on the grounds of providing legal certainty. Second, from a legal perspective, ignoring the decision of Constitutional Court Number 34/PUU-XI/2013 by the Supreme Court gave birth to legal uncertainty. Furthermore, research from Rifai Rofiannas (2017) with the title "Abandonment of Constitutional Court Decisions: Analysis of the Constitutionality of SEMA No. 7 of 2014” has the conclusion that the relationship between the Constitutional Court and other governing bodies that coordinate is a legal issue that cannot be given a black-and-white prescription. The most adequate description is to see the context of this relationship as a situation based on the principle of checks and balances with the main agenda being upholding the supremacy of the Constitution, especially in terms of application and interpretation. Based on this theory, the situation of the relationship between the Constitutional Court and other government bodies can be understood more rationally. Sometimes the relationship situation is described in the corridor of judicial supremacy where the Constitutional Court takes the lead in the interpretation of the constitution (when the interpretation of the constitution contains undeniable truth as in the Constitutional Court Decision No. 34/PUU-XI/2013) while on the other hand, the corridor of departmentalism also makes sense

as part of the dynamics of governance based on the principle of checks and balances as implemented by the Supreme Court through Supreme Court Decision No. 39 PK/Pid.sus/2011 and Supreme Court Decision No. 45 PK/Pid.sus/2011. And specifically about SEMA No. 7 of 2014 the author argues that the SEMA is a wrong departmental practice because materially the content of SEMA No. 7 of 2014 contradicts the Constitutional Court Decision No. 34/PUU-XI/2013 whose interpretation of the constitution by the Constitutional Court is correct.

2. Research Method

This type of research is included in the normative research group, namely research conducted by examining primary legal materials, secondary legal materials, and tertiary legal materials or supporting literature.(Soerjono & Mamudji, 2018). Normative research is understood as research to test a norm or applicable provisions(Irwansyah, 2021). Normative or doctrinal legal research is very closely related to research on values, norms, and written regulations so this research is very closely related to libraries. (Taufani, 2018). Researchers collected primary, secondary, and tertiary legal materials. The approaches used in this legal research are statutory approaches and case approaches. This research is important to do to explain SEMA's position in labor law and the Constitutional Court's decision regarding UUK is erga omnes, the decision is final and binding.

3. Results and Discussion

3.1. SEMA's position in Labor Law

Initially, SEMA was formed based on the provisions of Article 12 paragraph (3) of Law Number 1 of 1950 concerning the Composition, Powers, and Procedures of the Supreme Court of Indonesia which reads:
"The conduct of the actions (work) of these courts and the judges in those courts are closely monitored by the Supreme Court. In the interest of the service, for this reason, the Supreme Court has the right to give warnings, reprimands, and instructions deemed necessary and useful to the courts and judges, either in a separate letter or in a circular letter.

The existence of SEMA since 1950 has a constitutional basis of legality so that the contents and instructions outlined in it are binding to be obeyed and applied by judges in court. History records that since 1951 the Supreme Court has issued or published the first SEMA, namely SEMA No. 1 of 1951 dated January 20, 1951. Since then, SEMA has emerged with an average of 5 to 6 pieces each year. (Harahap, 2009).

Law Number 1 of 1950 has been revoked by Law Number 14 of 1985 concerning the Supreme Court and no longer explicitly mentions the authority of the Supreme Court in terms of making circulars. In Law Number 14 of 1985 Article 32 paragraph (4) it is stated that:
"The Supreme Court has the authority to give instructions, reprimands, or warnings as deemed necessary to the Courts in all Judicial Environments"

Based on these provisions, the form of provisions issued by the Supreme Court does not expressly give instructions, reprimands, or warnings to lower courts.

In Law Number 11 of 2012 as amended by Law Number 15 of 2019 concerning Formation of Laws and Regulations (UUPPPU) Article 7 it is stated that the types and hierarchy of laws and regulations consist of the 1945 NRI Law, MPR Decrees, Laws/PERPU, Regulations Government, Presidential Regulation, Provincial Regulation; and Regency/City Regional Regulations. Furthermore, Article 8 paragraph (2) states that the regulations stipulated by the People's Consultative Assembly (MPR), the People's Representative Council (DPR), the Regional Representative Council (DPD), MA, MK, Supreme Audit Agency (BPK), Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions at the same level established by law or the Government by order of the law, Provincial DPRDs (DPRD), Governors, Regency/City DPRDs, Regents/Mayors,

If it is related to Article 8 UUPPPU, then SEMA is not included in the system of laws and regulations. Included in the hierarchy of laws and regulations are the Supreme Court Regulations (PERMA), whose formation is based on the authority of the Supreme Court. All regulations made by the Supreme Court constitute the authority granted

by law to the Supreme Court in issuing statutory regulations for guidelines for the implementation and administration of justice under the Supreme Court. (Bakri, 2020). SEMA is a form of circular by the Supreme Court leadership to all levels of the judiciary which contains guidance in administering justice, which is more of an administrative nature(Fajarwati, 2017). SEMA is not a statutory regulation according to UUPPHI provisions, but only a circular letter or beleidregels.

Policy regulations "beleidregels" are referred to as rules because their content regulates, but the form is not outlined in the form of certain official regulations. A circular letter is a quasi-form of regulation or legislation which cannot be categorized as a regulation, but its contents are regulatory or contain regulation (retelling). Circulars are products of regulations issued by the Supreme Court to carry out the regulatory function of the Supreme Court. SEMA is a form of circular from the Supreme Court leadership to all levels of the judiciary whose contents are guidance in administering justice that is more administrative in nature(Sulaiman, 2017). SEMA is issued by elements of the judiciary leadership in the Supreme Court which are non-technical policies, the structure of which is more like an ordinary letter(Fauzan, 2015). Circulars are regulations issued by state administrative bodies or officials to carry out government activities.

Circulars are a form of policy regulation. Policy regulations only function as part of the operational implementation of government tasks, therefore they cannot change or deviate from laws and regulations. This regulation is a kind of shadow law from UU or pseudo-wetgeving (pseudo legislation). (Ridwan, 2018).

In the practice of labor law, the Supreme Court has issued 2 (two) SEMAs to respond to the Constitutional Court's decision, vizSEMA Number 4 of 2014 andSEMA Number 3 of 2015. The following is the difference between the Constitutional Court decision Number 12/PUU-I/2003, the Constitutional Court decision Number 37/PUU-IX/2011, and the Constitutional Court decision Number 100/PUU-X/2012 and withSEMA Number 3 of 2015 andSEMA Number 4 of 2014 as follows:

Table 2: Differences between the Constitutional Court's decision and SEMA

MK Decision Number	SEMA Number 2 of 2004	SEMA Number 3 of 2015
12/PUU-I/2003: *"…. not on the employer's complaint...*"; Article 170 insofar as it concerns the clause ".... except Article 158 paragraph (1), ..."; Article 171 insofar as it concerns the clause "…. Article 158 paragraph (1)…" contradicts the 1945 Constitution of the Republic of Indonesia	-	In the event of layoffs of workers/laborers due to serious wrongdoing ex. Article 158 UUK (post-Decision of the Constitutional Court Number 12/PUU-1/2003 dated 28 October 2004), then layoffs can be carried out without having to wait for a criminal decision with permanent legal force."
37/PUU-IX/2011: The phrase "has not been stipulated" in Article 155 paragraph (2) of the UUK is contrary to the 1945 Constitution of the Republic of Indonesia in so far as it is not interpreted as having no permanent legal force	-	After the Constitutional Court's decision Number 37/PUU-IX/2011, September 19, 2011, regarding process wages, the contents of the decision order were to sentence employers to pay process wages for 6 (six) months. Excess time in the PHI process as referred to in UUPPHI is no longer the responsibility of the parties.
100/PUU-X/2012; Article 96 of the UUK is contrary to the 1945 Constitution of the Republic of Indonesia and has no permanent	The application of the expiry date to claim severance rights is linked to the Constitutional Court's Decision. The formulation of Article 96 UUK	-

and binding legal force. There is no expiry for payment of wages	which has been judicially reviewed based on the Constitutional Court's Decision Number 100/PUU-X/2012 dated 19 September 2013 did not issue a new norm. Therefore, deciding on expiration does not reduce the freedom of the judge to consider the sense of justice based on Article 100 UUPPHI junction Article 5 Law Number 48 of 2009 concerning Judicial Power."	

Source: The data is processed by the researcher.

If you analyze Table number 2 above, there are differences between the Constitutional Court's decision and the SEMA, including:

a. Decision of the Constitutional Court Number 12/PUU-I/2003 confirms that layoffs with serious errors can be carried out after they have permanent legal force, while SEMA Number 3 of 2015 states that layoffs can be carried out without having to wait for a criminal decision with permanent legal force;
b. The Constitutional Court Decision Number 37/PUU-IX/2011 confirms that process wages are paid until they have permanent legal force, while SEMA Number 3 of 2015 states that the contents of the decision order are to punish employers for paying process wages for 6 (six) months. Excess time in the PHI process as referred to in UUPPHI is no longer the responsibility of the parties;
c. The Constitutional Court Decision Number 100/PUU-X/2012 has no expiration date for payment of wages, meaning that wages that have not been paid by employers can become the object of a request for dispute to court even though it has exceeded 2 (two) years while SEMA Number 4 of 2014 gives room to judges to determine the limit the timing of payment of wages in its decisions is based on the principles of justice, legal values and a sense of justice that lives in society, taking into account laws, existing agreements, and customs.

Decisions at the SEMA cassation level serve as a reference and guideline for the Supreme Court in deciding cases at PHI, including:

Table 3: Supreme Court Decision regarding Processing Wages after the issuance of SEMA No. 3 of 2015

No	PHI DECISION	DECISION AMAR	MA DECISION	DECISION AMAR
1	Decision Number 303/Pdt.Sus-PHI/2015/PN.JKT.Pst, April 28, 2016	12 (twelve) months	Decision Number 815 K/Pdt.Sus-PHI/2016, dated 20 October 2016	6 (six) months
2	Verdict Number 15/Pdt. G.PHI/2016/PN.Smg, dated 28 July 2016	January 2015 until the case obtains the permanent legal force	Decision Number 1033 K/Pdt.Sus-PHI/2016, dated 25 January 2017.	6 (six) months
3	Decision Number 34/Pdt.Sus-PHI/2016/PN.PAL, 19 January 2017.	17 (seventeen) months	Decision Number 679 K/Pdt.Sus-PHI/2017, July 31, 2017.	6 (six) months
4	Decision Number 100/Pdt.Sus-PHI/2016/PN Pbr, dated 6 March 2017.	13 (thirteen) months	Decision Number 908 K/Pdt.Sus-PHI/2017, September 28 2017.	13 (thirteen) months
5	Decision Number 66/Pdt.Sus-	12 (twelve) months	Decision Number 1260 K/Pdt.Sus-PHI/2017,	6 (six) months

	PHI/2014/PN.Tpg, July 9, 2015.		November 20 2017.	
6	Decision Number 22/Pdt.Sus-PHI/2017/PN.Pdg, July 22, 2017.	6 (six) months	Decision Number 1324 K/Pdt.Sus-PHI/2017, December 19 2017.	6 (six) months
7	Decision Number 13/Pdt.Sus –PHI /2017/PN Jmb, August 21 2017.	6 (six) months	Decision Number 1436 K/Pdt.Sus-PHI/2017, January 16, 2018.	6 (six) months
8	Decision Number 18/Pdt.Sus-PHI/2018/PN.Ptk, December 12 2018.	6 (six) months	Decision Number 723 K/Pdt.Sus-PHI/2019, September 3 2019.	6 (six) months
9	Decision Number 03/Pdt.Sus-PHI/2019/PN.Jmb, May 8, 2019.	6 (six) months	Decision Number 797 K/Pdt.Sus-PHI/2019, September 4 2019.	6 (six) months
10	Decision Number 45/Pdt.Sus-PHI/2019/PN Smr, September 5, 2019.	6 (six) months	Decision Number 216 K/Pdt.Sus-PHI/2020, 28 February 2020.	6 (six) months

Source: Data processed by researchers.

According to Table 3 above, out of 10 (ten) Supreme Court decisions, only 1 decision only processes wage payments exceeding 6 (six) months and follows the PHI decision which stipulates 13 (thirteen) months. The other 9 (nine) Supreme Court decisions stipulated that process wage payments were the same as SEMA Number 3 of 2015. If we analyze this data, it means that after the issuance of SEMA Number 3 of 2015, the judex Juris panel of judges was consistent in determining process wages of only 6 (six) months and did not comply with the Constitutional Court Decision Number 37/PUU-IX/2011.

Table 4: Supreme Court decision regarding layoffs on the grounds of serious misconduct

No	**Parkara number**	**PHI verdict**	**Cassation Decision**	**Settlement of layoffs based on MK Decision Number 12/PUU-I/2003**
1	Decision Number 158 K/Pdt.Sus/2007 Petitioner for cassation: PT. Jasa Marga (entrepreneur) Respondent for cassation: Suwanto (employee)	The decision of the PHI District Court Surabaya Number 122/G/2006/PHI.SBY, December 19, 2006: Rejecting the plaintiff's claim; ordered the defendant to return to work for the plaintiff	Granted the cassation request and canceled the PHI decision and decided to lay off the respondent on cassation.	None (the respondent on cassation/previously the defendant in his request for the panel of judges to consider the Constitutional Court's decision Number 12/PUU-I/2003)
2	Decision Number 593 K/Pdt.Sus/2012 Petitioner for cassation/formerly plaintiff: PT.Kurnia Anggun (entrepreneur) Appeal Respondents I & II / formerly Defendants I & II:	PHI Surabaya District Court Decision Number 112/G/2011/PHI-Sby; states the working relationship between the counterclaims and The counterclaim is not interrupted and continues.	Granted the cassation request from the cassation applicant PT.Kurnia Anggun; cancel the PHI decision on the PN Surabaya Number: 112/G/2011/PHI-	None (the respondent on cassation/previously the defendant in his request for the panel of judges to consider the Constitutional Court's decision

	Suwiko and Khomza (employees)		Sby., December 5 2011	Number 12/PUU-I/2003)
3	Decision 550 K/PDT.SUS/2008, An applicant for cassation/formerly the defendant PT.Senayan Sandang Makmur (entrepreneur); Respondent for cassation/previous plaintiff: Daeng Nani Giyanti et al (workers)	Decision of the PHI PN Bandung Number. 44/G/2008/PHI.BDG dated 3 June 2008 reject the interlocutory claims of the plaintiffs in their entirety; stated the actions of the defendant who had carried out the termination of employment on 7 September 2007 without prior decision of PHI is an act of opposites with article 151 paragraph (3) UUK and null and void	Rejecting the cassation request from the Cassation Petitioner: PT. PT. Senayan Sandang Makmur (entrepreneur).	None (however the respondent on cassation requested that the panel of judges consider the Constitutional Court decision Number 12/PUU-I/2003
4	Decision Number 611K /Pdt.Sus/ 2009. Petitioner for cassation/formerly the defendant Fahrizal (worker); The defendant for cassation/formerly the plaintiff PT. Panarub Industry (entrepreneur)	The decision of the PHI PN Serang Number 77/G/2008/PHI.Srg., April 30 2009 decided to grant the plaintiff's claim in its entirety; declared the termination of the employment relationship between the plaintiff and the defendant as of the 30th March 2008 without severance pay	Rejecting the cassation request from the cassation applicant/formerly the defendant Fahrizal and amending the PHI ruling at the District Court Serang Number 77/G/2008/PHI.Srg, April 30 2009.	None (applicant for cassation/formerly the defendant in his request for the panel of judges to consider the decision of the Constitutional Court Number 12/PUU-I/2003)
5	Decision Number 599 K/Pdt.Sus-PHI/2016. An applicant for cassation/formerly plaintiff PT Bank ANK Indonesia (entrepreneur); Respondent for cassation/formerly the defendant Syamsul Nababan (worker).	PHI verdict on Medan District Court Number 194/Pdt.Sus-PHI/ 2015/PN Mdn., dated 18 February 2016 decided to partially grant the Plaintiff's claim; state the termination action taken plaintiff to the defendant is not valid according to the provisions of the law apply.	Granted the cassation request from the cassation applicant PT Bank ANZ Indonesia decided canceling the PHI Decision on the Medan District Court Number 194/Pdt.Sus-PHI/2015/PN Mdn., February 18 2016 and stated that the working relationship between the plaintiff and the defendant was broken due to	None (applicant for cassation/formerly the defendant in his request for the panel of judges to consider the decision of the Constitutional Court Number 12/PUU-I/2003)

			violated the provisions of Article 161 UUK, since judex fact verdict pronounced;	

Source: Data processed by researchers

Based on Table 4 above, it can be concluded that the panel of judges at the cassation level did not consider Constitutional Court Decision Number 12/PUU-I/2003 in deciding the PPHI case. Of the 5 (five) decisions that were sampled, 4 (four) whose verdicts stated the termination of the employment relationship between workers and employers.

According to researchers, the application of SEMA No. 4 of 2004 and SEMA No. 3 of 2015 in employment law creates legal uncertainty and injustice for workers who fight for their normative rights. The two SEMAs again obscured the mandate of the Constitutional Court's decision.

3.1. Position of the Constitutional Court Decision Regarding UUK

UUK's position with the Constitutional Court's decision is equal because the touchstone for testing UUK is the 1945 Constitution of the Republic of Indonesia. The Constitutional Court's decision is final and binding and is erga omnes, meaning that the Constitutional Court's decision regarding UUK must be obeyed by all elements of the Indonesian nation, and the decision is no longer allowed to be translated differently by other laws and regulations that are of a lower degree than the Law, especially by a SEMA which does not have a statutory hierarchy according to the UUPPPU.

The Supreme Court is one of the institutions or organs of the state which is also bound by the results of the review of laws against the Constitution by the Constitutional Court. Because, in adjudicating a case, the Supreme Court will of course base the examination process and its decision on certain laws. If the law that is used as a guideline for examining cases has been annulled by the Constitutional Court, then the Supreme Court is obliged to guide it(Isra, 2015).

According to Alec Stone Sweet, the scope of binding decisions that are erga omnes in nature means that decisions are not only seen in terms of the attachment to the subject (address) of the decision which consists of all individuals, state institutions, and public officials or authorities. The scope of binding power and legal consequences of decisions also covers the entire area or field of law which is arranged in stages and hierarchically under the basic law or constitution as the highest law.(Suroso, 2018; Sweet, 2000).

According to Fajar Laksono Suroso, the Constitutional Court's decision is binding and there are no other legal remedies because the final and binding decision of the Constitutional Court is attached to the essence of the position of the 1945 Constitution of the Republic of Indonesia as the highest law. And there is no other law that is higher than it and is final in nature that the Constitutional Court's decision is an attempt to maintain the authority of the constitutional judiciary(Mahfud, 2009; Suroso, 2018). According to Sri Soemantri, final decisions must be binding and cannot be annulled by any institution. (Huda, 2018).

4. Conclusion

Based on the discussion above, it can be concluded that SEMA has no legal standing to further regulate the Constitutional Court's decision because SEMA is not a statutory regulation according to UUPPPU. SEMA is only a policy regulation (beleidsregel) while the Constitutional Court's decision regarding the UUK is final and binding and binds all citizens because the Constitutional Court's decision has the same position as the UUK. The implementation of the Constitutional Court's decision is not in line with what is interpreted by the Constitutional Court's decision. SEMA Number 4 of 2014 has annulled the Constitutional Court decision Number 100/PUU-X/2012 regarding the expiration of wage payments, SEMA Number 3 of 2015annulled the decision of the

Constitutional Court Number 12/PUU-I/2003 regarding termination of employment with serious reasons, and the decision of the Constitutional Court Number 37/PUU-IX/2011 concerning process wages. Since the release of the SEMA, there has been legal uncertainty in labor law and the elimination of workers' rights. For the Constitutional Court's decision regarding UUK to have legal certainty, it is proposed that a new article be made in the body of the UUK or Labor Cluster UUCK which generally states that: and/or parts of the law apply and become an integral part of this law and the implementation arrangements are further regulated by a ministerial regulation".

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Learning from Heraclitus to Better Understand Genocidal Regimes

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Abstract
This article will argue that from Heraclitus' writings on fire, we can better appreciate how genocidal regimes use it against a target population. In doing so, I am not arguing that I have presented the proper reading of Heraclitus' thoughts. Rather, I have tried to approach the available Fragments in a way whereby we can learn from Heraclitus about the potentially genocidal dangers and consequences of fire. To do this, I will approach Heraclitus' Fragments through a framework provided by Martin Heidegger. Ultimately, I will argue that from Heraclitus' thoughts we can better comprehend how tyrannical regimes utilise fire to exact genocides.

Keywords: Heraclitus, Martin Heidegger, Legal Philosophy, Genocide, International Criminal Law

1. Introduction

The great pre-Socratic philosopher Heraclitus of Ephesus (*fl. c.500 BC*) presented a series of cryptic and obscure thoughts on the constitution and underlying processes of the Universe. Although Heraclitus is most famous for his theory of flux and contingency, his thoughts on fire are just as insightful. Even though there are only a few surviving Fragments of Heraclitus' work, we can see that fire is an important constituent in his philosophy. For Heraclitus, fire is an omnipresent force which underpins the dynamics of the Universe. This article argues that from a closer inspection into Heraclitus' thoughts on the nature of fire, we will not only cultivate new perspectives into his philosophy but better understand a State's genocidal actions too.

This article has two objectives: first, I aim to show that we can systematically learn from Heraclitus' philosophy the various ways that a State can use fire to perform genocidal actions. By arguing this, I intend to expand Heraclitean legal theory beyond an analysis into his natural law theory (Singh, 1963), the organisation of justice (Shaw, 2019), or his thoughts on the strength and stability of the State (Schofield, 2015). Crucially, I argue that there are nuances within Heraclitus' thought on fire which have been missed by Heraclitean scholars particularly

in relation to how fire can be used to exact genocides.[1] My intention is not to show that Heraclitus was trying to create a logical approach to understand *how* regimes use fire to commit a genocide as this would involve a deeper textual, hermeneutic, and etymological analysis of his writings. Instead, I am arguing that we can *identify* that the way in which Heraclitus conceptualises fire is similar to the way that genocidal State's use it. Consequently, we can understand more deeply how genocidal regimes operate.

Looking ahead a little, in Section 2, I will outline three key problems that scholars face when examining Heraclitus. To avoid presenting another subjective interpretation of Heraclitus' writings, I shall adopt an approach similar to Martin Heidegger's. Heidegger acknowledges the Fragment(s) but rather than focusing upon etymology or translation, he emphasises what we can learn from them. In other words, the focus is placed upon what we can *learn from* Heraclitus rather than how we can *better learn* Heraclitus' philosophy.

We can see a broadly similar approach in modern Heraclitean scholarship. For example, David Shaw indicates that 'there is some uncertainty as to whether Heraclitus ever said that the universe is composed exclusively of processes rather than of things' (Shaw, 2019, p.166) Shaw is indeed correct in identifying that although this sentiment may be 'correct', Heraclitus himself 'did not hold that view in isolation' (Shaw, 2019, p.166). Furthermore, in Malcolm Schofield's brilliant analysis of Fragment 114 DK, we can see that the 'prime purpose of Heraclitus' saying is to offer a clue to the way humans may arrive at an intelligent understanding of things' (Schofield, 2015, p.66). In this article, by adopting an methodology akin to Heidegger's, we may too arrive at a more nuanced and insightful understanding of the way in which genocidal regimes utilise fire.

This contrasts with G.S. Kirk's examination, for example, who advocates a close and meticulous examination of the Fragments whilst dismissing subjective and hypothetical interpretations unless they are substantiated with references to other Fragments. Although there are genuine, worthy, and valuable academic merits to Kirk's method, his approach can stifle any lessons we can learn from Heraclitus' work because one's creative potential is sacrificed for the sake of contextual certainty which is impossible given that no scholar can ever know what Heraclitus truly meant in his work. Therefore, Kirk, and others who advocate a similar approach to him, can lead us to spend too much time focusing on the meaning and interpretation of the Fragments rather than what we can learn from them. This article wants to examine Heraclitus' Fragments and see whether there is anything we learn from this prophetic thinker concerning the actions of genocidal regimes.

This article's second objective is to expand on Charles H. Kahn's analysis of the verbs within Heraclitus' writings on fire (Kahn, 1983). There are two reasons why I have chosen Kahn to help me elaborate on Heraclitus' Fragments and how they facilitate a deeper appreciation of how the State can harness and deploy fire to carry out genocides. The first reason is that Kahn approaches Heraclitus's Fragments on fire with a view of understanding how it can mechanically operate rather focusing heavily upon the core and original meaning of the Fragments. Essentially, Kahn's approach is similar to Heidegger's in that it is focused on understanding Heraclitus and what we can learn from him rather examining the Fragments to better learn Heraclitean philosophy. The second reason is that Kahn provides a seminal insight into the language used by Heraclitus. In this article, I will expand on Kahn's analysis, and argue that from Heraclitus's thoughts, we can see that fire is an integral feature of the State's armoury. Furthermore, I argue that from Heraclitus' idea of the transformative and motivational nature of fire, we may even create a warning system to alert people when the State is either about to commit a genocide or is committing a genocide.

[1] To state that regimes use fire to commit genocides is a rather banal statement. In the twenty-first century, fire was used in the Bosnian genocide to cleanse the soil and force migration. In the Armenian and Cambodian genocides, fire was used to conduct mass burnings against the target population. During the Holocaust, fire was used to burn and dispose of dead corpses. In addition, we can see that fire has been used throughout history. If we restrict ourselves to Western Europe, then we can see that in England, there was the massacre of the Jewish people in Clifford Tower. In Ancient Athens, Alexander the Great burned the Palace of Persepolis. Furthermore, in the Hebrew Bible fire is integral. God is the Divine overseer when Moses encounters the Burning Bush. Not to mention, that Sodom and Gomorrah were set on fire and Elijah destroys the messengers of Ahaziah by fire. Within all these historical, cultural, and theological examples, fire is a common weapon of war. This, however, is the banality. I think, however, we can learn something more from Heraclitus's thoughts on fire which will re-envision how State's commit genocidal actions.

To achieve these two objectives, an analysis of Heraclitus' thoughts on fire is required. Speaking very broadly, one may identify three components to Heraclitus' thought on fire. These three components are distinct but they can mutually reinforce each other. Therefore, it is possible to place them under one umbrella especially given the limited number of Fragments available to us. This does not necessarily rule out valid philosophical and textual reasons for analysing each component separately. This article, however, does not intend to delve into such philosophical discussions. Consequently, I will not provide a distinct analysis of each of the components here. The reason is that the focus of this article is to better understand how genocidal regimes use fire against a target population after exploring Heraclitus' Fragments. To do this, I will treat each of the three components holistically whilst focusing on the thread that binds them together which is the lightning bolt.

The first component of Heraclitus' thought on fire is seeing it as the overseeing sun. Here, fire is used as an ever-watching tyrannical presence that can dispense justice against those that threaten the security of the State. Second, fire is seen as a transformative force. It is associated with flux, strife, and unity which can transform matter and states of affairs. Finally, fire is seen as a judge. Fire can be used to discriminate and separate to achieve certain objectives.

In this article, I will broadly examine the notion of the lightning bolt in the first component. Specifically, how the lightning bolt is harnessed by the State. Thereafter, I will explore how the State goes onto use the lightning bolt as a transformative weapon. Next, I will focus on how the transformative force of the lightning bolt is seen within the third component where fire becomes a judge. I argue that this thread in the three components can help us further understand how States can use fire to exact genocides.

The article shall be organised as follows: Section 2 will look at the issues surrounding the translation and interpretation of Heraclitus' Fragments. This Section will acknowledge the common problems in a study of Heraclitus' thought. Furthermore, it will advance how I shall proceed in my analysis of his writing and thinking on fire. In Section 3, with consideration of the drawbacks highlighted in Section 2, we shall explore the first two components of Heraclitus' thoughts on fire. This will involve looking at the relationship between fire and the lightning bolt. Section 3 will also examine how fire is harnessed by the State and how lightning is used as a transformative weapon. Section 4 will explore the third component of Heraclitus' thought on fire. In Section 4, we will explore fire as judge. In order to do this, we will explore Kahn's examination of the verbs surrounding fire and Heidegger's thought on fire and lightning in Heraclitus' writings. Thereafter, I shall critically apply this to concrete examples of genocide. By doing this, we will be in a position to better understand the subtle ways in which genocidal regimes use fire.

2. The Problems when Approaching Heraclitus' Thought – Adopting Heidegger's Framework

There are three problems which everyone faces when approaching Heraclitus' thought. First, there is problem of interpretation. This goes beyond a matter of hermeneutics and exegesis and is rooted in the fact that we have so little of Heraclitus' writings. In addition, the writing that we do have from Heraclitus are, generally, fragmented sentences. Therefore, situating the Fragments in an interpretative context is a difficult undertaking let alone pinpointing Heraclitus' true and authentic meaning behind his writing.

Second, there is the problem of translation. It is not only an obstacle for scholars to translate an author who is famously called "Heraclitus the Obscure" and "Heraclitus the Riddler", but also for the reader is reliant upon the translation, interpretation, and understanding of future thinkers. Notwithstanding that Heraclitus' 'obscurity is a calculated consequence of his style, which is usually compact and often deliberately cryptic… [and] is a formidable obstacle to understanding' (Hussey, 2005, p.378).

The final problem concerns the structure surrounding the Fragments themselves. This was recognised by ancient Greek philosophers such as Aristotle who held that it 'is difficult to punctuate Heraclitus' writings because it is unclear whether something goes with what follows or with what precedes it' (Aristotle, *Rhetoric*, 1407b14-18). More recently, Jonathan Barnes summarises the problem:

> It is hard to know how best to present the surviving fragments of Heraclitus' work. The problems of identifying them, of establishing the Greek text, and of translating the Greek into English are greater for Heraclitus than for any other Presocratic author… But there is a further problem: how to arrange the texts? Any arrangement insinuates some general interpretation of Heraclitus' thought, and every interpretation of Heraclitus' thought is controversial (Barnes, 2001, p.48).

To avoid these problems, this article shall not rely on a sole translation of Heraclitus' work. Rather, this article will adopt a comparative approach to the translations of Heraclitus' writings. Since there are so few Fragments of Heraclitus' writing available to us, I wish to adopt a broad study of the array of translations. The intention of such a methodology is that it will minimise the reliance of a particular translation of a Fragment. By adopting a wide and comparative approach to the translation of certain Fragments, we can start to learn from Heraclitus philosophy itself. For example, in Section 4 there is a study of Fragment 66 DK despite issues surrounding its authenticity and meaning. With Fragment 66 DK, I will present varying translations of the Fragment which could help us gather a sense of what Heraclitus was trying to convey and apply it to genocidal regimes.

2.1 Adopting Heidegger's Approach to Heraclitus' Fragments

Heidegger highlights that if an individual is to arrive at the 'inception' and 'constitutive core' of Heraclitus' thought then one must be 'if possible… true to the word' of Heraclitus when translating the Fragments (Heidegger, 2019, p.37). This involves going beyond a mere literal translative approach because the 'stakes are very high indeed' (Heidegger, 2019, p.37) regarding an ancient, fragmentary, and poetic thinker. Heidegger was shrewd enough to be aware that any translation, including his own, are dependent on the translator's interpretation which can themselves have a devastating impact upon the *word* of Heraclitus – *word* being here Heraclitus' true, authentic, and original meaningful expression. Heidegger writes:

> Here trans*lation* becomes a kind of trans*porting* to the other shore, one which is hardly known and lies on the opposite side of a wide river. Such a voyage is easily led astray, and most often ends in a shipwreck (Heidegger, 2019, pp.37-38).

This does not necessarily mean, however, that one should avoid this task. Instead, it is a task that should be undertaken with seriousness whilst acknowledging the natural obscurity of Heraclitus' thought and writing. For Heidegger, this obscurity is the result of Heraclitus writing in such an inceptual period of thinking about thinking or 'essential thinking' (Heidegger, 2019, pp.37-38). In fact, one must approach the Fragments with the conceptual and philosophical mindset that Heraclitus' sayings 'must remain as obscure as the originary word' (Heidegger, 2019, p.38) because that is their inherent nature – to be obscure because they are thoughts that involve a type of original and inceptive thinking. This inceptual thinking, according to Heidegger, necessitates obscurity and difficulty, but not impossibility, due to the historical era in which they were composed.

Indeed, for Heidegger, even if we were to possess Heraclitus' writings 'intact' and 'think-after the thinking of this thinker' then this would 'still be a difficult task' (Heidegger, 2019, p.22). This is because, according to Heidegger, 'even at the time when his writings were still accessible in their entirety, bore the epithet… "The Obscure"' (Heidegger, 2019, p.21). It is beyond the remit of this article to explore why Heidegger considers Heraclitus philosophically obscure. For the purposes of this article, however, it is important to recognise Heidegger's warning that we should not further shroud Heraclitus' obscurity. Heidegger writes:

> When we attempt to enter into the thinking of Heraclitus, we in truth set out on dangerous ground. By means of a certain and entirely incorrect image – but one which, precisely owing to its incorrectness, appeals to the modern imagination – we could say that the region of the words of this thinker is like a minefield where the slightest misstep annihilates everything into dust and smoke. We should be careful not to turn essential obscurity into mere murkiness (Heidegger, 2019, p.28).

Therefore, Heidegger advocates that we should take considerable care at 'every step, and it is necessary to have a view of what is and is not possible' (Heidegger, 2019, p.28) when it comes to understanding Heraclitus' writings. This also applies when looking at the context of the Fragments and their arrangements. Heidegger writes:

> Because the particular choice of passages quoted by the aforementioned authors [Plato, Aristotle, Plutarch, Hippolytus, etc.] is determined from out of their own unique paths of thinking or writing – paths that occur later than Heraclitus – we can only make out, through meticulous consideration of the position of these later writings, the context in which the quotation is embedded, but not the context from out of which it was torn. The quotations do not directly pass on to us what is essential in the writing of Heraclitus's (i.e., the authoritative and organised unity of its inner structure) (Heidegger, 2019, p.29).

This is antagonistic to Kirk's position where a closer and forensic examination of the text, which incorporates acknowledgement of wider Fragments and their origin in the writings of previous thinkers, is required. For Kirk:

> [T]he present-day scholar who wishes to gain the clearest possible idea of what Heraclitus thought must resort in the first instance to the actual surviving fragments, and must base his reconstruction primarily upon these, using the ancient indirect evidence as ancillary. In these circumstances the fragments themselves must be subjected to the most careful possible examination of authenticity and content; hypothetical interpretations must not be given credence until they are adequately corroborated by other fragments (Kirk, 2010, p.30).

Instead, for Heidegger, when approaching Heraclitus, 'we do not strive after a philological/historiographical reconstruction of the writings of Heraclitus's; rather, we seek to prepare ourselves for the as-yet delivered word to meet us from out of its essential core' (Heidegger, 2019, p.30). In other words, if our attention is fixated on the historical and philological realm of Heraclitus' writings then we cannot 'prepare' for his 'as-yet delivered word.' In this article, I extend this Heideggerian framework and argue that we would miss vital lessons from Heraclitus' writings which we could re-envision the actions of genocidal regimes when they use fire to target a specific population.

Furthermore, if we look at the problems that Heidegger identifies when it comes to the task of translating and interpreting Heraclitus then we can further distance ourselves from Kirk. Chief among the problems that Heidegger identifies is that when it comes to 'mere literal translations, single words are confronted by almost mechanically lexical counterparts' (Heidegger, 2019, p.37). Heidegger continues:

> But mere words are not yet words in the fullest sense. Therefore, when translation seeks to be not only literal, but also true to the word, the words must receive their naming power and their structure from the already presiding fidelity to the unifying word (that is, to the totality of the saying) (Heidegger, 2019, p.37).

Yet, as we saw above, for Heidegger, the 'stakes are very high indeed' when it comes to Heraclitus' writings because we are in 'the realm of transportive translation' where 'all translations are poor, only more or less so' (Heidegger, 2019, p.38). Heidegger acknowledges that his own work on Heraclitus is not exempt from 'this judgment [sic]' (Heidegger, 2019, p.38). This is for several reasons but I shall note three important ones here. First, for Heidegger, scholars should not 'measure the inceptual language of the Greek thinker [Heraclitus] by means of the yardstick of subsequent Hellenistic grammar' (Heidegger, 2019, p.18). Second, the writing and 'word' of Heraclitus writing 'attends to "the obscure"' (Heidegger, 2019, p.26). Finally, for Heidegger, not only does Heraclitus' thinking necessitate obscurity but belongs to poetry. Heidegger writes that since:

> The word of inceptual thinking… [is] within the region of essential history it is no coincidence that the history of thinking belongs first and foremost with that of poetry, then such a situation must have its peculiar explanation in the way and the form in which the inceptual word of Heraclitus speaks to us (Heidegger, 2019, p.33).

Heidegger goes onto write:

> Translations undertaken in the realm of the vaunted word of poetry and of thinking, however, are always in need of interpretation, for they themselves are an interpretation. Such translations can either inaugurate the interpretation or consummate it. But it is precisely the consummating translation of

> Heraclitus's sayings that must necessarily remain as obscure as the originary word (Heidegger, 2019, p.38).

This provides an underpinning for the methodology of this article. One salient motivation for adopting a Heideggerian framework is that provides a degree of flexibility to explore Heraclitus's writings without over-emphasising the authenticity of the thinker's sayings. Kirk's approach is certainly valid in preventing highly subjective and hypothetical interpretations of Heraclitus's writings. This article, like Heidegger's approach, does not advance a *true* or *authentic* insight into Heraclitus' sayings. Rather, this article wishes to use Heraclitus' writings to better understand how fire is used in genocidal regimes.

In addition, I will take into consideration Heidegger's warnings and shall avoid stretching Heraclitus' thoughts beyond their fragmentary limits. Instead, I shall build upon some of the insightful and prophetic assertions made by Heraclitus on fire. To do this, I will examine Kahn's analysis of Heraclitus' on fire in Section 4. As noted in Section 1, Kahn adopts the position of understanding and learning from Heraclitus rather than better learning Heraclitus. Consequently, Kahn's approach can be, to an extent, categorised in the same realm as Heidegger. Therefore, it would be consistent with the Heideggerian framework to utilise Kahn's analysis of the Fragments on fire when looking at the actions of genocidal regimes. Thereafter, we will be in a position to take some of the teachings of Heraclitus and better understand how fire can be used by genocidal regimes.

3. Fire in Heraclitus' Philosophy

For Heraclitus, fire's most important relationship is the one that it has with Logos which is the guiding force or will of the cosmos or Universe. Consequently, Heraclitus' ontological analysis of the Universe has been characterised as materially monist with fire being the 'ultimate reality… [as] all things are just manifestations of fire' (Graham, 2019). This material monist view of Heraclitus' philosophy on fire has drawn criticism. For example, Daniel Graham writes:

> In [Heraclitus'] alleged version of monism, fire is the ultimate reality. Yet fire (as the ancients recognized) is the least substantial and the most evanescent of elemental stuffs. It makes a better symbol of change than of permanence... [Heraclitus'] appeal to fire seems to draw on material monism in a way that points beyond the theory to an account in which the process of change is more real than the material substances that undergo change (Graham, 2019).

It is in this idea of the 'process of change' that we can start to appreciate Heraclitus' thoughts on fire being used for genocidal purposes. Dennis Sweet writes:

> In the natural world fire represents change inasmuch as it radically alters the things upon it feeds. Yet it also represents something unchangeable amid change. For while the shapes and the appearances of a fire are always changing, the fire retains its unity over time (Sweet, 1995, p.58).

The textual evidence for Sweet's contention and the process of change is found in the following Fragment of Heraclitus:

> κόσμον (τόνδε), τὸν αὐτὸν ἁπάντων, οὔτε τις θεῶν, οὔτε ἀνθρώπων ἐποίησεν, ἀλλ' ἦν ἀεὶ καὶ ἔστιν καὶ ἔσται πῦρ ἀείζωον, ἁπτόμενον μέτρα καὶ ἀποσβεννύμενον μέτρα
>
> The order, the same for all, was made neither by gods nor by humans, but it was always and is and will be fire ever-living – being lighted in measures and going out in measures (Heraclitus/1995 (D. Sweet, Trans.), Fragment 30, p.15).
>
> The ordering, the same for all, no god nor man has made, but it ever was and is and will be: fire everliving, kindled in measures and in measures going out (Heraclitus/1983 (C. Kahn, Trans.), Fragment 37, p.45).

> That which always was,/and is, and will be everliving fire,/the same for all, the cosmos,/made neither by god nor man,/replenishes in measures/as it burns away (Heraclitus/2003 (B. Haxton, Trans.), Fragment 20, p. 15).

Here, we can see that fire has multiple capabilities and capacities. Fire can disappear by burning away and yet reappear through 'measures' such as replenishment or even tension and strife itself[2], as heat, glow, movement, and friction can all be means whereby fire can spark into life. To where does it appear and from where does it re-appear? The word 'order' or cosmos is the ultimate unity and structural arrangement of the Universe itself. Fire can "go out" and merge with the Universe and its nature can be a part of being-itself. Fire through its light, kindling, and glow can appear, dis-appear, and re-appear with the Universe's Being which provides a platform for fire to engage with life through action, movement, and, importantly for this article, as a weapon for the State.

The way in which fire can engage with life from the Universe's Being is important to the construction of a legal system in the way it can be a judge and manifest as 'lightning' and the overseeing sun. It is the 'jointure' of fire (Heidegger, 2019, p.37), through lightning, where we can understand how regimes dispense their "justice" upon a group of people. In this way, Heraclitus writes: 'Justice will seize the fabricators of lies and those who testify to them' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 28, p.15).

This section shall now examine in further depth how the ways in which fire is visualised by Heraclitus. First, there shall be an exploration of the lightning bolt. Heraclitus uses the lightning bolt to symbolise the authoritative ruler to dispense justice upon the 'fabricators of lies and those who testify to them.' Second, building upon the transformative quality of fire, we shall explore how the lightning bolt can be used to *transform* the world itself. Here, the authoritarian ruler who controls the lightning bolt can use it to initiate and execute their will in the world. Finally, we shall analyse exactly how this will is executed. This will involve the ways in which fire can engage with the world and how genocidal regimes exact violence upon specific categories of people.

3.1 The Lightning Bolt – The Harnessing of Fire, the Legal System, and Dispensing Justice

The role of fire as lightning is integral to Heraclitus' political and legal theory. The cosmological and cosmogonical process of fire permeates into his legal system. The law, for Heraclitus, is 'an institution…[it] is neither man-made nor conventional: it is the expression in social terms of the cosmic order for which another name is Justice (Dike)' (Kahn, 1983, p.15). Fire is the underpinning dynamic energy, which orders the 'cosmic order as a pattern of Justice' (Kahn, 1983, p.15).

So, when Heraclitus writes '[a]ll things are requital for fire, and fire for all things, as goods for gold and gold for goods', there is an implication that if an individual's actions run contrary to the universality of the cosmos then there is a corresponding punishment to ensure justice (Dike). The fulfilment of this punishment is symbolised in Fragment 64 DK:

> τὰ δὲ πὰντα οἰακίζει κεραυνός
>
> 'A thunderbolt steers all these things' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 64, p.64).
>
> 'The lightning bolt steers everything' (Heraclitus/2011 (E. Brann, Trans.), Fragment 64, p.65).

Keraunos, the lightning bolt, in its classical sense 'belongs to Zeus' who 'hurls it as [a] weapon and wields it as [a] sceptre' (Brann, 2011, p.65). The Fragment appears in Hippolytus' writings who purports that Heraclitus holds the lightning bolt to mean 'the eternal fire' which is the cause 'of the management of the Universe' (Hippolytus, *Refutatio*, IX). It is 'Zeus's lightning, the rule function of Fire [which] comes to the fore as a destroying and enlivening force that marshals the transformative phases of the elements' (Brann, 2011, pp.67-68).

[2] This can be cross-referenced with the following Fragments: 'The way up and down is one and the same' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 60, p.27) and 'What is in opposition is in agreement, and the most beautiful harmony comes out of things in conflict (and all happens according to strife)' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 8, p.5).

The lightning bolt being wielded as a sceptre indicates that it is a weapon of Justice dispensed by the ruling authority to manage and control the Universe. In this sense, the lightning bolt is the physical manifestation of the weapon of Justice. If one were to harness fire through lightning then this could be an act of Justice. Therefore, if an authority were to use *any* instrument that would display the force, efficiency, and vigour of lightning then it is a "just" form of violence. This can have tragic consequences whereby genocidal regimes can justify hideous actions such as the live burnings in Cambodia, the shootings in the Holocaust, or using 'bombs and explosives… against Muslim[s] and Croatian[s] to wound and cause material damage' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 746-747). In Section 4, I shall elaborate on such examples to demonstrate how the State's harnessing of fire can potentially manifest themselves in genocidal actions.

3.2 The Lightning Bolt – Transformative Power

In lightning bolt Fragment, the term 'steer' is utilised but the Ancient Greek *oiakizei* can also mean 'guides' or 'manages.'[3] This may indicate that the lightning bolt is fire guiding changes throughout the Universe. Sweet writes: 'Fire is also suggested in the image if the thunderbolt, which guides and manages the world… This brings to mind Zeus, the personification of the eternal cosmic order, who used thunderbolts to control his enemies' (Sweet, 1995, p.60). Ultimately, the steering of the lightning bolt is reflective of the transformative power of fire hence Heraclitus writes: 'The earth is melted/into the sea/by that same reckoning/whereby the sea/sinks into the earth' (Heraclitus/2003 (B. Haxton, Trans.), Fragment 23, p.17). In Section 4, we will see how fire's transformative power to radically shift states of being (Heraclitus/2003 (B. Haxton, Trans.), Fragment 55, p.35) may provide a lesson as to how tyrannical regimes can hide genocidal atrocities. The lightning bolt exemplifies this 'regularity of exchange, from fuel to smoke…and…those changes, and the variegated bodies that result from them, are in a sense due to the "steering" of fire' (Kirk, 2010, p.356). The lightning bolt is the eternal initiator of the transformative changes in the world, which can be, depending on the circumstances, life-affirming or life-destroying.

From this analysis, the next logical progression is to explore how 'the cosmic fire' actually goes about fulfilling the lightning bolt's motivating and guiding influence in the world. We can see this in Fragment 66 DK where fire becomes a judge.

4. Appreciating Heraclitus' Thoughts on Fire and their Application to the Genocidal Actions of States – Fragment 66 DK

In the available Fragments of Heraclitus, one can see that there is a conception of fire *becoming* a judge in-itself. This is encapsulated in Fragment 66 DK:

πάντα γάρ, φησί, τὸ πῦρ ἐπελθὸν κρινεῖ καὶ καταλήψεται

The varying translations of this Fragment can provide a deeper insight into what Heraclitus' may have been trying to explain and what we can learn from them. The Fragment has been interpreted and translated in the following ways:

> 'Fire will come upon and lay hold of all things' (Diels-Kranz, Trans.).
>
> 'Fire, having come upon them, will distinguish and seize all things' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 66, p.29).
>
> 'Fire of all things/is the judge and ravisher' (Heraclitus/2003 (B. Haxton, Trans.), Fragment 26, p. 19).
>
> 'Fire coming on will discern and catch up with all things' (Heraclitus/1983 (C. Kahn, Trans.), Fragment 121, p.83).

[3] The link of the lightning bolt to the ruler can be seen through Ancient Greek rhetoric, as Kahn explains: 'The metaphor of the helmsman guiding the ship of state is as old as Greek lyric poetry. And the cognate metaphor for cosmic governance is probably as old as Greek philosophy' (Kahn, 1983, p.272).

> '[F]ire having come upon them will judge and overtake all things' (Heraclitus/2010 (Hippolytus in Kirk, Trans.), Fragment 65, p.349).
>
> '[F]ire having come suddenly upon all things will bring them to trial and secure their conviction' (Heraclitus/2010 (G.S. Kirk, Trans.), Fragment 65, p.360).
>
> 'Coming upon everything, the Fire will discriminate (also, "judge") and take down (also, "condemn") everything' (Heraclitus/2011 (E. Brann, Trans.), Fragment 66, p.62).
>
> 'All things, fire, ceaselessly advancing, shall (joining them) set out and lift away' (Heraclitus/2019 (M. Heidegger, Trans.), Fragment 66, p.123).

For Kahn, Fragment 66 DK 'connects' the lightning bolt with 'the cosmic fire' (Kahn, 1983, p.272). Additionally, Heidegger uses the term 'joining.' For Heidegger, there is a 'jointure', particularly a 'lightening jointure' between the lightning bolt and fire where 'beings appear and gleam forth' (Heidegger, 2019, p.123). It is beyond the scope of this article to explore Heidegger's thoughts on the mechanics of how the lightning bolt connects to fire. For Heidegger, in the 'jointure of the conjoining beings, the adornment in which, and from out of which, beings gleam' (Heidegger, 2019, p.124). He continues:

> [L]ighting places into the light (and thus also produces and provides) the dark and what is opposite to the lightening. We often speak about jewelry [sic] being "flashy" and say that a precious stone itself "flashes", but we do not consider the possibility that the flash itself is the originary adornment and unfolds as the precious (Heidegger, 2019, p.124).

In this flashing, the lightning bolt is starting to stretch through this appearing and gleaming and joining itself to other beings. In Section 4.1, we will see that in this process fire starts to become a judge through its mechanical operation. Here, we can start to pragmatically understand how fire not only operates but how a State can harness it for genocidal actions from Heraclitus' sayings.

4.1 Kahn's Framework on Fragment 66 DK

Kahn semantically analyses Fragment 66 DK. In particular, Kahn examines three verbs to explain fire's 'control over "all things" (*Panta*)' (Kahn, 1983, p.272). First, there is *epelthon* (it comes upon). Second, *krinei* (it will discern or decide or distinguish them). Finally, *katalepsetai* (it will seize or catch hold of them all). With *katalepsetai*, Kahn writes that this 'should mean that they will literally catch fire' (Kahn, 1983, p.273). Essentially, for Kahn, 'justice, judgment, and punishment of some sort are represented' (Kahn, 1983, p.272) in the Fragment. With *epelthon*, here fire comes upon 'or "attacks" all things' (Kahn, 1983, 272). Kahn refers to one use of *epelthein* in Herodotus's writings to mean an 'advance upon an enemy' (Kahn, 1983, 272). In this context, fire is an actively destructive tool of war. In relation to *krinei* and *katalepsetai*, the following quote, albeit lengthy, presents Kahn's thought on the two verbs:

> The universal approach of fire [in *krinei* and *katalepsetai*] is depicted as hostile and threatening, but not exclusively so. For *krinein* may mean to select someone for special honours, to judge a contest in his favour, as well as to judge him guilty or subject to punishment… According to the merits of the case, the seizure of a thing by fire will entail either its punishment or its reward, its promotion upwards to enhanced life or downwards to elemental death (Kahn, 1983, p.273).

Even with G.S. Kirk's reservations that the 'diction [of Fragment 66 DK] is un-Heraclitean and typically Christian' (Kirk, 2010, p.360), we can still see targeting is present in the Fragment. This targeting is important when we consider that genocidal regimes specifically target a particular group and is underpinning Article 6 of the Rome Statute of the International Criminal Court 2010.

Moving forward, if we build on Kahn's semantic analysis into Fragment 66 DK then we can see two further points of interest: First, *krinei* can be translated as 'judge' but it can also be mean 'distinguish', 'separate', 'discriminate',

or 'pick out.' Second, within comparative translations, there is a temporal dimension to fire's judgment. In Sweet's translation, fire is said to have been 'having come upon them'; whereas in Diels' translation, fire 'will come upon.' In the former, the fire is seen as having *burned* those who have been separated or picked out. In the latter, fire is a punishment *to burn* those who have been separated or picked out.

In both contexts, fire is not only an instrument used to destroy things but it was used in a judging capacity. This is where temporality plays an important role when examining fire. In the instance where fire *as having come upon*, fire has been used in order to achieve an objective. In the instance where fire *will come upon*, a certain act has already been carried out which is either confirmed or hidden through fire. With both, the judgement against a target has been made but there are temporal sequences of fire which govern different sets of behaviour.

From this, we can now further delve into how Heraclitus conceives fire and see how this can operate in genocidal regimes. In the following sub-sections, we will see that fire is an important tool in genocidal regimes. In doing so, we may learn about the various ways that tyrannical regimes may use fire. To explore this further I will turn to the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Cambodia Tribunal. In these tribunals, we can see evidence of Heraclitus' thoughts on the use of fire by the State in genocidal actions. For example, if one were to turn to the case-law of the ICTY then one can see that fire was a predominant feature of the Bosnian genocide. The Trial Chamber II of the ICTY in *Prosecutor v. Mićo Stanišić Stojan Župljanin* held that the 'Serb Forces committed wanton destruction in those villages, through the burning of personal documents and the torching of houses' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1286). In addition, due to the sheer use of fire, Colonel Basara issued an order stating 'that soldiers "prone to committing genocide" against people "unable to conduct an armed struggle," and soldiers prone to burning and destroying buildings not used by the enemy for military purposes, had to be immediately discharged' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 728).

Before examining this in further depth, I want to establish that I am not using these examples to demonstrate that Heraclitus' thoughts on fire operate in genocidal regimes. Instead, I am using examples from the ICTY, ICTR, and ECCC to illustrate and strengthen my suggestion that from Heraclitus' thought we can learn how fire can be systematically controlled and used for genocidal purposes. From this, we could develop an early-warning system to alert us of potential genocidal action. It is here where we can start to map Kahn's framework regarding Heraclitus' thought into how fire manifests its control over 'all things'. Thereafter, we will be in a position to analyse the temporal dimensions in Heraclitus' thought on fire and better understand how genocidal regimes manipulate it.

4.2 Fire as Having Come Upon

In Sweet's *fire as having come upon*, fire is seen as having *burned* those that have been separated or picked out. In this context, fire has burned something to achieve an objective. There are several ways in which one can see fire being used as *having come upon* a target population to achieve a certain objective. Fire can come upon belongings, property, and people to achieve a specific objective. This specific objective can range from forced migration to persecution to the very act of genocide itself.

4.2.1 Fire as Having Come Upon Belongings

The Trial Chamber II of the ICTY in *Prosecutor v. Tolimir* examined the destruction of personal belongings and identification papers by fire (Prosecutor v. Tolimir, 2012, 873). The case explored two incidences where Bosnian Serb forces grouped Muslim men and burned their identification cards and personal belongings. In one incident in Potočari, the Bosnian Serb forces burned identification cards and personal belongings and transported the Muslim men to Bratunac. The other incident, which occurred in Nova Kasaba, Bosnian Serb forces burned personal belongings and then killed the Bosnian Muslim men.

Župljanin notes that *Tolimir* held that although there was no 'militarily justifiable reason for the burning of these belongings' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 873), the acts did not constitute to the 'equal gravity' of the crimes stipulated in Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia 2009. This is because the burning of ID cards and personal belongings do not fall within Article 5's jurisprudential ambit of the 'destruction of the livelihood of a certain population' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 873-874). The burning of the personal belongings and ID cards 'constituted an element of the implementation' of the 'greater plan to eliminate the existence of the Bosnian Muslim men from the region' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 874). Consequently, the acts of burning in these incidences did not constitute an act of persecution pursuant to Article 5(h) of the Statute of the International Criminal Tribunal for the Former Yugoslavia 2009. This decision, however, does not rule out that burning of IDs and personal belongings can constitute an act of persecution. If fire is seen *as having come upon*, then the specific objective of destroying the livelihood of a certain population can be achieved. The Trial Chamber II of the ICTY heard an example where burning an individual's car constituted destroying their livelihood as it was 'an indispensable and vital asset to the owner' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 874).

In Heraclitean terms, this burning goes to the 'root'[4] of the livelihood of the population and amounts to persecution. Consequently, if there is an intention to 'prevent a population from returning to their homes following their forcible transfer or deportation' (Prosecutor v. Tolimir, 2012, 874) by burning their identification cards and personal belongings then it can constitute an act of persecution. Fire is used to burn belongings to achieve several objectives such as forced migration or persecution. From Sweet's translation of Fragment 66 DK, Heraclitus' fire *as having come upon* is akin to this act of persecution from genocidal regimes.

4.2.2 Fire as Having Come Upon Property

In the ICTY, it was heard that after the forced migration of the target population, Serbian 'forces were… explicitly ordered to burn all the houses to prevent the owners from returning' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1435). Here, fire *has come upon* the target population to achieve the objective of permanently displacing a group of people as the homeowners were unable to return because homes were burned. Here, fire has *burned* the target population by destroying their homes and in doing so they are forced to migrate. Here, as Heraclitus writes, 'Every animal is drive to pasture with a blow' (Heraclitus/1995 (D.Sweet, Trans.), Fragment 11, p.7).[5]

Fire *as having come upon* to achieve the objective of forced migration is not an isolated occurrence. In Trnovo, property was burned, and, after the death of woman, the population fled to another village. Fire was used here to burn in order to migrate the people (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 747). Furthermore, *Župljanin* referenced examples where 'detainees knew they could not go home because smoke could be seen in the direction of their houses; everything was thought to have been burned or looted. ST065 [the witness] returned to his house in 1999 finding it without a roof, doors, or windows—its walls blackened by fire' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 634). This is not unique to the Bosnian genocide for in the Cambodian genocide the homes of the villagers within the Khmer Rouge controlled territory had their homes 'burned down to stop them returning' (Case 002/01, 2013, 105). Here, fire has come upon to achieve the objective of forced migration which is achieved by destroying their homes.

4.2.3 Fire as Having Come Upon People

In addition, fire can be used to achieve specific objectives of hunting and killing people. In *Župljanin*, it was heard that in the town of Čarakovo, 'the houses were burned down, and the soldiers pursued the inhabitants into the woods "as if it were some kind of a hunt"' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 557). In other

[4] This can be cross-referenced to Heraclitus' idea that the thunderbolt can strike to the 'root' of 'everything': 'One thunderbolt strikes root through everything' (Heraclitus/2003 (B. Haxton, Trans.), Fragment 28, p. 19).

[5] Interestingly, the word 'animal' or *herpeton* can refer to animal on four feet and, as Dennis Sweet indicates, in the 'Homeric sense it was used by the gods when referring to humans' (Sweet, 1995, p.7). The animal, or human (animal), is driven from one land to another by a 'blow.' There are harrowing and tragic photographs from, for example, the Armenian, Bosnian, and Rwandan genocides, where people are seen moving from land on their hands and feet. They are the manifestation of Heraclitus' idea that the human animals can be driven from land with a blow.

instances, the burning of homes led to the "hunt" and killing of '130 women, children, and elderly persons who were not able to get away' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1208). The use of fire to forcibly migrate a population can also be seen in the Cambodian genocide. The people of Kampong Cham in 1973 had their houses 'set on fire' by Khmer Rouge soldiers in order to transfer the people 'to the forest' (Case 002/01, 2013, 107). In this context, we can see the horrific reality of fire being used to kill people and achieve genocidal objectives. Here, fire *has come upon* the bodies of the people to execute them.

4.3 Fire Will Come Upon

In DK's *fire will come upon*, fire is set in order to burn thus achieving an objective. In Section 4.1, we saw that this translation indicates that a certain act has already been carried out which is either confirmed or hidden through fire. In this context, there are *two* fires. The first fire, the primary fire, is a tangible burning (such as book and property burning) and the secondary fire is the indirect fire aiming to achieve another objective (such as the destruction of thought and conscience). With *fire will come upon*, the fire can hide further motivations of the actor beyond the primary fire. There are instances where a direct act using fire has occurred but this accompanied by a further indirect intentional use of fire. The sheer transformative force of the fire means that not only will property be destroyed but other qualities such as thought and conscience will be burned too.[6]

There are several ways in which this can occur. For example, fire *will come upon* buildings to burn the religious thoughts of the target people. Additionally, there can be instances where fire has been permitted to rage against a specific people but the fire was deliberately not extinguished in order to achieve another objective such as the destruction of religious thought.

4.3.1 Fire Will Come Upon Buildings and the Religious Thoughts of the Target Population

In *Nyiramasuhuko*, the ICTR heard evidence that a church was 'set…on fire' (The Prosecutor v. Pauline Nyiramasuhuko, 2015, 2985). This is Rwandan incident can be cross-referenced with *Župljanin* where a church was burned down in addition to businesses and homes which belonged to Muslims (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1203 and 1238). Furthermore, the Mosques in Drinsko (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1370), Dobrun (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1370), and Radžići (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1627) were set alight and burned down. In Drinsko, the Minaret was decapitated, which is especially pertinent as that is where the call to prayer occurs. Here, the burning paved the way for actions which pierced the root of the religious spirit of the target population.

In *Župljanin*, it was heard that Serbian Forces burnt the Hadži Paša (wooden) mosque in an 'organised and premeditated' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1061) attack in the 'predominately' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1063) Muslim town of Brčko in 1992. This 'organised' attack also extended to the deliberate orders to firefighters to not extinguish the fires (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1063) which were causing further destruction to the targeted population's property whilst protecting the medical centre that was housing Serbian Forces' soldiers (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1061) and 'any Serb-owned homes surrounding it' (Prosecutor v. Mićo Stanišić Stojan Župljanin, 2013, 1063). The burning of the houses and religious buildings was a direct use of fire but the prevention of subsequent burning potentially hides a deeper motivation for destruction of the livelihood, thought, conscience, religious beliefs of the target population.

[6] One area that this article has not explored is in relation to fire's use on dead bodies. From Heraclitus' thoughts, we can potentially see how fire can have a transformative effect on the victim's bodies. In the context of fire *will come upon*, there is another example of a secondary, indirect fire which can be seen in the burning of bodies to hide the evidence of mass killing. Heraclitus writes: 'Fire penetrates the lump of myrrh, until the joining bodies die and rise again in smoke called incense' (Heraclitus/2003 (B. Haxton, Trans.), Fragment 36, p.25). Fire not only transforms the living into the dead but the dead into 'smoke.' We can see examples of this in Nazi Germany with the haunting images of burning smoke rising from the burnings at Auschwitz and Treblinka. Unfortunately, it is beyond the remit of this article this dimension of Heraclitus' thoughts on transformation. The reason for this is that it will take parameters of this article into Heraclitus' thoughts on disgust and smell (*see* Fragments: 'Corpses should be thrown out more than dung' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 96, p.41) and 'Souls smell things in Hades' (Heraclitus/1995 (D. Sweet, Trans.), Fragment 98, p.43).

The orders to fire-fighters here in the Bosnian genocide can also be seen in Nazi Germany prior to the Second World War. During Kristallnacht, fire was not a direct instrument of war but an indirect weapon conveying the Nazis' 'fury on Jews' (Mann, 2013, p.185) In the events of Kristallnacht, Jewish property was set alight but police personnel and fire-fighters were prevented from combating the flames until they threatened Ayrian property. Once again, the barriers placed upon the fire-fighters was an indirect weapon used to destroy the Jewish people's homes and emphasise their separation from society.

It could be said that preventing the fire from being extinguished is a deliberate act of, as Heraclitus writes, striking to the 'root' of the people like the lightning bolt. There is not a confirmation of the act, as the property has already been set alight. Instead, the property is left to burn despite the potential for it being salvaged thus the true intention of destruction is hidden by preventing the fire-fighters from combating the flames. This destruction or the letting of property to burn is a hidden attack upon the thought and beliefs of the target population.

4.3.2 Fire Will Come Upon Buildings to Marginalise and Control the Target Population

Now, if one were to theoretically invert one of Heraclitus' Fragments then one may be able to ascertain a unique perspective as to how fire is used by leaders to hide various layers of motivation. Heraclitus writes: 'One must quench violence quicker than a blazing fire' (Heraclitus/1983 (C. Kahn, Trans.), Fragment 104, p.75). Kahn holds that this Fragment is 'negative' and where fire is 'a purely destructive force' (Kahn, 1983, 241). He continues to state that the Fragment 'may simply reflect the fact that Heraclitus is exploiting the familiar conceit 'to quench *hybris*' (Kahn, 1983, 241). This goes beyond 'the traditional warning against *hybris*' and reflects the 'a more distinctly Heraclitean thought' (Kahn, 1983, 241). Kahn elaborates:

> As an enemy attack on the city wall threatens all the inhabitants of the city, so a house on fire threatens the whole neighbourhood with destruction. And just as the defence of the civic law is seen… to be as vital as the defence of the wall, so here the suppression of *hybris* – the suppression of that violence which disregards the law and endangers the community – is seen to be more urgent than the quenching of a fire raging out of control (Kahn, 1983, p.241).[7]

We can learn from Kahn's analysis that potential hybris behaviour must be extinguished *before* fire comes upon it. In the above Bosnian genocide and Nazi Germany examples, the mere behaviour, thought, and presence of the target population must be quenched before the fire is extinguished. It is the suppression and destruction of the hybris of the target population which will permit the extinguishment of the fire.

In these examples, however, there is an inversion of Heraclitus' Fragment. In the Bosnian and Nazi Germany examples, the fire stemmed from the explosions and shelling of the targets' property which was then deliberately left to burn. The fire was used to quash to hybris rather than being an independent blazing situation which Heraclitus' Fragment suggests. So, herein lies an inversion analysis: there are *two* fires – the first is the "lightning bolt" through the shelling and torching of homes to quash the hybris of the target population and until that is complete, the secondary fire of the burning homes will not be extinguished.

4.3.3 Fire Will Come Upon Books and the Religious Thoughts of the Target Population

Further demonstration of the use of the fire striking to the 'root' of the thought and conscience of the people can be seen in book burning. In this context, there is a secondary fiery transformation. The first is the book burning with the subsequent secondary *to burn* the thoughts and beliefs of the selected people. The book burning, for example, leads the way for another fire that *will come upon* the mind of the people. In Cambodia, for example, there was the burning of books and libraries (Hinton, 1998; Jackson 2014, p.136). In Nazi Germany, there were public displays of book burning at universities. The use of primary fire, the book burning, is to not only destroy the ideas of a population; but also allow the fire *to burn* potential future thinkers as a deterrent.

[7] Kahn is linking his analysis to the Fragments 'The people must fight for the law as for their city wall' (Heraclitus/1983 (C. Kahn, Trans.), Fragment 65, p.59) and 'Speaking with understanding they must hold fast to what is shared by all, as a city holds to its law, and even more firmly. For all human laws are nourished by a divine one. It prevails as it will and suffices for all and is more than enough' (Heraclitus/1983 (C. Kahn, Trans.), Fragment 30, p.43).

5. Conclusion

To conclude, I have suggested in this article that we can better learn about genocidal regimes by turning to the sayings of Heraclitus. Although there are significant issues surrounding the interpretation and translation of Heraclitus' writings, this does not mean that we should not attempt to learn from this brilliant thinker. Therefore, I advocated for a Heideggerian approach to Heraclitus' writings which, in conjunction to Kahn's analysis, can help us better understand how fire can be harnessed and wielded by humanity can lead to tragic consequences.

In doing so, I am not arguing that I have presented *the* proper reading of Heraclitus' thoughts. Rather, I have tried to approach the available Fragments in a way whereby we can learn from Heraclitus about the potentially genocidal dangers and consequences of fire. In other words, from Heraclitus' writings we can start to re-envision the actions of genocidal regimes through their use of fire. If we learn the lessons from this visionary, prophetic, and ancient thinker then we may further develop an early-warning system which could save millions of lives.

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Corruption Prevention at the Village Level: A Study of the Legal Cadre Training and Formation Model

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Abstract
Corruption in the management of village finances is an action that can harm both the finances and the economy of the state or the village. Therefore, village officials must receive guidance on clean and corruption-free governance, collusion and nepotism. In this regard, the role of the community is needed to exercise social control over the practice of government. This article aims to address the management of village finances based on legislation, the factors that make corruption prevention important, and the role of the community in corruption prevention through legal training for cadres in Galang Suka Village, Deli Sedang Regency. This study uses normative and empirical legal research that is expected to produce academic studies that are useful for governance, especially in the prevention of corruption in Galang Suka Village, Deli Sedang Regency. This research is conducted in two stages. First, conducting a study of normative law. Second, conducting a study on the implementation of regulations on village financial management. The results of the study indicate that the Deli Serdang Regency Government has implemented several policies, including a large budget allocation, fixed income and allowances for the head and village officials. The factors that cause corruption in village funds are the lack of community involvement in the planning and supervision of village funds. Community participation in overseeing the use of village funds is one of the keys to the success of utilizing village funds.

Keywords: Legal Training, Formation of Legal Cadres, Corruption Prevention Efforts

1. Introduction

1.1 Introduce the Problem

The village, as part of the government, has the authority to regulate and manage the interests of the community based on diversity, participation, indigenous autonomy, democracy, and community empowerment. The government is currently paying close attention to rural development. Based on Article 72 paragraph 1 letter b of Law No. 6 of 2014 on Villages, the government has provided billions of rupiah in funding to address the development gap in villages. However, the large amount of funds allocated to villages will not be managed properly if the human resources in the village, especially the village head and its apparatus, are not given proper

understanding, ultimately resulting in new corruptors. It is not impossible that corruption cases, which have recently affected many regional heads in several regions in Indonesia, could also affect village heads and other village officials.

In 2020, the Galang Suka Village in Deli Serdang Regency became a public discussion. According to news from NusantaraPosOnline.com, the head of Galang Suka Village, Deli Serdang, North Sumatra, was suspected of corruption in the BUMDes (Village-Owned Enterprises) fund. For almost three years from 2016-2019, the BUMDes fund was unclearly disbursed. The BUMDes fund comes from government funding in the amount of IDR 205,700,000, which was given in 2016 (NusantaraPos, 2020).

To prevent such incidents from recurring, it is necessary for the village head and village officials to receive guidance that clean and corruption-free governance is not only the responsibility of state officials, but also the responsibility of the community. Community participation is needed to conduct social control over the practice of government. This is in line with Article 82 paragraph 2 of Law No. 6 of 2014, which states that village communities have the right to monitor the implementation of village development (Cahyana, 2021).

In order to carry out the work and achieve the goals of the government that have been planned, supervision is needed. The purpose of supervision is to create a clean and authoritative apparatus supported by an effective and efficient government management system, as well as constructive and controlled participation of the community in the form of objective, healthy, and responsible social control (Situmorang, 1994).

Implementation of community surveillance can be carried out by individuals, groups, or organizations in the following ways:

1. Providing information regarding indications of corruption, collusion, or nepotism in the village government or BPD environment.
2. Providing opinions and suggestions for improvement, both preventive and repressive, on the issues (Triwulan & Widod, 2011).

The enactment of Law No. 14 of 2008 on Public Information Disclosure by relevant agencies is expected to open up public space for matters related to activities in the village. This freedom of public information is expected to make the government more transparent and free from negative actions such as corruption and nepotism.

Public disclosure of information gives wide attention to the people to participate in public policy and become a force in overseeing the development process of the region in Indonesia, including in the village. As stated in Article 1 paragraph 12 of Law No. 6 of 2014 on Villages, Village Community Empowerment is an effort to develop independence and prosperity of the community by increasing knowledge, attitudes, skills, behaviors, abilities, awareness, and utilizing resources through the establishment of policies, programs, activities, and appropriate assistance that reflect the essence of problems and priorities of village communities.

Community participation in law enforcement can be done individually or through community organizations in various activities such as:

1. Attending education about the consequences of corruption and knowledge related to activities in the village;
2. Avoiding ignorance towards corrupt practices in the surrounding environment, by actively monitoring the process of activities held in the surrounding environment related to the government and the village by reporting any suspicious activities;
3. Exercising control over various public policies (Ndraha & Uang, 2018).

Therefore, the initial step that can be taken is by providing education through programs from the government in collaboration with legal education experts in the form of training and formation of legal cadres, so that the rural community can exercise their rights and obligations to participate in monitoring the performance of the village government in implementing development projects using state funds. This will help establish good synergy between the village government and the community.

1.2 Explore Importance of the Problem

Preventing corruption at the village level is crucial because corruption at this level can have a very detrimental impact on society. Corruption can reduce the quality of public services provided by the village government and harm the community members who need assistance from the village government. Corruption can also harm the village's finances and cause the village budget that should be used for development and community welfare to be wasted.

Therefore, it is important to take preventive measures against corruption at the village level, one of which is through training and the formation of legal cadres. Through training and the formation of legal cadres, the community at the village level can gain a better understanding of the law and good governance, which can help the community understand what is expected from the village government and how the village government should act to avoid corruption (Habaora et al., 2020).

In addition, training and formation of legal cadres can help increase public awareness about the importance of preventing corruption and encourage active participation in monitoring and controlling the government. This can help the community carry out their roles as watchdogs and controllers of the village government more effectively, thus preventing corrupt practices.

However, efforts to prevent corruption at the village level are not enough with only training and formation of legal cadres. Other efforts are needed, such as transparency and accountability of the village government, as well as active participation of the community in monitoring and controlling the government. Furthermore, efforts to prevent corruption at the village level must be carried out systematically and sustainably, and must be supported by the village government and other relevant institutions (Pahlevi, 2022).

By conducting efforts to prevent corruption at the village level, it is hoped that a clean and corruption-free government can be created, as well as improve the quality of public services provided by the village government to the community. This will have a positive impact on the welfare of the people and better development at the village level.

1.3 Describe Relevant Scholarship

Nugroho focus on emphasizing the importance of training and forming legal cadres to prevent corruption at the village level (Nugroho, 2016). Asri dan Susanti, focuses on the model of corruption prevention at the village level through training of cadres (Asri & Susanti, 2016). Rahmawati dan Asri focuses on evaluating the effectiveness of anti-corruption cadre training in preventing corruption at the village level (Rahmawati & Asri, 2019). Basrowi dan Handoyo focuses on the model of forming anti-corruption cadres in preventing corruption in villages. (Basrowi & Handoyo, 2017). Yusuf focus on increasing community participation in corruption prevention at the village level (Yusuf, 2017).

1.4 State Hypotheses and Their Correspondence to Research Design

The hypothesis proposed in the research on preventing corruption at the village level through the training and formation of legal cadres is that such training and formation can be effective in preventing corruption at the village level. This hypothesis is in line with the research design that uses a quantitative approach by collecting data through surveys and statistical analysis to test the relationship between variables. In this research, the independent variable is the training and formation of legal cadres, while the dependent variable is the level of corruption at the village level. The research can also use a qualitative approach by conducting interviews or case studies to gain a deeper understanding of how training and the formation of legal cadres can help prevent corruption at the village level. In addition, the research can use a mixed methods approach that combines quantitative and qualitative approaches to obtain more comprehensive results.

2. Method

The research method used is normative juridical and empirical juridical, so that secondary data will be accompanied by primary data obtained directly from field observations through interviews and questionnaire distribution, which is expected to result in useful academic studies for governance management, especially in preventing corruption in Galang Suka Village, Deli Sedang Regency. The descriptive method can be interpreted as a problem-solving procedure that investigates by describing the condition of the subject or object in the study, which can be individuals, institutions, communities, and others that currently exist based on visible facts or as they are (Irwansyah, 2020).

2.1 Identify Subsections

This research is conducted in several stages. In the first stage, a study is conducted on normative law. The second stage involves a study on the implementation of regulations regarding village financial management. Therefore, this research requires both secondary and primary data (Sunggono, 1997). Primary data in legal research refers to data obtained mainly from empirical research, which is research conducted directly in the community of Desa Galang Suka. Data collection techniques are carried out through interviews, questionnaire distribution, and observation. Interviews are conducted by conducting in-depth interviews directly between the researcher and informants to obtain useful information in collecting data. Questionnaires are conducted by creating a list of systematically arranged questions and then distributed them to respondents to obtain useful information for the research. Observation is carried out by observing the phenomenon of the development of the financial governance of Desa Galang Suka.

2.2 Tipologi Penelitian

This legal research has a typology of normative empirical research. Normative empirical legal research (applied) examines the implementation of positive legal provisions factually in every particular legal event. The purpose of such examination is to ensure whether the results of the application of the law in concreto are in accordance with the provisions of the law. Normative empirical legal research consists of two stages. The first stage examines the existing regulations, and the second stage looks at how the implementation of those regulations takes place. This legal research has a juridical-empirical approach. Empirical legal research is research obtained directly from the community or by studying primary data (Efendi & Ibrahim, 2016).

2.3 Data Sources

The data used consists of primary and secondary data. Primary data are obtained directly from the research location, while secondary data are obtained from official documents, books related to the research object, research results in the form of reports, theses, dissertations, and legislation regulations.

2.3.1. Primary Legal Materials

Primary legal materials are authoritative legal materials, meaning they have authority. Primary legal materials consist of legislation, official notes or minutes in the making of legislation, and court decisions. The primary legal material used in this research is Law No. 31 of 1999, as amended by Law No. 20 of 2001 on the Eradication of Corruption.

2.3.2. Secondary Legal Materials

Secondary legal materials are legal materials that provide explanations of primary legal materials, namely the works of legal experts in the form of books, journals, research results, and opinions of scholars. The purpose of secondary legal materials is to provide researchers with guidance on where to go next (Marzuki, 2005).

2.3.3. Tertiary Legal Materials

Tertiary legal materials are legal materials that support primary and secondary legal materials, including the Indonesian Dictionary (KBBI), legal dictionaries, news articles, and qualitative data analysis whose results will be described in a descriptive analytical manner.

3. Results

3.1. Factors Leading to the Importance of Corruption Prevention

The amount of village funds received and managed by the village government must be a concern for various parties in the village to jointly supervise and manage them in accordance with applicable laws and regulations. This is further reinforced by the increasing number of corruption cases related to village funds in Indonesia. Indonesia Corruption Watch (ICW) found that the most cases of corruption enforcement by law enforcement officials (APH) occurred in the village budget sector, with 154 cases in 2021 and a potential state loss of Rp 233 billion. Corruption in village fund budgets had even tended to increase since 2015, when there were only 17 cases with a loss of Rp 40.1 billion. ICW recommends that supervisors in the village budget sector be closely monitored given that the central government allocated a village fund budget of Rp 68 trillion in 2022. In terms of actors, generally the perpetrators of corruption are village heads. The number of village heads who become suspects indicates that they did not carry out their obligations as stipulated in the Village Law. Article 26 paragraph (4) of the Village Law states that village heads are obliged to implement the principles of accountable, transparent, professional, effective, efficient, clean, and free from collusion, corruption, and nepotism in village governance.

From ICW's observation, seven common forms of corruption are identified that are generally committed by village governments, namely embezzlement, misuse of funds, abuse of authority, illegal levies, markups, fictitious reports, budget cuts, and bribery. These seven forms of corruption indicate that there are five vulnerable points in the village fund management process, namely: 1. Planning process, 2. Accountability process, 3. Monitoring and evaluation process, 4. Implementation process, and 5. Procurement process of goods and services in the distribution and management of village funds (Prakoso, 2019).

1. Some of the monitored modes of misusing village funds include:
2. Creating a budget plan with inflated prices above the market value.
3. Justifying the financing of physical buildings with village funds even though the project is sourced from other funds.
4. Temporarily borrowing village funds for personal purposes but not returning them.
5. Extorting or deducting village funds by officials from the subdistrict or district.
6. Creating fictitious official trips for the village head or officials.
7. Inflating the payment of honorarium for village officials.
8. Inflating the payment of office supplies.
9. Collecting village taxes or fees but not depositing the collection to the village treasury or tax office.
10. Purchasing office inventory with village funds but intended for personal use.
11. Cutting public budget then allocating it for the benefit of village officials.
12. Manipulating projects funded by village funds.
13. Creating fictitious activities or projects that are charged to village funds.

The factors causing corruption in village funds are varied. The most fundamental factor is the lack of involvement of the community in the planning and supervision of village funds. In practice, access for the community to obtain information on the management of village funds and to actively participate in planning and management is limited. However, Article 68 of the Village Law has regulated the rights and obligations of the village community to access and be involved in village development. Community involvement is the most fundamental factor because the village community knows the needs of the village and directly witnesses the development in the village (Safitri, 2022).

3.2. The Role of the Community in Corruption Prevention through the Formation and Training of Legal Cadres

The increasing corruption of village funds must be addressed by finding solutions to prevent it. If not, village corruption will continue to increase and disrupt the agenda of village development and welfare. In order to prevent village corruption from continuing and to achieve the goal of decentralizing authority and budget to the village, prevention efforts need to be made through strengthening formal and non-formal oversight functions. The participation of the community in oversight is believed to be the most effective, so it is important to ensure its implementation. In this case, the commitment of the village government in providing access to information and space for community involvement is important to be carried out.

Community participation in overseeing the use of village funds is one of the keys to the success of utilizing those funds. As an important element in the entire process of development, the community must be able to participate in proposing and overseeing the development process with the aim of bringing the greatest possible benefits for improving the quality of life of the community, improving access to basic needs, and even fostering a sense of ownership towards every result of the development process.

Based on the infographic of the Galang Suka Village Budget for the year 2022 in Galang Subdistrict, Deli Serdang Regency:

Total Revenue : Rp. 1,286,441,000
Financing : Rp. 34,918,308
Total Expenditures : Rp. 1,320,393,308

The shopping details for each field are as follows:

1.	Field of Government Administration	Rp. 477.151.618
2.	Development Sector	Rp. 308.179.490
3.	Field of Community Development	Rp. 7. 300.000
4.	Community Empowerment	Rp. 204.308.200
5.	Disaster Management Field	Rp. 324.000.000

To assess the perception and level of understanding of the community regarding the importance of community participation in monitoring the management of village funds, researchers distributed questionnaires to 20 respondents and the results are as follows

Table 1: Community Residence Status

	F	%
Indigenous Peoples	14	70
Peopleare immigrants	6	30
Sum	20	100

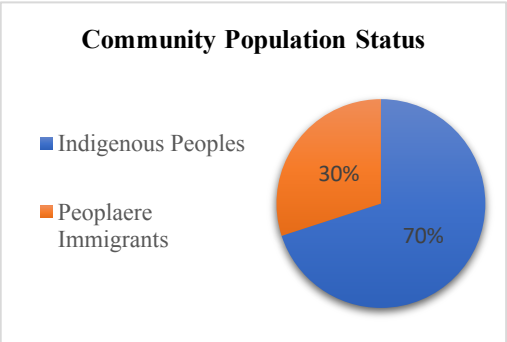

Figure 2. Graph of the Population Status of the Galang Suka Village Community

Out of 20 respondents from the community of Desa Galang Suka, 70% (14 people) are native to the village while 30% (6 people) are newcomers

Table 2: The Level of Intensity of Galang Village Likes to Organize Government Activities

	F	%
Often	13	65
Not Often	7	35
Sum	20	100

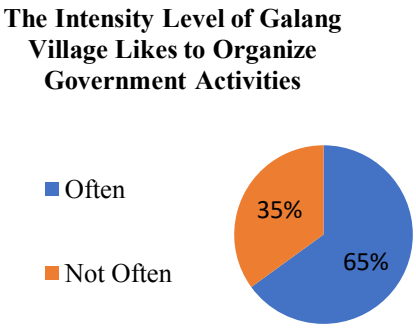

Figure 3: Graph of the Level of Intensity of Galang Suka Village in Conducting Government Activities

From 20 respondents of Galang Suka Village community, it was found that 65% (13 people) have the perception that Galang Suka Village frequently conducts government activities, while 35% (7 people) have the perception that Galang Suka Village does not frequently conduct government activities.

Table 3: Community Involvement in Activities Organized by Galang Suka Village

	F	%
Ever	15	75
Never	5	25
Sum	20	100

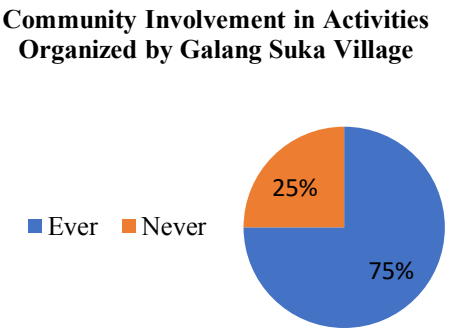

Figure 4: Graph of Community Involvement in Activities Organized by Galang Suka Village

From 20 respondents of the community of Galang Suka Village, it was found that 75% (15 people) have been involved in activities organized by Galang Suka Village, while 25% (5 people) have never been involved in activities organized by Galang Suka Village.

Table 4: Types of Activities Participated by the People of Galang Suka Village

	F	%
Committee	3	20
Mutual Aid/Cleaning	5	33,3
Taruna Reef	5	33,3
Community Empowerment	2	13,3
Sum	15	100

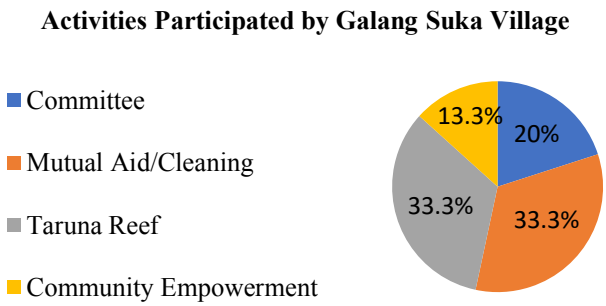

Figure 5: Graph of the Types of Activities Participated in by the Galang Suka Village Community

From 15 respondents of the community of Desa Galang Suka who stated that they had been involved in activities organized by the village, it was found that the majority participated in community service/cleanliness activities, which is 33.3% (5 people), and youth organization (karang taruna) activities, which is also 33.33% (5 people). Around 20% (3 people) participated in committee activities, while 13.3% (2 people) were involved in community empowerment activities

Table 5: Community Knowledge About the Fund Allocation System for Galang Suka Village Activities

	F	%
Know	4	20
Not Knowing	16	80
Sum	20	100

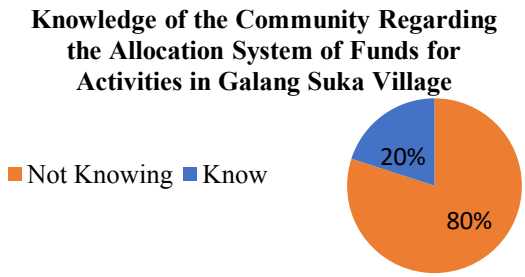

Figure 6: Community Graph Regarding the Fund Allocation System for Galang Suka Village Activities

From 20 respondents of the community in Desa Galang Suka, it was found that only 20% (4 people) knew about the allocation system of funds for activities in Desa Galang Suka, while the majority, which is 80% (16 people), did not know about the allocation system of funds for activities in Desa Galang Suka.

Table 6: The level of public trust regarding the management of Galang Suka Village funds

	F	%	
Believe	5	25	
Disbelief	8	40	
Not Fully Believing Yet	6	30	
Don't Know	1	5	
Sum		20	100

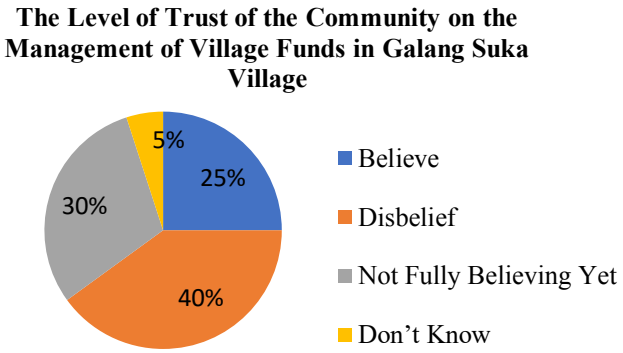

Figure 7. Graph of the Level of Community Trust Regarding the Management of Galang Suka Village Funds

Out of 20 respondents from the community of Desa Galang Suka, it was found that the majority of the community does not trust the management of Desa Galang Suka's funds, which is 40% (8 people), while 30% (6 people) do not fully trust the management of Desa Galang Suka's funds. A number of 25% (5 people) trust the management of Desa Galang Suka's funds, and 5% (1 person) stated that they do not know.

Table 7: Community Knowledge Regarding Corruption Cases Involving Village Officials

	F	%
Know	12	60
Not Knowing	8	40
Sum	20	100

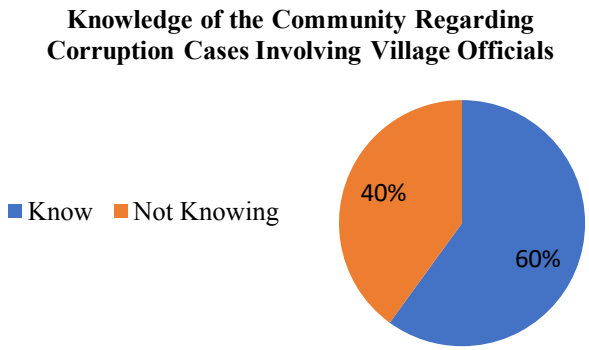

Figure 8: Graph of Community Knowledge Regarding Corruption Cases Involving Village Officials

From the 20 respondents of Desa Galang Suka, it was found that 60% (12 people) have knowledge about corruption cases involving village officials, while the remaining 40% (8 people) do not have knowledge about it.

Table 8: Community Perceptions Regarding Sanctions That Should Be Given to Village Officials Who Commit Misappropriation/Corruption of Funds

	F	%
Related Parties Legally Followed Up	2	60
Related Parties Terminated	3	15
Do not know	5	25
Sum	0	100

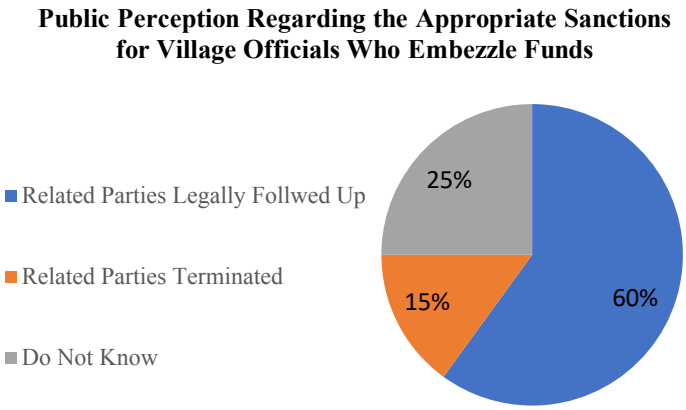

Figure 9: Graph of Community Perceptions Regarding Sanctions That Should Be Given to Village Officials who commit Fund Fraud/Corruption

From 20 respondents in the Galang Suka village community, it was found that 60% (12 people) have the perception that the appropriate sanction for village officials who commit embezzlement/corruption of funds is that the relevant parties should be prosecuted, while 15% (3 people) believe that the relevant parties should be dismissed. A total of 25% (5 people) answered "don't know" when asked about their perception of the appropriate sanctions for village officials who commit embezzlement/corruption of funds.

Table 9: Community Efforts in Preventing Corruption in Galang Suka Village

	F	%
Efforts to prevent	8	90
Shut up/Don't Know	2	10
Jumlah	20	100

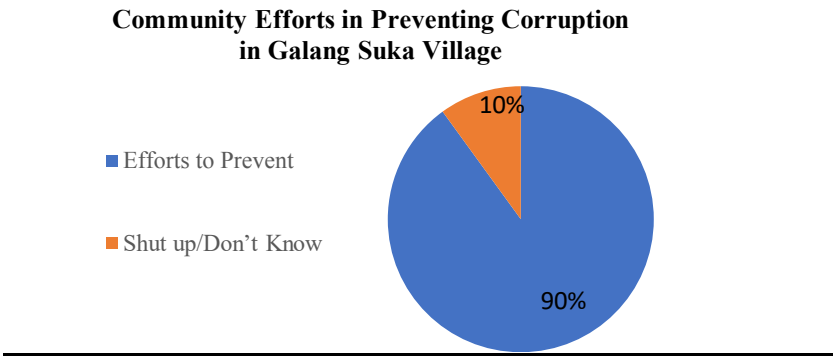

Figure 10: Graph of Community Efforts in Preventing Corruption in Galang Suka Village

From 20 respondents in the Galang Suka village community, it was found that 90% (18 people) make efforts to prevent corruption in Galang Suka Village when they sense signs of fraud, while the remaining 10% (2 people) remain silent when corruption occurs in the village.

Table 10: Public Perception of the Interests of Youth/Youth Anti-Corruption Law Cadres as the Front Line in Corruption Prevention in Galang Suka Village

	F	%
Important	20	100
Not Important	0	0
Sum	20	100

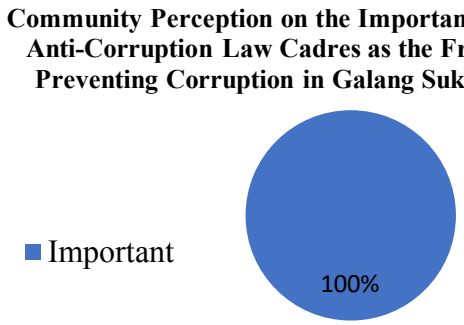

Figure 11: Graph of Community Perceptions Regarding the Interests of Youth/Youth Anti-Corruption Legal Cadres as the Front Guard in Corruption Prevention in Galang Suka Village

From 20 respondents in the Galang Suka village community, all respondents with a percentage of 100% (20 people) agreed on the importance of youth/teenage anti-corruption law cadres as the frontline in preventing corruption in Galang Suka Village.

Table 11: Views, Criticisms, Suggestions, and Inputs Related to Good Village Government Management

	F	%
Transparent Government	11	55
Allocation of Funds to the Community	2	10
Do not know	7	35
Sum	20	100

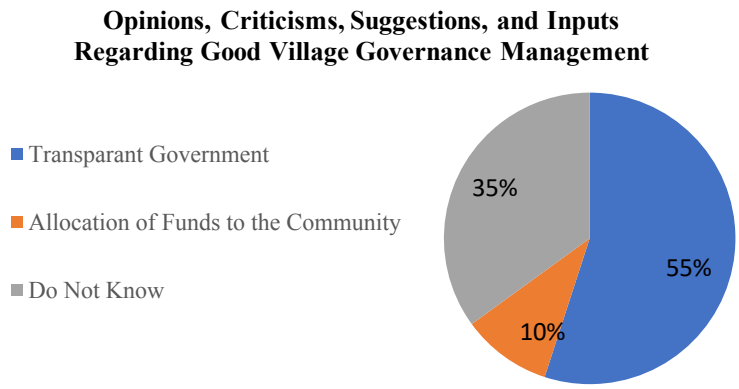

Figure 12: Graphic of Views, Criticisms, Suggestions, and Inputs related to Good Village Government Management

From 20 respondents in the Galang Suka village community, the majority of the respondents, amounting to 55% (11 people), believe that to produce good village governance management, the government should be transparent, while 10% (2 people) stated that funds should be allocated for the benefit of the community. A total of 35% (7

people) answered "don't know" when asked about their opinions, criticisms, suggestions, and inputs regarding good village governance management.

Table 12: Public Knowledge of Examples of Corruption

	F	%
Misappropriation of Village Funds	12	60
Data Manipulation	2	10
Money/Time Corruption	3	15
Bribes/Bribes	1	5
Do not know	2	10
Sum	20	100

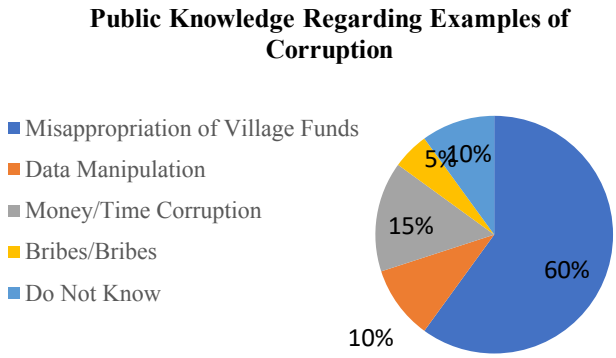

Figure 13: Graph of Public Knowledge Regarding Examples of Corruption

In the graph above, it can be seen that more than 50% of community knowledge regarding examples of corruption is related to embezzlement of village funds with a value of 60% (12 people), followed by corruption of money/time 15% (3 people), data manipulation 10% (2 people), and bribery in the last position with a value of 5% (1 person). A total of 10% (2 people) answered "don't know" about examples of corruption.

Table 13: Public perception of the statement that corruption can hurt the people

	F	%
Get	20	100
Unable to	0	0
Sum	20	100

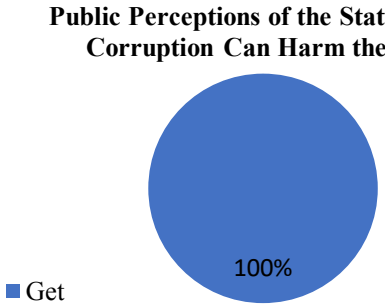

Figure 14: Graph of Public Perceptions of the Statement that Corruption Can Harm the People

From 20 respondents in the Galang Suka village community, all respondents, with a percentage of 100% (20 people), agreed that corruption could cause suffering to the people

Table 14: Community Opinion on Village Interests Making Village Integrity Statement

	F	%
Necessary	10	50
Absolutely necessary	10	50
Sum	20	100

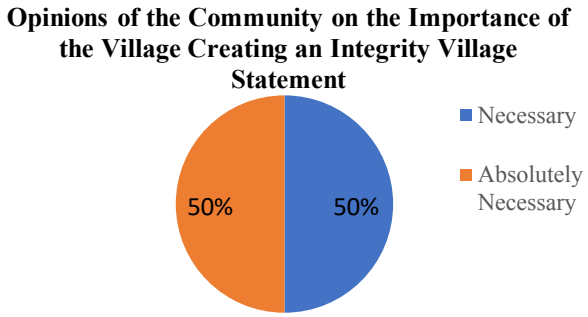

Figure 15: Graph of Community Opinions Regarding Village Interests Making a Village Integrity Statement

From 20 respondents in the community of Galang Suka Village, 50% (10 people) have the perception that the creation of a village integrity statement is very necessary and 50% (10 people) stated that it is necessary. Community participation in overseeing the use of village funds is one of the keys to the success of utilizing these funds. The community, as an important element in the entire development process, must be able to take part in proposing and overseeing the development process with the aim of bringing the greatest possible benefit to improving the quality of life of the community, increasing access to basic needs, and even the community can maintain and foster a sense of ownership of every result of the development process. Article 24 of Law Number 6 of 2014 concerning Villages states that the implementation of Village government is based on the principle of participatory governance.

Barriers to community participation in village budget management include:

1. Unwise decisions, such as unfair and unequal distribution of village funds focused on one program and one village chief.
2. Non-interactive communication. Lack of communication between the government and the community in planning, decision-making, program implementation, and budgeting processes.
3. Lack of community awareness. The community is indifferent to what the government decides and does (apathetic) regarding budget management.
4. Low education. With low community education, the community does not know what to do regarding planning, implementation, and supervision of village budget use.
5. Lack of transparency and accountability. There is no transparency in the use of funds in program implementation and no accountability for the program implementation and budgeting processes.

From the questionnaire results, the majority of the Galang Suka Village community does not know the allocation system for village activities, meaning that the village government is not transparent, resulting in a low level of community trust in the local government. This is evidenced by the former Village Chief who was suspected of embezzling BUMDesa funds. This situation is being addressed by the newly appointed Village Chief, Mr. Drs. Suhelman, S.PD.I. In an interview with him to obtain input on community programs, he is not hesitant to go down and mingle with the community directly.

4. Discussion

The Village Law and its implementing regulations have mandated village governments to be more independent in managing their governance, including financial management and village assets. Some policies include allocating a large budget to villages and providing fixed income and allowances to village heads and officials. The Deli

Serdang Regency Government implements Law No. 6 of 2014 on Villages, Government Regulation No. 43 of 2014 on the Implementation of Law No. 6 of 2014, and Minister of Home Affairs Regulation No. 20 of 2018 on Village Financial Management by issuing Regent Regulation No. 3 of 2019 on Village Financial Management.
The causes of village fund corruption can vary and be complex. Some factors that can contribute to village fund corruption include:

1. Limited knowledge and financial management skills of village officials.
2. Limited supervision and accountability for the use of village funds by authorized parties.
3. Political interests in managing village funds, such as using village funds for campaign purposes.
4. Lack of transparency in the management of village funds, such as not providing clear information on the use of village funds to the public.
5. Demands and pressures from the community on village governments to fulfill their needs.
6. Lack of community awareness of the importance of preventing corruption and overseeing village funds.

Therefore, efforts are needed to increase understanding and knowledge about village financial management, improve transparency and accountability, and involve communities in overseeing the use of village funds. In addition, it is also important to build strong awareness and commitment from village leaders and communities to prevent corruption and promoting good village financial governance.

Community participation in monitoring the use of village funds is one of the keys to the success of utilizing the funds. The community, as an important element in the entire development process, must be able to participate in proposing and monitoring the development process with the aim of bringing the greatest benefit to improving the quality of life of the community, increasing access to basic needs, and even fostering a sense of ownership towards every result of the development process.

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Diversion: The Concept of Child Criminal Case Resolution in Indonesia

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Abstract
Diversion is a mechanism for resolving criminal cases of children in conflict with the law outside the formal justice process. The research problem is how the basic principles of diversion for the settlement of juvenile criminal cases in Indonesia? How is the implementation of the principles of diversion in juvenile court practice in Indonesia? This research is a normative legal research, namely research that uses library materials or secondary data consisting of primary legal materials, secondary legal materials as the main data. The results of the study concluded that the principles of diversion in juvenile court practice in Indonesia are guided by the principles of child welfare that exist in international instruments and national legal provisions, which consider the interests of victims, the welfare and responsibility of children, avoidance of negative stigma, avoidance of retaliation, community harmony and decency, decency and public order. The implementation of the principle of diversion in juvenile court practice in Indonesia has resulted in diversion agreements in the crimes of maltreatment, theft, narcotics, traffic accidents due to negligence and child abuse. These various criminal offenses reached diversion agreements through court decisions, including; Stipulation No. 2/Pen.Div/2021/PN Rta jo No. 5/Pid.Sus-Anak/2021/PN Rta, Stipulation No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat, Stipulation No.12/pen.Div/2020/PN Kisaran, Stipulation No/Pen.Div/2020/PN Bbu jo No./Pid.Sus-Anak/2020/PN Blambangan Umpu, Stipulation No.3 /Pid.Sus-Anak/2020/PN.Tenggaron, Stipulation No.8/Pid.Sus-Anak/2018/PN Kuningan, Stipulation No.1/Pid.Sus-Anak/2014/PN Garut, Stipulation No.26/Pid.Sus-Anak/2016/PN Denpasar, Stipulation No.35/Pid. Sus-Anak/2017/PN Batam, Stipulation No.81/JN/2021/Mahkamah Syar'iyah Suka Makmue, Stipulation No.111/Pid.Sus -Anak/2014/PN.Surabaya.

Keywords: Juvenile Diversion, Juvenile Case Resolution and Juvenile Court Practice

1. Introduction

Diversion is an integral part of the settlement of juvenile criminal cases in the world, including Indonesia. The provision on diversion is expressly regulated in Article 5.1 of the United Nations Standard Minimum Rules for the administration of juvenile justice 1985 or The Beijing Rules (SMRJJ) (Wangga, 2016). Article 5.1 asserts that the goal of the juvenile criminal justice system is to prioritize the welfare of the child and to ensure that any response

to juvenile offenders will always be commensurate with the good circumstances of the offender. According to The Beijing Rules, diversion means that the police, public prosecutors/other agencies dealing with juvenile cases are authorized to discontinue the case at their discretion.

International instruments that regulate diversion include The Beijing Rules (SMRJJ), The Riyadh Guidelines, The Tokyo Rules and The United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Even in General Comment Number.10 2007 of The Committee on the Rights of the Child on Children's rights juvenile justice implicitly found rules on diversion. The above international provisions expect participating countries to adopt the provisions of diversion into national provisions in each country, including Indonesia.

2. Problem Statement

Indonesia, has national provisions governing diversion for children in conflict with the law. Although there are provisions on the concept of diversion, it is still felt to be contrary to the basic principles of diversion in the Law. Based on the above description, the problems in this study are; how are the basic principles of diversion for the settlement of juvenile criminal cases in Indonesia? And how is the implementation of the principles of diversion in juvenile court practice in Indonesia?

3. Research Objectives

The object of study is the legal reality in the form of Law Number 11 of 2012 concerning the existing Child Criminal Justice System in Indonesia, Supreme Court Regulation (PERMA) Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Child Criminal Justice System.

4. Literature Review

Diversion" which means diversion, then the word "Diversion" was absorbed into the Indonesian language into the term diversion (KBBI: 2005). According to the history of the development of criminal law, the word "Diversion" was first proposed as a vocabulary in the report on the implementation of juvenile justice submitted by the President of the Australian Crime Commission in the United States in 1960. The basic idea of diversion is to avoid the negative effects of conventional criminal justice examinations on children, both the negative effects of the court process and the negative effects of the stigma (bad label) of the judicial process, so conventional examinations are diverted.

Diversion according to Jack E Bynum (2002), in his book Jevenile Delinquency a Sociological Approach, namely diversion is an attempt to divert, or channel out, youthful offenders from the juvenile system (Diversion is an action or treatment to divert or place child offenders out of the criminal justice system). According to Nasir Djamil in his book "Children Are Not to Be Punished" is a transfer of the settlement of cases of children suspected of committing certain criminal offenses from the formal criminal process to a peaceful settlement between the suspect/defendant/criminal offender and the victim facilitated by the family and/or community, Child Community Supervisor, Police, Prosecutor or Judge (Hera Susanti, 2017). The definition of diversion is also stated by Marlina in her book Juvenile Justice in Indonesia, which is a policy carried out to avoid perpetrators from the formal criminal justice system to provide protection and rehabilitation to perpetrators as an effort to prevent children from becoming adult criminal offenders (Marlina, 2009). According to M Nasir Djamil (2013), what is meant by diversion is a transfer of settlement of cases of children suspected of committing certain criminal offenses from the formal criminal process to an amicable settlement between the suspect/defendant/offender and the victim facilitated by the family and/or community, child community counselor, police, prosecutor, or judge.

Yul Ernis (2016), in his research, stated that the application of diversion and restorative justice had been practiced long before the SPPA Law was enacted in Indonesia. Ernis added that diversion is practiced to resolve juvenile criminal cases in a family and deliberative manner through the traditions of indigenous peoples. In line with Ernis' research is research from Maidina Rahmati et al. (2022), which suggests that the form of case settlement in indigenous communities can be seen in South Sulawesi, the Flores community of NTT, the Banjar community and others.

The Ammatoa, Kajang indigenous community in Bulukumba Regency, South Sulawesi also has a customary judicial institution that has been recognized by the state through Regulation Number 9 of 2015 concerning the confirmation of the recognition and protection of the rights of the Ammatoa Kajang customary law community. Article 22 of this regulation gives the Ammatoa Kajang customary law community (MHA) the right to carry out its customary law and resolve violations of customary law through its own customary justice system. For the people of Flores, NTT, namely the local community of Lamaholot, Larantuka Regency, NTT has a way of resolving problems with a traditional ritual called "mela sareka" (rite of peace). Meanwhile, the Banjar community is known for "adat badamai", which is a settlement of disputes of both civil and criminal nature that is commonly practiced by the Banjar community. Adat badamai in criminal dispute resolution is also known as "Baparbaik" or "Bapatut".

Achmad Ratomi (2013), in his research, suggests three (3) forms of implementation of diversion at the investigation stage. First; Police deliberation. The parties only consist of the police and the offender. The types of crimes are violations and minor crimes. The sanctions are in the form of informal warnings, namely oral warnings and written warnings. The informal warning is not recorded in an agreement and does not need to be requested to the district court. Second, the family deliberation. The parties involved are the police, the offender and/or his/her parents/guardians, and the community counselor. The types of crimes are minor crimes, victimless crimes and crimes where the value of the victim's loss does not exceed the value of the minimum wage of the local province. The sanction is a formal warning that is recorded in the police record book but does not need to be submitted to the District Court. Third; Community Deliberation. The parties involved are the police, the offender and/or his/her parents/guardians, the victim and/or his/her parents/guardians and the community counselor. The type of crime is a criminal offense punishable by imprisonment of less than 7 (seven) years and is not a repetition of the crime and is not included in the category of criminal offenses, minor crimes, crimes without victims and crimes where the value of the victim's loss is not more than the value of the minimum wage of the local province. The sanction is a formal warning that must obtain the consent of the victim and/or his/her family if the victim is a minor. The results of the deliberation are then outlined in a diversion agreement signed by the parties.

5. Methodology

This scientific paper is a doctrinal legal research, which conceptualizes law as a norm with the scope of *ius constituendum, ius constitum* and judge made law. This legal research is descriptive analytical, which uses secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials, as binding legal materials, consisting of regulations on restorative justice established by law enforcement agencies. Secondary legal materials consist of textbooks, expert opinions, research results, seminar results. Meanwhile, tertiary legal materials are legal materials that support primary and secondary legal materials, including print media, online media, encyclopedias and other tertiary legal materials. The whole data is collected and processed and then analyzed juridically qualitatively to find the meanings hidden behind the object to be studied.

6. Data Analysis

Court decisions on juvenile criminal cases that reached diversion agreements in several District Courts in Indonesia from 2014 - 2021 in the following table:

No	Diversion Case Court Determination Number	Type of Crime	Child's age	Education	The result of the diversion agreement
1	Decisions No2/Pen.Div/2021/PN Rta jo Number 5/Pid.Sus-Anak/2021/PN Rta	Crime of theft	14 years	Elementary School	-The perpetrator's son & the victim agreed to reconcile; -. The perpetrator's son was given guidance by working at the Lokpaikat Resort Police at least 2 days a week.
2	Decisions No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat	Crime of theft	17 years	Middle School	-. The victim & the perpetrator's son agreed to reconcile by returning the laptop & the loss of Rp 5 million to the victim; -. The perpetrator's child was returned to the guardian

3	Decisions No.12/pen.Div/2020/PN Kisaran	Narcotics Crime	17 years	Not mentioned	-. The child regrets his/her actions; -. The perpetrator's child was included in job training owned by Mr. M. Nuh in Dusun IV Silo Village, Silau Laut Sub-District, Asahan Regency for 3 months.
4	Decisions No/Pen.Div/2020/PN Bbu jo Nomor/Pid.Sus-Anak/2020/PN Blambangan Umpu	Narcotics Crime	17 years	Not mentioned	-child returned to parents with PK Bapas supervision for 6 months
5	Decisions No.3/Pid.Sus-Child/2020/PN.Tenggaron	Narcotics Crime	17 years	Not mentioned	-The child admits guilt & promises not to repeat the crime; -Child undergoes medical rehabilitation & psychosocial rehabilitation at the East Kalimantan Provincial BNN (in accordance with the mandate of Law 35/2009 on Narcotics).
6	Decisions No.8/Pid.Sus-Anak/2018/PN Kuningan	Crime of maltreatment	15 years	Student	-The child admits his/her actions & promises not to repeat the crime; -. The victim forgives the perpetrator's actions & does not hold a grudge and will not retaliate; -. The child undergoes community service 2 hours / day for 1 month in the Kuningan sub-district & program from the Correctional Center Supervisor and the child continues to live with parents and must obey parental advice.
7	Decisions No.1/Pid.Sus-Child/2014/PN Garut	Crime of maltreatment	17 yeras	Not mentioned	-The victim forgives & does not dispute the act committed and does not demand material; -. The victim expects the child's parents to educate, guide, foster the child to be better and the Sakawayana village head who will supervise it & provide direction for parents
8	Decisions No.26/Pid.Sus-Anak/2016/PN Denpasar	Narcotics Crime	16 years	High school grade 2	-.The child realizes his/her mistake & apologizes; -.The child is returned to the parents for guidance & counseling.
9	Decisions No.35/Pid. Sus-Anak/2017/PN Batam	Crime of negligence resulting in accident or damage			-. The victim did not claim damages; -The perpetrator's child is returned to the parents to be educated and sent to school.
10	Decisions No.81/JN/2021/Syar'iyah Court Suka Makmue	Crime of child molestation	Consists of 3 child perpetrators (1) 17 years old (2) 16 years old (3) 17 years old	Intermediate Technical School (STM) Intermediate Technical School (STM) Vocational High School (SMK)	-The perpetrator's son paid compensation of Rp 10,000,000 (ten million) & apologized to the victim; -.there are 2 children of the perpetrator who have STM education received social coaching at the Nurul Iman Mosque, Ujong rambong Village, Gampong Kuta Makmue to carry out & be assigned as muezzin at every prayer at the mosque for 3 months. -. Children with vocational education received social guidance at the pesantren where the child was educated for 3 months.
11	Decisions No.111/Pid.Sus - Anak/2014/PN.Surabaya	Narcotics offenses	17 years	Vocational High School (SMK) Grade I	-The perpetrator's son regretted his actions & promised not to repeat the crime; -. The Integrated Assessment Team of the East Java Provincial BNN recommends that the child undergo rehabilitation at the ANKN (Juvenile Delinquents & Victims of Narcotics) Social Rehab Unit in Surabaya for 4 months and is approved by the Correctional Center's Community Supervisor.

Source of data processed by the author from primary legal materials

The table above shows that diversion agreements are implemented at the level of investigation, prosecution and court hearings so as to request a district court decision. The existence of a court decision causes the termination of the settlement of criminal cases involving child perpetrators. The results of this study found 11 (eleven) court

decisions with a variety of criminal offenses committed by children. 5 children committed narcotics crimes, 2 children committed theft crimes and 2 children committed maltreatment crimes. There was 1 child who committed a criminal offense due to negligence resulting in an accident or damage and 1 child who committed a criminal offense of child abuse.

7. Discussion and Conclusion

7.1. Principles of Diversion in the Settlement of Juvenile Criminal Cases in Indonesia

Diversion in Article 1 point 7 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System is defined as the transfer of the settlement of juvenile cases from the criminal justice process to a process outside of criminal justice. Furthermore, in Articles (5) through Article 14, Article 29, Article 42 and 52 paragraphs (2) through (6) of Law No. 11 of 2012 concerning the Child Criminal Justice System, diversion must be pursued at the level of investigation, prosecution and examination of children's cases in court by prioritizing a restorative justice approach. The word "shall be pursued" implies that juvenile law enforcers from investigators, prosecutors and judges are required to pursue the diversion process. The obligation to seek diversion from the start of the investigation, prosecution and examination of children's cases in the district court, is carried out in the event that the criminal offense is punishable by imprisonment under 7 (seven) years and does not constitute a recidivism. Article 9 stipulates that investigators, public prosecutors, and judges in conducting diversion must consider the category of criminal offense, as an indicator that the lower the criminal threat, the higher the priority of diversion.

Diversion is not intended to be implemented against perpetrators of serious crimes, such as murder, rape, drug trafficking, and terrorism, which are punishable by more than 7 (seven) years, while the age of the child in the article above is used as a determination of the priority of providing diversion and the younger the child, the higher the priority of diversion, taking into account the results of community research from the Correctional Agency (BAPAS) and the support of the family and community environment. The diversion process pursued by investigators, public prosecutors and court judges must pay attention to the interests of victims, the welfare and responsibility of children, the avoidance of negative stigma, the avoidance of retaliation, the harmony of society and decency, decency and public order. All of these principles must be applied to achieve the objectives of diversion, namely achieving peace between the victim and the child; resolving the child's case outside the judicial process; preventing the child from deprivation of liberty; encouraging the community to participate; and instilling a sense of responsibility in the child.

Article 40 of the United Nations Convention on the Right of Children (The CRC) emphasizes the principles of diversion as follows (Wangga, 2016):

1) The principle of diversion is only applied in cases where there is strong evidence that the child has violated the law and he/she is willing to voluntarily take responsibility for his/her actions. This means that the ability to take responsibility is not obtained through intimidation, pressure, persuasion or coercion (Paragraph 27 point 1 General Comment No.10 (2007);
2) The principle that children must give their free and voluntary consent in the formulation of diversion, which consent is given after the child has received detailed information about the form, content or alternatives of the program. It is necessary to inform the child about the consequences of failure to implement the alternative program that has been determined. Even for children less than 16 years old, parental consent is required (children who violate the law), (Paragraph 27 point 2 General Comment No.10 (2007);
3) The principle that there needs to be specific legal rules to determine diversion can be applied in terms of what the authority of the Police, Public Prosecutor and/or other related parties in deciding diversion, must be well regulated and can be changed, especially to protect children from discrimination (Paragraph 27 point 3 General Comment No.10 (2007);
4) The principle of the child who has violated the law being given the opportunity to obtain legal or other assistance in the matter of diversion, in particular in order to assess the feasibility and objectives of diversion provided by the competent Institution, such as the possibility of changing the alternative program offered, (Paragraph 27 point 4 General Comment No.10 (2007);

The principle of full and complete implementation of diversion proclaimed in the United Nations Standard Minimum Rules for the administration of juvenile justice 1985 or The Beijing Rules (SMRJJ: 1985) endorsed in UN General Assembly Resolution No.44/33 of November 29, 1985 which consists of 6 (six) chapters and 30 (thirty). Article 5.1 affirms that the purpose of the juvenile criminal justice system is to promote the welfare of the child and to ensure that any response to juvenile offenders will always be commensurate with the good circumstances of the offender. In article 11 of The Beijing Rules (SMRJJ) the concept of diversion is that the police, public prosecutors/other agencies dealing with juvenile matters are authorized to discontinue the case at their discretion. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules: 1990) adopted in UN General Assembly Resolution 45/133 of December 14, 1990 affirms the important role of the prosecutor in promoting diversion from criminal proceedings for juveniles. It also emphasizes that juvenile detention should only be used in exceptional cases and as a last resort. The Riyadh Guidelines, as the United Nations Guidelines for the Prevention of Juvenile Delinquency explicitly emphasize the prohibition of criminalizing and punishing children for conduct that does not cause serious damage to the child's development or harm to others. In summary, the provisions of various international instruments emphasize the importance of diversionary measures in dealing with children in conflict with the law. These instruments emphasize that children in conflict with the law may be diverted from any formal judicial process. The mandate of these international provisions has been practiced in court decisions in Indonesia.

8. Implementation of Restorative Justice in Case Resolution in Indonesia

The Supreme Court strengthened the implementation of diversion in the juvenile criminal justice system by establishing Supreme Court Regulation (PERMA) Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System. This PERMA requires judges to resolve the problems of children in conflict with the law by conducting diversion first. In addition, this PERMA contains procedures for the implementation of diversion which become the guide for judges in resolving juvenile crimes. According to PERMA 4 of 2014, what is meant by Diversion Deliberation is a deliberation between parties involving the Child and his/her parents/guardians, victims and/or parents/guardians, Community Counselors, Professional Social Workers, representatives and other involved parties to reach an agreement on diversion through a restorative justice approach. The facilitator is a judge appointed by the President of the Court to handle the child's case. Diversion is applied to children who are 12 (twelve) years old but not yet 18 (eighteen) years old or 12 (twelve) years old even though they have been married but not yet 18 (eighteen) years old, who are suspected of committing a criminal offense. Not all criminal offenses can be made diversion efforts, the provisions of Article 7 paragraph 2 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System limit criminal offenses that can be made diversion efforts, namely;

1) punishable with imprisonment under 7 years; and
2) is not a repetition of a criminal offense.

Government Regulation No. 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Under the Age of 12 (twelve) years regulates the technical efforts for diversion. Diversion agreements in the settlement of juvenile criminal cases have been implemented in narcotics crimes, theft crimes, maltreatment crimes and crimes due to negligence resulting in accidents or damage as well as sexual abuse crimes with children as perpetrators. The various criminal offenses have successfully reached diversion agreements and have been stipulated in several court decisions, among others; Stipulation No. 2/Pen.Div/2021/PN Rta jo No. 5/Pid.Sus-Anak/2021/PN Rta, Stipulation No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat, Stipulation No.12/Pen.Div/2020/PN Kisaran, Stipulation No/Pen.Div/2020/PN Bbu jo No./Pid.Sus-Anak/2020/PN Blambangan Umpu, Stipulation No.3 (1). /Pid.Sus-Anak/2020/PN.Tenggaron, Stipulation No.8/Pid.Sus-Anak/2018/PN Kuningan, Stipulation No.1/Pid.Sus-Anak/2014/PN Garut, Stipulation No.26/Pid.Sus-Anak/2016/PN Denpasar, Stipulation No.35/Pid. Sus-Anak/2017/PN Batam, Stipulation No.81/JN/2021/Mahkamah Syar'iyah Suka Makmue, Stipulation No.111/Pid.Sus -Anak/2014/PN.Surabaya.

The diversion agreement stipulated in the court decision shows weaknesses as seen in Stipulation No. 2/Pen.Div/2021/PN Rta jo No. 5/Pid.Sus-Anak/2021/PN Rta in the crime of theft. The result of the diversion agreement decided that the perpetrator had apologized and the victim had given forgiveness. The perpetrator's

child was also decided to work at least 2 days a week under the supervision of the public prosecutor and a representative of the Lokpaikat Police. However, the weakness is that it is not stated for how long the child assists with social service work at the Lokpaikat Police. Another weakness that shows disparity in this diversion agreement is the detention of children in the crime of theft, this is found in Determination No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat.

The results of the diversion agreement in narcotics crimes with child victims of abuse have been determined through Stipulation No.12 / Pen.Div / 2020 / PN Kisaran that the child admits guilt and regrets his actions. For the guidance of the child, it was decided that the child would be included in the job training owned by Mr. M. Nuh in Dusun IV Silo Village, Silau Laut Sub-District, Asahan Regency for 3 months. The weakness of this diversion agreement is that the child did not receive a medical rehabilitation or social rehabilitation program, as mandated by Law No. 35/2009 on Narcotics. Violations of the Narcotics Law, which mandates that child victims of abuse undergo medical rehabilitation or social rehabilitation, were also found in two (2) other District Court decisions, namely Stipulation No/Pen.Div/2020/PN Bbu jo Number/Pid.Sus-Anak/2020/PN Blambangan Umpu and Stipulation No.26/Pid.Sus-Anak/2016/PN Denpasar.

The diversion agreement was also successfully carried out in the crime of sexual abuse with a child as the perpetrator, violating Article 76E of Law Number 35 Year 2014. If the criminal elements of Article 76E are fulfilled, the child perpetrator will also be subject to the criminal threat of Article 82 of Law Number 17 Year 2016 with a minimum imprisonment of 5 years and a maximum of 15 years and/or a maximum fine of Rp 5,000,000,000. The result of Determination No.81/JN/2021/Mahkamah Syar'iyah Suka Makmue is that the child perpetrator pays compensation of IDR 10,000,000 (ten million) & apologizes to the victim. The two (2) children of the perpetrator who have an STM education received social guidance at the Nurul Iman Mosque, Ujong rambong Village, Gampong Kuta Makmue to carry out & be assigned as muezzins at every prayer at the Mosque for 3 months. Meanwhile, children who have a vocational high school education receive social coaching at the pesantren where the child is studying for 3 months. The weakness of this coaching program is the absence of supervision from Community Supervisors who should be stipulated in the District Court Determination.

9. Conclusion

Diversion, which is the transfer of the settlement of juvenile cases from the criminal justice process to a process outside of criminal justice, has been successfully implemented in the criminal justice system in Indonesia. The form of this agreement has been outlined, among others; Stipulation No. 2/Pen.Div/2021/PN Rta jo No. 5/Pid.Sus-Anak/2021/PN Rta, Stipulation No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat, Stipulation No.12/pen.Div/2020/PN Kisaran, Stipulation No/Pen.Div/2020/PN Bbu jo No./Pid.Sus-Anak/2020/PN Blambangan Umpu, Stipulation No.3. /Pid.Sus-Anak/2020/PN.Tenggaron, Stipulation No.8/Pid.Sus-Anak/2018/PN Kuningan, Stipulation No.1/Pid.Sus-Anak/2014/PN Garut, Stipulation No.26/Pid.Sus-Anak/2016/PN Denpasar, Stipulation No.35/Pid. Sus-Anak/2017/PN Batam, Stipulation No.81/JN/2021/Mahkamah Syar'iyah Suka Makmue, Stipulation No.111/Pid.Sus -Anak/2014/PN.Surabaya.

The diversion agreements outlined in the various district court decisions above, stem from a variety of criminal offenses including; narcotics offenses, theft offenses, maltreatment offenses and criminal offenses due to negligence resulting in accidents or damage as well as sexual abuse offenses with children as perpetrators. The implementation of diversion in court practice still shows various weaknesses, including child victims of narcotics abuse, not receiving medical rehabilitation or social rehabilitation programs, as mandated by Law Number 35 of 2009 concerning Narcotics, found in two (2) other District Court decisions, namely Stipulation No/Pen.Div/2020/PN Bbu jo Number/Pid.Sus-Anak/2020/PN Blambangan Umpu and Stipulation No.26/Pid.Sus-Anak/2016/PN Denpasar. Another weakness that shows disparity in the crime of theft. The juvenile offender was detained for the crime of theft as stipulated in Stipulation No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat. For other theft offenses in Stipulation No. 2/Pen.Div/2021/PN Rta jo No. 5/Pid.Sus-Anak/2021/PN Rta, the child was not detained.

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State Criminal Return Policy Against Corruption

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Abstract
The Anti-Corruption Law was ruled out by Criminal Agency STR, here according to the author the law is not ruled out, but if the state's losses are returned then the criminal act will stop at the investigation level. There is a gap in understanding in legal references between investigations which should be interpreted as investigations but because the Criminal Procedure Code separates the functions of investigation and investigation, this study will follow a positive law pattern, where investigations are divided into two, namely investigation and investigation. The investigation is not yet pro-justiciar in nature, while the investigation is already pro-justiciar with all its legal consequences. In line with the special characteristics of corruption compared to other criminal acts. With this STR and the recovery of losses the state can stop investigations, thus contradicting Article 4 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, that returning state financial losses or the state's economy does not abolish the punishment of perpetrators of criminal acts as referred to in Articles 2 and Article 3. The purpose of this research is to examine criminal policies regarding the recovery of state financial losses against corruption. The method used is normative legal research. Based on the research results it is known that the criminal policy that has been implemented by the government through various laws does not eliminate the unlawful nature of corruption even though there is compensation for state financial losses by the defendant. This return is because Article 4 of the PTPK Law states that returning state financial losses is only one of the reasons to alleviate punishment and does not abolish punishment for perpetrators who violate the provisions of Article 2 and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes. Although many corruptors have been charged with Law Number 31 of 1999 concerning the Eradication of Corruption Crimes and sentenced to prison for being proven detrimental to state finances, in practice the application of the element of harming state finances in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes The handling process Cases of criminal acts of corruption often cause problems, namely violations/deviations of the provisions of Article 4 in law enforcement practices of criminal acts of corruption.

Keywords: Criminal Policy, Crime, Corruption

1. Introduction

The provisions contained in Law Number 2 of 2002 concerning the Indonesian National Police require the concept of settling criminal acts by setting aside the criminal process for the benefit of Harkamtibmas and the public

interest through the concept of restorative justice. And this is the juridical basis of Bareskrim Telegram Letter Number ST/206/VII/2016 dated 24 August 2016 concerning Handling Corruption Crimes in Recovering State Financial Losses.

In this letter it is explained that the reason for stopping the Investigation is based on Telegram Kabareskrim Polri Number: ST/206/VIII/2016 dated 25 July 2016, if, during the Investigation process, there is a return of state financial losses to the state. treasury so that the investigation does not escalate to the level of Investigation.

Investigators complete the Administration of Termination of Investigation based on the Circular of the Chief of Police Number: SE/7/VII/2018 dated 27 July 2018 Concerning Termination of Investigation, make an SP2HP report to the reporter, and write to the police.

According to Nurdjana (2009), Corruption which is an extraordinary crime has a more complicated complexity compared to conventional crimes or even other special crimes. Especially in the investigation stage of this corruption crime, several investigative agencies are authorized to handle the investigative process of perpetrators of crimes related to this corruption crime. Including various PPNS institutions when associated with various criminal acts that contain elements of corruption in their respective fields of work and by the laws and regulations which form the legal basis of each.

The Law on the Eradication of Criminal Acts of Corruption specifically stipulates its procedural law for law enforcement against perpetrators of corruption, in general, it is distinguished from the handling of other special crimes. This is because corruption is an extraordinary crime that must take precedence over other crimes (Nurdjana, 2009).

In addition, one of the causes of rampant corruption is ineffective law enforcement. There is already an ideal concept of eradicating corruption from principle to norm, but in reality, corruption is still rife. One of the things that need to be put forward in law enforcement is the existence of a principle that forms the basis for the prosecution of criminal acts of corruption. Compliance with these principles is important in law enforcement, especially in the context of eradicating corruption which is seen as an extraordinary crime.

Telegram Letter of the Head of the Criminal Investigation Agency Number ST/206/VII/2016 dated 24 August 2016 concerning Handling Corruption Crimes in the Context of Recovering State Financial Losses associated with Law Number 31 of 1999 confirms that the settlement of corruption is when state losses are returned specifically For cases carried out in Ministries, Provincial Government Institutions, Regional Governments if the state losses are returned it will only be resolved by the Police, this is a form of public demand that wants to change at this time.

The Anti-Corruption Law was ruled out by Bareskrim STR, here according to the author the law is not ruled out, but if the state's losses are returned then the criminal act will stop at the investigation level. There is a gap in understanding in legal references between investigations which should be interpreted as investigations but because the Criminal Procedure Code separates the functions of investigation and investigation, this study will follow a positive law pattern, where investigations are divided into two, namely investigation and investigation.

The investigation is not yet pro-justiciar in nature, while the investigation is already pro-justiciar with all its legal consequences. In line with the special characteristics of corruption compared to other criminal acts.

Thus, from the background of the problems described above, the authors are interested in conducting research with the title "CRIMINAL POLICY FOR RETURNING STATE LOSSES TOWARDS CRIMINAL ACTS OF CORRUPTION".

2. Research Method

Research is the main tool in the development of science. This is because research aims to reveal the truth systematically, methodologically, and consistently. Through this research, an analysis and construction process was carried out on the data that had been collected and processed.

To improve the writing of this research, a study was carried out to complete the data that must be obtained to be accounted for as correct which will be used as material for writing and objective answers (Soekanto and Mamuji, 2011).

The type of legal research is normative juridical which is supported by primary and secondary data in the form of written legal norms. The written law used is Law Number 31 of 1999 which was later amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes.

This research is descriptive in nature, according to Hadari Nawawi this descriptive research method has two main characteristics, namely:
A. Focusing attention on problems that existed at the time the research was conducted (currently) or actual problems.
B. Describe the facts about the problem being investigated as it is accompanied by rational interpretation.

Furthermore, it is also said that the implementation of the descriptive method is not limited to collecting and compiling data, but includes analyzing and interpreting the meaning of data.
The method of data collection used in this research is through the collection of legal material useful for writing which is obtained using document studies or library materials (documentary study), namely the technique of collecting legal materials by studying library materials or written data. , especially related to issues that will be discussed and then analyze the data (Nawawi, 2003).

Based on the data obtained, is analyzed juridically and presented qualitatively, meaning that it describes the results of the research using sentences so that the results of the research can be easily understood. If there is quantitative data, the author will include it in the research results for the completeness of the information relating to the problem under study or as supporting data.

3. Results and Discussion

State Criminal Recovery Policy Against Corruption Crimes

Corruption Crimes in Indonesian Laws and Regulations

The long history of eradicating corruption in Indonesia shows that eradicating criminal acts of corruption does require extra hard handling and requires enormous and serious political will from the ruling government. The politics of eradicating corruption itself is reflected in laws and regulations issued during certain government periods. The birth of a law that specifically regulates the eradication of criminal acts of corruption is not enough to show the government's seriousness or commitment. It is necessary to do more than just produce statutory regulations, namely implementing the provisions stipulated in the law by encouraging law enforcement officers who are authorized to eradicate corruption in ways that are firm, courageous, and indiscriminate.

The existence of an anti-corruption law is only one of the many serious efforts to eradicate corruption. In addition to strong laws and regulations, public awareness is also needed in eradicating corruption. Public awareness can only arise if the public has knowledge and understanding of the nature of corruption as stipulated in the law. For this reason, the socialization of anti-corruption laws, especially regarding criminal acts of corruption regulated therein, needs to be carried out simultaneously and consistently. Public knowledge about corruption is necessary

considering that ignorance of the existence of laws and regulations cannot be used as an excuse to avoid legal responsibility.

Various efforts to eradicate corruption have been carried out by the government since independence, both by using existing laws and regulations and by establishing new laws and regulations that specifically regulate the eradication of criminal acts of corruption. Among the laws and regulations that have been used to eradicate criminal acts of corruption are:

Corruption offenses in the Criminal Code.

3.1. Central War Commander Corruption Eradication Regulation Number Prt/Peperpu/013/1950

1. Law Number 24 (PRP) of 1960 concerning Corruption Crimes.
2. Law Number 3 of 1971 concerning Eradication of Corruption Crimes.
3. TAP MPR No. XI/MPR/1998 concerning State Organizers who are Clean and Free from Corruption, Collusion, and Nepotism.
4. Law Number 28 of 1999 concerning State Organizers who are Clean and Free from Corruption, Collusion, and Nepotism.
5. Law Number 31 of 1999 concerning Eradication of Corruption Crimes.
6. Law No. 20 of 2001 concerning Amendments to Law no. 31 of 1999 concerning the Eradication of Corruption Crimes.
7. Law Number 30 of 2002 concerning the Corruption Eradication Commission.
8. Law Number 7 of 2006 concerning the Ratification of the 2003 United Nation Convention Against Corruption (UNCAC).
9. Government Regulation no. 71 of 2000 concerning Community Participation and Giving Awards in the Prevention and Eradication of Corruption Crimes.
10. Presidential Instruction No. 5 of 2004 concerning the Acceleration of Corruption Eradication.
11. The number of corruption laws and regulations that have been made and are in force in Indonesia is interesting to examine separately to find out and understand the birth of each of these laws and regulations, including knowing and understanding the advantages and disadvantages of each.

The Criminal Code which has been in force in Indonesia since January 1, 1918, is a legacy of the Netherlands. Is a codification and unification that applies to all groups in Indonesia based on the principle of harmony, which was promulgated in the 1915 Staatblad Number 752 based on KB 15 October 1915.

As an adaptation of Wetboek van Strafrecht Nederland 1881, it means that it took 34 years for unification based on the principle of this concordance. Thus, the Criminal Code was not new at the time it was born. In practice, many adjustments are needed for the enforcement of the Criminal Code in Indonesia, bearing in mind that as a legacy from the Netherlands, many provisions are not to the legal needs of the Indonesian people.

Although it does not specifically regulate criminal acts of corruption in it, the Criminal Code has regulated many acts of corruption, the arrangements of which have been followed and imitated by legislators against criminal acts of corruption to date. However, there is an open way to apply criminal law that is appropriate and in harmony with the lives of Indonesian people, considering that the Criminal Code that we have is old and often branded with colonialism.

In its journey, the Criminal Code has been amended, supplemented, and corrected by several national laws such as Law Number 1 of 1946, Law Number 20 of 1946, and Law Number 73 of 1958, including various laws on eradicating corruption. which regulates more specifically several provisions in the Criminal Code.

The criminal acts of corruption contained in the Criminal Code include delicts of office and offenses related to delicts of office. By the nature and position of the Criminal Code, the criminal act of corruption regulated in it is still an ordinary crime.

3.2. Corruption Eradication Regulation of the Central War Commander Number Prt/Peperpu/013/1950.

Opinions stating that corruption is caused by, among other things, bad existing regulations have been known for a long time. Thus the opinion that improving anti-corruption regulations will reduce corruption is still a matter of debate.

The regulation that specifically regulates the eradication of corruption is the Corruption Eradication Regulation of the War Authority Center Number Prt/Peperpu/013/1950, which was then followed by the Military Authority Regulation dated 9 April 1957 Number Prt/PM/06/1957, 27 May 1957 Number Prt/ PM/03/1957, and dated July 1, 1957 Number Prt/PM/011/1957.

What is important to note from the above regulations is that for the first time, there has been an attempt to use the term corruption as a legal term and define the definition of corruption as "an act that is detrimental to the country's finances and economy".

What is interesting about the provisions of this Central War Commander Regulation is that corruption is divided into 2 actions:
A. Corruption as a crime;
Corruption as a crime is explained as,
1) The act of a person with or because of committing a criminal act or delict enriches himself or another person or entity which directly or indirectly harms the finances or the economy of the state or region or harms an entity that receives assistance from state finances or another party. legal entities that use community capital and concessions.
2) The act of someone who due to or because of committing a crime or violation enriches himself or an entity and is carried out by abusing his position or position.
3) Crimes are listed in Articles 41 to Article 50 of this Pepperpu and Articles 209, 210, 418, 419, and 420 of the Criminal Code.

B. Corruption as another act;
Corruption as an act, not a crime or other action, is explained as follows:
1) The act of someone who due to or because of committing an unlawful act enriches himself or another person or entity which directly or indirectly harms state or regional finances or harms the finances of an entity that receives assistance from state or regional finance or other legal entity that uses capital or concessions from the community.
2) The act of someone who, because of or because of committing an act against the law, enriches himself or another person or an entity and is committed by abusing his position or position.
3) The differentiation of corruption into these two divisions invites a lot of criticism and reactions among legal scholars, although it must be admitted that the Central War Authority Regulation also has various advantages such as provisions that can undermine bank secrecy.

3.3. Law Number 24 Corruption Crimes (PRP) of 1960 concerning Corruption Crimes

From the outset, it can be seen that the Central War Commander Regulation on Corruption Eradication is emergency in nature, temporary in nature, and based on the Emergency Situation Law. Under normal circumstances it requires adjustment. Based on considerations to adjust to the situation, Law Number 24 (Prp) of 1960 concerning the Eradication of Corruption was born, which was originally in the form of a Government Regulation instead of a Law.

The main change from the Central War Commander Regulation to this Law is the change in the term act to a criminal act. However, this law turned out to be considered too lenient and favored the defendant considering that proving was more difficult.

3.4. Law No.3 of 1971 concerning Eradication of Corruption Crimes

History does not record many cases of corruption in the 1960-1970 period. It is not known whether the 1960 law was effective or because in other periods after that, the quantity and quality were greater.

In the 1970s, the President formed Commission 4 with the intention that all efforts to eradicate corruption could run more effectively and efficiently. Commission 4 consists of several people, namely Wilopo, SH, IJ Kasimo, Prof. Ir. Johannes, and Anwar Tjokroaminoto. Commission 4's duties are:
1) Conduct research and evaluation of policies and results that have been achieved in eradicating corruption.
2) Provide consideration to the government regarding policies that are still needed in eradicating corruption.

In its preparation, Law Number 3 of 1971 went relatively smoothly without experiencing any obstacles except for a few things such as the thought of imposing the principle of proof to be reversed and the desire to include provisions that apply retroactively.

3.5. TAP MPR No. Xi/MPR/1998 concerning State Organizers who are Clean and Free from Corruption, Collusion, and Nepotism

Along with the reform movement that arose as a result of public dissatisfaction with the New Order government for nearly 32 years, the desire to develop a new order of life for civil society developed in Indonesia. The desire to formulate a new order that prioritizes civil society began with the formulation of laws and regulations which were considered to prioritize the interests of the people as a demand for reform that had removed Suharto from the presidency.

Through the holding of the MPR Special General Session, TAP No. XI/MPR/1998 concerning State Organizers who are Clean and Free from Corruption, Collusion, and Nepotism. This TAP MPR contains many mandates to form laws that will oversee the development of the reform order, including a mandate to resolve legal issues against former President Suharto and his cronies.

3.6. Law Number 28 of 1999 Concerning State Organizers who are Clean and Free from Corruption, Collusion, and Nepotism

Law Number 28 of 1999 has the same title as TAP MPR No. XI/MPR/1998, namely about state administrators who are clean and free from corruption, collusion, and nepotism. The birth of this law introduced a new terminology regarding crime or criminalization in the sense of collusion and nepotism.

This law regulates the notion of collusion as a criminal act, namely agreements or cooperation unlawfully between state administrators, or between state administrators and other parties, which harm other people, society, and or the state. Meanwhile, the crime of nepotism is defined as any unlawful act by state officials that benefits the interests of their family and/or cronies above the interests of the community, nation, and state.

Along the way, this law is of little use. Some of the reasons for the unpopularity of this law are the too broad provisions on criminal acts regulated in it and the need to use more specific and strict statutory provisions, namely laws that specifically regulate the eradication of corruption.

3.7. Law Number 31 of 1999 concerning Eradication of Corruption Crimes.

The background to the emergence of the Law on the Eradication of Corruption Crimes Number 31 of 1999 was due to 2 things, namely first, as the reform order was progressing, it was deemed necessary to provide new values in efforts to eradicate corruption, and the two previous laws, namely Law No. 3 of 1971 is considered too old and no longer effective.

What is regulated as a criminal act of corruption in Law Number 31 of 1999 is not a new thing because legislators still use many of the provisions contained in the previous law. However, it is believed that the spirit and spirit of reform which is considered the spirit of the formation of this new law will give birth to breakthroughs, especially with the mandate to form a commission to eradicate criminal acts of corruption as a new instrument. for eradicating corruption.

The public's expectations for this new law to be firmer and more effective are enormous, however, the legislators made several fundamental mistakes which resulted in the need for amendments to Law Number 31 of 1999. Some of the weaknesses of this law include:
1) Withdrawal of certain acts from the Criminal Code as criminal acts of corruption by revoking the article number. This repeal poses a risk that if the Criminal Code is amended it will result in the provisions of the new Criminal Code being out of sync with the provisions for criminal acts of corruption originating from the Criminal Code.
2) There is a regulation regarding the reasons for imposing capital punishment based on certain circumstances which are considered excessive and not by the spirit of law enforcement.
3) There are no transitional rules that explicitly bridge between the old law and the new law, which causes a legal vacuum for a certain period or situation.

3.8. Law no. 20 of 2001 concerning Amendments to Law no. 31 of 1999 concerning the Eradication of Corruption Crimes

Law Number 20 of 2001 is a law that was born solely to correct the weaknesses and shortcomings of the previous law. As mentioned above, some of these weaknesses were later revised in the new law.
Weakness revisions to Law Number 31 of 1999 are:
1. The repeal of certain acts of the Criminal Code as acts of corruption are carried out by adopting the contents of these articles as a whole so that changes to the Criminal Code do not result in disharmony.
2. Determination of the reasons for imposing capital punishment is based on acts of corruption committed on funds used to deal with certain situations such as emergencies, national disasters, and monetary crises.
3. Inclusion of transitional regulations that explicitly bridge the gap between old laws that are no longer valid and new, so that they no longer pose a risk of a legal vacuum that could be detrimental to eradicating corruption.

3.9. Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption (UNCAC) of 2003

Corruption is rampant not only in Indonesia but also in almost all parts of the world. This is evidenced by the birth of the United Nation Convention Against Corruption or UNCAC as a result of the Merida Conference in Mexico in 2003. As a form of world concern for the epidemic of corruption, through the UNCAC it was agreed to change the world order and strengthen cooperation in eradicating corruption. Some of the new things regulated in UNCAC include mutual legal assistance, transfer of punishment persons, corruption in the private sector (corruption in the public sector), asset recovery, and others.

The Government of Indonesia, which is promoting the eradication of corruption, feels the need to participate in strengthening the UNCAC because, through Law Number 7 of 2006, its ratification (conditional) exempts the provisions of Article 66 paragraph (2) concerning Dispute Resolution. Submission of Reservations (requirements) against Article 66 paragraph (2) is based on the principle of not accepting the obligation to submit a dispute to the International Court of Justice except with the approval of the Parties.

3.10. Presidential Instruction No. 5 of 2004 concerning the Acceleration of Corruption Eradication

Presidential Instruction No. 5 of 2004 was born against the background of the desire to accelerate the eradication of corruption, bearing in mind the situation at the time the issuance of the Presidential Decree on corruption eradication experienced obstacles and a kind of resistance/backlash from corruptors.

Through this Presidential Instruction, the President feels the need to provide special instructions to assist the KPK in carrying out reports, registration, announcements, and examination of LHKPN (State Officials Wealth Report). The President issued 12 special instructions in the context of accelerating the eradication of corruption. The instructions were also specifically addressed to certain ministers, the Attorney General, the National Police Chief, including Governors and Regents/Mayors, according to their respective roles and responsibilities.

Along with the development of laws and regulations on eradicating corruption that already exists and is in effect in Indonesia, certain institutions have also been established, both those specifically dealing with eradicating corruption and institutions related to eradicating corruption. corruption crimes such as the State Officials Wealth Examination Commission (KPK). KPKPN) which was formed based on Presidential Decree No. 127 of 1999.
In its development, considering that the formation of the KPKPN was only through a Presidential Decree, this resulted in the institution's position not being strong enough. With the promulgation of Law Number 31 of 1999 which mandated the formation of a corruption eradication commission, the idea emerged to integrate the KPKPN into the eradication commission.

In the end, with the enactment of Law Number 30 of 2002 concerning the Corruption Eradication Commission and the formation of the KPK, the KPKPN merged and integrated with the KPK.

Corruption is an act that has a very big impact on society and its civilization. However, this is not well understood by the public, especially in Indonesia. In Indonesia, corruption is very widespread and has entered all levels of society. The development of this criminal act of corruption continues to increase from year to year, given the number of cases that have occurred and the large loss of state finances, as well as the increasingly systematic corruption that has entered all aspects of people's lives. in terms of quality (Djaja, 2009).

Corruption in Indonesia is no longer under control. even in various surveys, Indonesia is included in one of the lists of the most corrupt countries in the world. Various kinds of corruption cases ranging from large, medium to small cases occur from year to year continuously without stopping. Light punishment is the main reason for corruptors to continue their actions.

If you look at the three perspectives in legal theory as a social engineering tool, then Islamic law can be used as a form of regulation applied in Indonesia in the formation of corruption laws and regulations to provide sanctions for perpetrators of corruption. There are several reasons underlying this as explained in this book.

First, Islamic law as social control is one of the most widely used concepts in social science, because the majority of Indonesian people are Muslims. In this perspective, the main function of Islamic law in an integrative manner is intended to regulate and maintain the social order of Indonesian people who are mostly Muslim in a well-organized legal system. In this case, it is the integration of Islamic law into positive law in Indonesia, namely against criminal acts of corruption. For example: in the fiqh analogy with robbery, namely, corruption is carried out with strength and power and the person who is corrupted has reached one mishap/minimum limit, then the law is subject to cutting off the hands crosswise at the wrists. (The mishap of gold weighs 93.6 grams, in 2011 the price of 1 gram of gold was Rp. 400,000.00, so the nishab = Rp. 38,520. 000.00). Whereas for perpetrators who have repeatedly committed acts of corruption, based on the Ijtima Nahdlatul Ulama (NU), corruptors can be sentenced to death if they have repeatedly committed acts of corruption. And in Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Corruption, the maximum sentence imposed is 20 years in prison.

Second, Islamic law as social engineering which is a review can be used by officials (legal official perspective) to explore what sources of power can be mobilized by using Islamic law as the mechanism. This is because the crime of corruption in Indonesia is very heavy and the punishment received by the perpetrators of corruption in Indonesia is also very light. The criminal act of corruption is indeed a crime, even though there are strict and compelling laws and regulations, the fact is that corruption will always exist at any time. So this is where the role of the government apparatus both as policymakers and as supervisors and regulators of a legal product must make a policy or legislation which can later become social engineering for all people in Indonesia. One of them is in making the product of the legislation itself it is necessary to pay attention to legal sources that live in society, one

of which is Islamic law. In connection with criminal acts of corruption that occurred in Indonesia, even though the Corruption Law contains articles regarding the death penalty, the fact is that in the application of sanctions, there is no death penalty. Why is there a need for the death penalty? Because corruption is also a form of extraordinary crime or known as extraordinary crime, such as terrorism and drugs. Ijtima' Nahdlatul Ulama (NU) once issued a fatwa allowing the death penalty for corruptors. According to the fatwa, corruptors can be executed if they have repeatedly committed corruption. Wahbah Zuhaili in Al-Fiqh al-Islami wa Adillatuh concluded that the death penalty could be given to people who commit crimes very often, are alcoholics (especially narcotics), criminal supporters, and perpetrators of subversive acts that threaten national security or for example. Corruptors can be included in this type of category. 30 From the fatwa and the views of the fiqh experts, it can be applied in the laws and regulations in Indonesia, so that the application of sanctions for criminal acts of corruption for those who commit acts of corruption repeatedly (recidivist) can be subject to a maximum penalty of death. As for the criminal act of corruption which is carried out jointly (corporation) for those who are proven to have committed an evil conspiracy by jointly harming the state, alcoholics (especially narcotics), supporters of crime, and perpetrators of subversive acts that threaten national security or for example. Corruptors can be included in this type of category. 30 From the fatwa and the views of the fiqh experts, it can be applied in the laws and regulations in Indonesia, so that the application of sanctions for criminal acts of corruption for those who commit acts of corruption repeatedly (recidivist) can be subject to a maximum penalty of death. As for the criminal act of corruption which is carried out jointly (corporation) for those who are proven to have committed an evil conspiracy by jointly harming the state, alcoholics (especially narcotics), supporters of crime, and perpetrators of subversive acts that threaten national security or for example. Corruptors can be included in this type of category. 30 From the fatwa and the views of the fiqh experts, it can be applied in the laws and regulations in Indonesia, so that the application of sanctions for criminal acts of corruption for those who commit acts of corruption repeatedly (recidivist) can be subject to a maximum penalty of death. As for the criminal act of corruption which is carried out jointly (corporation) for those who are proven to have committed an evil conspiracy by jointly harming the state, 30 From the fatwa and the views of the fiqh experts, it can be applied in the laws and regulations in Indonesia, so that the application of sanctions for criminal acts of corruption for those who commit acts of corruption repeatedly (recidivist) can be subject to a maximum penalty of death. As for the criminal act of corruption which is carried out jointly (corporation) for those who are proven to have committed an evil conspiracy by jointly harming the state, 30 From the fatwa and the views of the fiqh experts, it can be applied in the laws and regulations in Indonesia, so that the application of sanctions for criminal acts of corruption for those who commit acts of corruption repeatedly (recidivist) can be subject to a maximum penalty of death. As for the criminal act of corruption which is carried out jointly (corporation) by those who are proven to have committed an evil conspiracy by jointly harming the state.

Third, the perspective of the emancipation of Islamic society in Indonesia towards the law (legal culture). This perspective is a legal view from the bottom up, law in this perspective includes objects of study such as legal capacity, legal awareness, law enforcement, and so on. The Indonesian people suffer greatly from the many cases of corruption that are always repeated and occur continuously in Indonesia, even corruption cases have also become entrenched at the smallest level of government in Indonesia. Here the perspective of Muslims in Indonesia also needs to be considered by the government. Muslims in Indonesia no longer trust government officials. For example, in the management of community E-KTPs in villages, according to a presidential regulation, the E-KTP arrangements are free of charge. Not yet at the central government, there are indications of leakage of funds for making E-KTP which was proclaimed nationally, it was also abused for personal or group interests. The KPK is still investigating the misappropriation of state funds in the E-KTP project. Referring to the example of this case, the views of the people in Indonesia, especially Muslims, agree that perpetrators of corruption can also be given the punishment of cutting off their hands. 31 This is because corruption can be equated with the crime of theft in Islam which is regulated in the Qur'an. . However, in the conception of Islamic law it is very difficult to categorize corruption as a syrah (theft) crime. This is due to the various corruption practices themselves which are generally not included in the meaning of tariqah (theft). then the views of the people in Indonesia, especially Muslims, agree that perpetrators of corruption can also be given the punishment of cutting off their hands. 31 This is because corruption can be equated with the crime of theft in Islam which is regulated in the Qur'an. . However, in the conception of Islamic law it is very difficult to categorize corruption as a syrah (theft) crime. This is due to the various corruption practices themselves which are generally not included in the meaning of tariqah (theft). then

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Based on the results of research from Umi Kalsum (2009) states that as a crime that endangers social life, corruption is always associated with the culture or social conditions of society. According to Robert Klitgaard, the main cause of corruption is gift giving which has become a habit. In line with this opinion, Umi Kulsum argues that corruption in Indonesia is an act that is rooted in various aspects of human life, so it seems as if it is considered a culture.

As a crime, corruption is essentially the result of a learning process, according to Sutherland through his well-known theory, namely the differential association theory which emphasizes that a crime (including corruption or in the language of white collar crime) is an acquired crime. by knowing, by nine propositions. . First, criminal behavior is learned. Negatively, this means that criminal behavior is not inherited. (Criminal behavior is negatively informed behavior meaning it is not inherited). Second, criminal behavior is learned in interactions with other people in the communication process. This communication is in many ways verbal but also includes "signal communication". (behavior observed in interactions with others in the communication process. Such communication can mainly be done verbally or using sign language). Third,
Negatively, this means that the agents of interpersonal communication, such as movies, and newspapers, play a relatively insignificant role in the origins of criminal behavior. (The most important part of the criminal behavior process takes place within intimate personal groups. Negatively, this means that communication is impersonal, and relatively unimportant in crime cases).

Fourth, when criminal behavior is learned, the learning includes (a) the techniques of committing the crime, which is sometimes very complex, sometimes very simple. (B) the specific direction of motives, drives, rationalizations, and attitudes. (The behavioral entity that investigates what is pursued includes (a) techniques of committing a crime, (b) certain motives, actions, and justifications including attitudes). Fifth, the specific directions of motives and drives are studied from the definition of the legal code as favorable to unfavorable.

In some societies, a person is surrounded by people who always define a code of law as rules that must be obeyed, while in other societies he is surrounded by people whose definition supports violating the code of law. (The direction of motives and intelligence is known through the definition of rules. In society, sometimes people see what is regulated in the rules of law as something that needs to be considered and obeyed, but sometimes it is people) who see the rules of law as something that allows threatening crime).

Sixth, a person becomes delinquent because of the excess of the favorable definition of lawlessness over the unfavorable definition of lawlessness. (a person becomes naughty because of access to a mindset that sees the rule of law as an opportunity to commit crimes that sees law as something that must be considered and obeyed).

Seventh, Differential Associations may vary in frequency, duration, priority, and intensity. (Differential Associations vary in frequency, duration, priority, and insensitivity).

Eighth, the process of learning criminal behavior related to criminal and anti-criminal patterns includes all the mechanisms involved in other learning. (the process of crime committed by crime is obtained through the relationship with crime and anti-crime patterns based on all that usually occurs in each learning process in general). Ninth, while criminal behavior is an expression of general needs and values, it is not explained by these general needs and values because non-criminal behavior is an expression of the same needs and values. (While criminal behavior is an expression of general needs and values, it is not expressed by those general needs and values, because behavior that is not a crime is also an expression of the same needs and values) (Hadisuprapto, 2008).
To ward off corruption as a crime that endangers people's lives, a cultural change (social engineering) or a social engineering tool is needed, however, cultural change is a very big change and not an easy job, even according to Satjipto Rahardjo (2009) these changes require study and study. thorough. However, These changes can also be made through amendments or rearrangement of the criminal law system which regulates criminal acts of corruption, which are expected to influence the attitude of the Indonesian people without exception.

Changing the culture through legal regulation by Soerjono Soekanto is called social engineering or social planning, namely ways to influence society with an orderly and planned system. Social engineering is closely related to the function of law, namely certainty and law enforcement. According to D. Schaffmeister (1995), the law has a creative function if legal norms deviate from social norms and thus humans will behave differently from before. To create social change through structuring the legal system, good social engineering is needed, where the law to be used must reflect the protection of the public interest. As an illustration, according to Andi Hamzah, in Australia, the formulation of corruption offenses focuses more on the public interest, so the public always comes first and wins. For this reason, efforts are needed through a penal policy. (Hamza, 2005)

Apart from being adapted to the situation and conditions in Indonesia, this conception is also linked to Northrop's cultural philosophy and the policy-oriented views of Laswell and McDougal. The law that is used as a means of renewal can be in the form of law or jurisprudence or a combination of both, as previously stated, in Indonesia the most prominent is legislation, jurisprudence also plays a role but not much. The results of the writings of Lili Rasjidi and Thania Rasjidi (2002) conclude that for the implementation of laws and regulations aimed at renewal to work as they should, the laws and regulations formed must be following what is at the heart of the thinking of the sociological school of jurisprudence, namely good law must comply with with the laws that live in society. Because if not, as a result, these provisions will not be implemented and will face challenges. Some examples of laws that function as a means of renewal in the sense of changing the mental attitude of traditional society towards modern ones, for example, the prohibition on the use of koteka in Irian Jaya, the obligation to issue land certificates, and so on.

In this case, with the function of law as a means of community renewal, it can also be interpreted that law is used as a tool by agents of change who are pioneers of change, namely a person or group of people who gain public trust as leaders of one or more social institutions. These pioneers emphasized social system change, influencing society with a pre-planned system called social engineering or planning or as a social engineering tool. (Dirksen, 2009)

Law as a social engineering tool can also be interpreted as a means aimed at changing the behavior of citizens, by predetermined goals. One of the problems faced in this field is when there is what Gunnar Myrdal calls soft development, namely when certain laws that are formed and implemented are found to be ineffective. Symptoms like that will appear if certain factors become obstacles. These factors can come from legislators, law enforcers, justice seekers, or other groups in society. It is these factors that must be identified because weaknesses occur when only goals are formulated without considering how to achieve these goals. (Soekanto, 2009)

If the law is the means chosen to achieve that goal, then the process does not only stop at selecting law as a means, but a strong knowledge of the nature of law also needs to be known to know the limitations in using law as a

means. to change or regulate the behavior of citizens. Because existing means limit the achievement of goals, while goals determine which means are appropriate to use.

According to Raharjo, Law in today's modern society has a prominent feature, namely its use has been carried out consciously by the community. Here the law is not only used to strengthen existing patterns of habits and behavior in society, but also to direct it to the desired goal, eliminate habits that are deemed no longer appropriate, create new patterns of behavior, and so on. This is what is called the modern view of the law which leads to the use of law as an instrument, namely law as a social engineering tool.

This conscious use, namely the use of law as a tool to change society or as a tool to renew society, can also be referred to as social engineering by law. The steps taken in social engineering are systematic, starting from identifying the problem to how to solve it, namely first, getting to know the problem at hand as well as possible. This includes carefully identifying the people one wants to target for cultivation. Second, understanding the values that exist in society, is important in terms of social engineering that will be applied to society with various sectors of life, such as traditional, modern, and planning. At this stage, it is determined which sector value is selected. Third, make a hypothesis and choose which one is most feasible to implement. Fourth, The relation with existing legal products in Indonesia is how these legal products can integrate with people's lives, or how the law continues to show its superiority in society as a tool to change society, but this law also does not bring misery to society. Quoting Satjipto Raharjo's opinion, the application of existing law in society does not have to look at the legal product, but how a product can be interpreted and practiced as much as possible by the needs of society to achieve justice.

From the opinions above, both Pound and Satjipto think that the purpose of law formation must be studied to achieve the maximum limit of fulfilling human needs. Therefore, in the formation of a legal product, it must be overhauled by establishing another basic framework that takes into account the wider recognition of the needs, demands, and interests of the community.

Law as an institution that works in society has at least 3 (three) perspectives from its function (legal function) as according to AG Peters in Ronny Hanitijo Soemitro (1998), namely: First, as social control over the law which is one of the most common concepts most widely used in the social sciences (Peters, 1998). In this perspective, the main function of a legal system is integrative because it is intended to regulate and maintain social regulations in a social system. Therefore, Berger said, that no society can live forever without social control from the law as a means (Berger, 1992). Furthermore, according to Parsons, for the law to carry out its control function, he stated that there are 4 (four) functional prerequisites for a legal system, namely the basic issue of legitimacy, which concerns the ideology that forms the basis for law. structuring the rule of law; the issue of the rights and obligations of the community which is the target of the legal process of laws and regulations; the problem of sanctions and institutions that apply these sanctions; and the issue of enforcement authority of the rule of law (Campbell, 1994). The second is social engineering which is the legal perspective that is most widely used in reviews to explore what sources of power can be mobilized by using law as the mechanism. Following the views of proponents of the perspective of social engineering by law, Satjipto Rahardjo (1977) stated that there are 4 (four) basic conditions that must be met for a rule of law to be able to direct society, namely by having a good picture of the situation at hand; assessment analysis and determine the level of value; hypothesis verification; and measuring the effectiveness of applicable law.

The three perspectives of community emancipation towards law. This perspective is a legal view from the bottom up, law in this perspective includes objects of study such as legal capacity, legal awareness, law enforcement, and so on.

The problem of law enforcement is a problem faced by every society. Although each community has its characteristics, it can provide its pattern of problems within the framework of law enforcement. However, every society has the same goal, to achieve peace in society as a result of formal law enforcement.

The main task of law is social engineering (law as a tool of social engineering, Roscoe Pound). The law is not only formed based on the interests of society but must also be enforced in such a way by legal experts as an effort to control society in a broad sense whose implementation is oriented towards the desired changes.

Therefore, heavily influenced by non-legal components, law enforcers in carrying out their main legal duties must correctly understand the logic, history, customs, customs, correct code of conduct so that justice can be upheld. Fair legal decisions can be used as a means to build society. The main task is a means of renewal of society in development.

Legal life as social control lies in the practice of implementing or applying the law. The judge's task in applying the law is not only understood as an effort to formal social control in resolving conflicts but at the same time designing the application of the law as a social engineering effort. The judicial task of judges is no longer understood as merely applying the law to concrete events (in the form of various cases and conflicts) or merely as a mouthpiece for law (buncha de la loi) but also as a driving force for social engineering. Law administrators must pay attention to the functional aspects of law, namely to achieve change, by making changes to the law, always using all kinds of interpretation techniques (functional law theory).

"Law is a tool of social engineering" is what Roscoe Pound says about law. As Mochtar Kusumaatmadja said, the law is the overall principles and rules that govern society, including the institutions and processes to realize that law. These two jurists have the same views on the law.

The interests of the state must be the highest/highest because the state has national interests. National interests must protect the interests of the state, the will of the state is the will of the people. Because the law is not as stated by positivist theories, the law is closed. Law is heavily influenced by ideology, politics, economy, society, and culture. It's not just the government's wish. Logic is open, and the development of community needs greatly influences the growth of law in society. Politics greatly influences the growth of law in society.

One of the problems faced is finding a law enforcement system and implementation that can properly realize legal functions such as the social control function, the dispute resolution function, the integration function, the facilitation function, the function of Updates, welfare functions, and others. At present, the difference in the function of law is often an element that encourages differences regarding the purpose of applying the law. Some place more emphasis on the function of social control, the function of change, and so on. If each party demands according to their wishes, what arises is a legal issue, not a legal settlement. It even creates conflicts that connote blaming each other, accusing each other, and so on. The main function of law is to protect the interests that exist in society. As discussed in the previous topic in the context of interests according to Roscoe Pound. The details of each of these interests are not an absolute list but change according to the development of society.

4. Conclusion

The criminal policy that has been implemented by the government through various laws does not eliminate the unlawful nature of corruption even though there is the restitution of state financial losses by the defendant. This return is because Article 4 of the PTPK Law states that returning state financial losses is only one of the reasons to alleviate punishment and does not abolish punishment for perpetrators who violate the provisions of Article 2 and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes. Even though many corruptors have been charged with Law Number 31 of 1999 concerning the Eradication of Corruption Crimes and sentenced to prison terms because they have proven to be detrimental to state finances, in practice,

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The Legal Approach to Drug Trafficking with a Follow-the-Money Approach

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Abstract
Generally, money laundering is carried out in the banking sector. The form is that the perpetrators of criminal acts try to hide or disguise the origin of assets that are the result of criminal acts in various ways so that the assets resulting from crime are difficult to trace by law enforcement officials so that they freely utilize these assets for both legal and illegal activities. Money laundering activities almost always involve banks because of the globalization of banks so that through the payment system, especially those that are electronic (electronic funds transfer), the proceeds of crime that are generally large amounts will flow or even move beyond national borders by utilizing the bank's confidential factors that are generally upheld high by banking. In this study, an example of a case that has permanent legal force will be raised, namely: Medan District Court Decision No. 1738/Pid.Sus/2016/PN.Mdn., Dated 28 June 2016 An. Defendant Abdul Jalil; and Decision of the Medan District Court No. 1995/Pid.Sus/2017/PN.Mdn., Dated November 1, 2017, An. Defendant Mursalin Alias Salim. North Sumatra Police investigators conduct a financial analysis of the accounts concerned. It turned out that a significant flow of funds was found in Abdul Jalil from a suspect named Mursalin Alias Salim. Efforts to strengthen the legal framework in the field of investigating money laundering are one of the efforts to prevent Indonesia from re-entering the NCCT's list issued by FATF. Investigation of money laundering by using the follow-the-money method is expected to increase the disclosure of cases of money laundering crimes that occur in Indonesia, especially regarding narcotics criminal action.

Keywords: Law Enforcement, Illicit Narcotics Circulation, Follow-the-Money Approach

1. Introduction

1.1. Background

Money laundering or the Crime of Money Laundering ("TPPU") is generally known as a follow-up crime. A follow-up crime is a crime that occurs after the predicate crime has occurred (Supandji, 2009: 3). In this study specifically discusses the crime of illicit traffic of Narcotics. The trade-in of Narcotics and illegal drugs (hereinafter referred to as Narcotics) in the world in one year reaches more than US$. 400 billion or almost equivalent to Rp. 4,000.- trillion. This means that drug transactions every day are more than Rp. 1 trillion (World Development Report, 2011: 62). The United Nations (UN) and the International Narcotics Agency estimate that around 4% of

the world's population currently uses drugs (Majalah Sinar BNN, January 2014: 6). Drugs such as heroin, morphine, and cocaine come from countries that are often called the Golden Crescent, namely: Iran, Pakistan, and Afghanistan, and the countries of the Golden Triangle, such as Burma, Thailand, Laos whose circulation passes through Hong Kong (BNN-RI, 2009: 8). Distribution channels for psychotropics such as methamphetamine, the raw material for ecstasy and other illegal drugs, originate from China which is then distributed to the Netherlands and Australia (Jehani & Antoro, et al., 2006: 25).

Globalization makes the illegal drug trade smoother because state border checks are not carried out regularly and are less effective, and in every conflict area there are many arms trade transactions in exchange for drugs (Batara G., & Sukadis (Ed.), 2007: 15). Many countries make drugs a source of income for farmers and residents, such as cocaine in South America, opium in Afghanistan, and mountainous regions in Central Asia and countries in the golden triangle region (Majalah Tempo, Tuesday, April 16th, 2013).

Based on information from the National Narcotics Agency (BNN), illegal narcotics traffic routes to Indonesia originate from 3 (three) places called the Golden Triangle, namely: Thailand, Laos, and Myanmar, these countries are detected to have plantations of opium since ancient times. Other opium suppliers recorded from BNN data are Iran, Pakistan, and Afghanistan whose production reaches 4,000 tons per year. While domestically, cannabis from Aceh, which is known to be of the best quality, is widely circulated. The illegal goods eventually entered Bali by land route to Lampung to be brought to Jakarta and were quite varied. The perpetrators brought them either by land route (buses, railways), sea routes via yachts (small cruise ships), and also air routes. (BNN-RI, http://www.bnn.or.id., accessed Monday, August 13th, 2018).

The modus operandi for the spread of illegal drugs in Indonesia is mostly through international tourism areas. The cargo business in tourist areas is often exploited by international cartel networks. Drug dealers who come from other than Indonesia choose Bali Island, to avoid the tight security in the Caribbean Sea, the Gulf of Mexico, or the Gulf of Panama. Dealers are willing to travel long distances just to avoid areas that have a higher level of customs control. Bali is also a transit area for drug shipments from Thailand to Europe due to tight supervision in Europe for imported goods from Thailand. The impact is that many high-profile international dealers are caught in Bali. According to data from the Bali High Court in Denpasar, this island has become a haven for drug dealers. For example, drug kingpin Kid Mikie, a fugitive from the United States Drug Enforcement Administration (DEA) for drug smuggling in the Golden Triangle area (Tobing, 2002: 83).

According to Andrew Haynes, said that: "*The simple reason for this new paradigm is that eliminating the passion and motivation of criminals to commit crimes, can be done by blocking them from enjoying the results or fruits of their crimes*". Thus, the birth of the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988 (Vienna Convention 1988), is seen as a milestone and the culmination of the attention of the international community to establish an "*International Anti-Money Laundering Legal Regime*". In essence, this regime was established to combat drug trafficking and encourage all ratifying countries to immediately criminalize money laundering activities. In addition, the 1988 Vienna Convention also seeks to regulate infrastructure covering issues of international relations, establishing agreed norms, regulations, and procedures within the framework of regulating anti-money laundering provisions (Haynes *in*. Husein, 2004: 2).

Money Laundering not only threatens economic stability and the integrity of the financial system but also endangers the foundations of social, national, and state life based on Pancasila and the 1945 Constitution (Section Considering the letter a. Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes). Money laundering is done to disguise the proceeds of crime (Reuter & Truman, 2004: 1-8). In this case, it will be raised about criminal acts of narcotics and illegal drugs. Drug crimes that are disguised are the money from the sale so that they are considered halal and legal. The drugs that are in circulation will be sold to the user after they are sold, then the money obtained will be made into an attempt or whatever form it takes to legalize the money so that the money from selling the drugs is obscure, that's why it is called money laundering (Nurhadiyanto, 2010: 161).

The crime of illicit drug trafficking has long been believed to have a close connection with the money laundering process. The history of the development of the typology of money laundering shows that the drug trade is the most dominant source and the main predicate crime that gives rise to money laundering crimes. Organized crime always uses money laundering methods to hide, disguise, or obscure illicit business results to appear as if they were the results of legitimate activities. Furthermore, the money from buying and selling drugs that have been laundered is used again to commit similar crimes or develop new crimes (Husein, 2004: 1).

The absence of an adequate anti-money laundering regime in Indonesia has resulted in Indonesia being included in the list of non-cooperative countries in preventing and eradicating money laundering (Non-Cooperative Countries and Territories - NCCTs) by the Financial Action Task Force (FATF) on Money Laundering since June 2001. Indonesia's inclusion in the NCCT list has had negative consequences both economically and politically. Economically, being included in the NCCT's list results in high costs being borne by the Indonesian financial industry, especially national banking when conducting transactions with partners abroad (high-risk premium). This cost is of course an additional burden on the economy which in turn can reduce the competitiveness of Ineonsia's products abroad. Meanwhile, politically, Indonesia's entry into the NCCT's list can disrupt Indonesia's association in the international arena (Nasution, 2008: 22-23).

Serious steps were then taken by the Indonesian government, namely the promulgation of Law No. 15 of 2002 which explicitly states that money laundering is a crime, and orders the disclosure of the Financial Transaction Reports and Analysis Center (PPAT) as the focal point for implementing the law. However, the FATF considered this law to be inadequate because it had not fully adopted the 40 recommendations and 8 special recommendations they issued. The FATF formally requested that the law be corrected and finalized. Finally, efforts to improve and perfect the law can be completed with the promulgation of Law No. 25 of 2003 concerning Amendments to Law No. 15 of 2002 concerning the Crime of Money Laundering on October 13, 2003 (Nasution, 2008: 23-24).

By making amendments to this law, Indonesia will not be immediately removed from the NCCT list because the FATF still sees the proposed implementation plan and the effectiveness of its implementation is not yet sufficient. The last time the FATF required that there be 3 main points for Indonesia to be removed from the black list (NCCTs), namely: "*Conducting compliance audits of financial service providers; Mutual legal assistance cooperation; and There is a money laundering case decided by the court*" (Nasution, 2008: 24). Meanwhile, the FATF recently issued a special recommendation (special recommendation) regarding bringing cash into or out of a country's territory (cash courier) (Nasution, 2008).

The Presence of Law No. 15 of 2002 concerning the Crime of Money Laundering as amended by Law No. 25 of 2003 concerning the Crime of Money Laundering is Indonesia's effort to respond to the FATF Decision dated 22 June 2001. The FATF decision included Indonesia as one of the 15 (fifteen) countries deemed uncooperative in eradicating money laundering practices. In other words, Indonesia is considered to be included in the list of countries that are not cooperative (Non-Cooperative Countries and Regions) to eradicate money laundering, as contained in the list released by the FATF which is a task force from the Organization for Economic Cooperation and Development (OECD) (Nasution, 2007: 2).

The passage of time proves that these steps are a continuous effort that never ends. Efforts made over a period of 4 (four) years from 2001 to 2005, is not a short time for a struggle. This struggle is further exacerbated by the additional recommendations issued by the FATF after each face-to-face meeting with the Government of Indonesia. Of course, good cooperation and coordination between related agencies and every element involved in building the anti-money laundering regime also contributed greatly to the success of Indonesia's exit from the NCCT's list (Husein, 2005: 9-10).

The removal of Indonesia from the NCCT's list by the FATF in February 2005 was not the end of everything, but rather a starting point for a new journey towards the development of a better anti-money laundering regime. Very good cooperation between related agencies and full support from all components of Indonesian society is needed during the monitoring period set by the FATF to prevent Indonesia from being re-entered into the NCCT's list (Husein, 2005: 10).

In overcoming the various weaknesses (shortcomings) as stated by the FATF, the Government of Indonesia has again taken various steps and efforts to prevent and eradicate money laundering crimes. These steps and efforts include aspects of strengthening the legal framework, increasing supervision in the financial sector, operationalizing PPATK, and strengthening cooperation between domestic and international institutions (Husein, 2005: 13-14).

The protection of the legal framework is in terms of law enforcement on money laundering crimes. Meanwhile, increasing supervision in the financial sector is by applying the Know Your Customer (KYC) principle to the financial services sector (Husein, 2005: 13-14). One way to strengthen law enforcement is to enact Law No. 8 of 2010 concerning the Eradication and Prevention of Money Laundering Crimes. This law provides an opportunity for the legal detention of intellectual actors with investigative pressure on the flow of money generated and also provides a basis for law enforcement officials to ensnare intellectual actors who are recorded and hide crimes that are included in the predicate of crime by carrying out investigations and investigations. to the proceeds of crime money flows (Nasution, 2007: 2).

In general, money laundering is carried out in the banking sector. The form is that the perpetrators of criminal acts try to hide or disguise the origin of assets that are the result of criminal acts in various ways so that the assets resulting from crimes are difficult to trace by law enforcement officials so that they can freely utilize these assets both for legal and illegal activities. Money laundering activities almost always involve banks due to the globalization of banking so that through payment systems, especially those that are electronic in nature (electronic funds transfer), the proceeds of crime which are generally in large quantities will flow or even move across national borders by utilizing bank secrecy factors which are generally upheld. high by banks (Hafizi, 2011).

The Financial Transaction Reports and Analysis Center (PPATK) is an intelligence agency in the financial sector, better known internationally by its generic name, namely the Financial Intelligence Unit (FIU). In the anti-money laundering regime in Indonesia, PPATK is an important element because it is the national focal point in efforts to prevent and eradicate criminal acts of money laundering and financing terrorism. PPATK was born after the issuance of Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes.

PPATK has the task of preventing and eradicating money laundering crimes, with the function of preventing and eradicating money laundering crimes; management of data and information obtained; supervision of the Compliance of the Reporting Party; and analysis or examination of financial transaction reports and information indicating money laundering and/or other criminal acts (*see*. Article 40 of the Anti Money Laundering Law).

In carrying out the function of preventing and eradicating money laundering, PPATK has the authority to request and obtain data and information from government agencies and/or private institutions that have the authority to manage data and information, including from government agencies and/or private institutions that receive reports from certain professions; establish guidelines for identifying Suspicious Financial Transactions; coordinate efforts to prevent money laundering crimes with related agencies; provide recommendations to the government regarding efforts to prevent money laundering; represent the Government of the Republic of Indonesia in international organizations and forums related to the prevention and eradication of money laundering; organize anti-money laundering education and training programs; and organize socialization on the prevention and eradication of money laundering crimes (*see*. Article 41 paragraph (1) Anti Money Laundering Law).

As for the results of the analysis and examination results compiled as an initiative of the PPATK in the framework of carrying out its duties in preventing and eradicating money laundering, with narcotics predicate crimes, among others against the suspects "JT" and "FIN." The mode of action is by sending money abroad with funds suspected of originating from narcotics crimes committed through intermediary accounts of private parties within the country. The transaction value allegedly originating from the crime amounted to Rp. 3.6 trillion for each suspect (Indonesian Financial Transaction Reports and Analysis Center (INTRAC), http://www.ppatk.go.id/backend/assets/uploads/20171219165527.pdf., accessed Monday, August 13th, 2018).

In this study, examples of cases that have permanent legal force will be raised, namely: Medan District Court Decision No. 1738/Pid.Sus/2016/PN.Mdn., dated 28 June 2016 An. The accused Abdul Jalil; and Medan District Court Decision No. 1995/Pid.Sus/2017/PN.Mdn., dated 01 November 2017 An. The accused Mursalin Alias Salim.

During the first case of An. Abdul Jalil carried out an investigation and investigation into narcotics crimes at the North Sumatra Regional Police, the investigative technique carried out was used the follow-the-money approach. Investigators from the North Sumatra Regional Police conducted a financial analysis of the accounts in question. The results of a financial analysis of the account found sizable flows of funds to Abdul Jalil from a suspect named Mursalin Alias Salim. The fund transaction is in the form of a fund transfer. After discovering the transfer of funds, then questioned suspect An. Abdul Jalil for what to transfer funds. As is known, it turned out that the suspect An. Mursalin Alias Salim is a narcotics dealer, so this is the basis for North Sumatra Police investigators to return to uncover the crime of illicit drug trafficking against suspect An. Abdul Jalil.

Efforts to strengthen the legal framework in the field of money laundering investigations are one of the efforts to prevent Indonesia from being included in the NCCT's list issued by the FATF. Investigations into money laundering crimes using the follow-the-money method are expected to increase the disclosure of money laundering cases that occurred in Indonesia, particularly regarding narcotics crimes.

Based on the case examples above, there is a pattern established by law enforcement, namely the follow-the-money approach. This approach in law enforcement is that when someone suspected of committing a narcotics crime is arrested, then an analysis of the transactions in his savings account is carried out to pursue other perpetrators. This is the reason for conducting a study entitled: “The legal approach to drug trafficking with a follow-the-money approach.”

1.2. Problems

The problems that arise in this study can be formulated as follows:

1. How is law enforcement against the illicit traffic of narcotics through the follow-the-money approach?
2. What are the obstacles faced by investigators in enforcing the law on narcotics crimes through the follow-the-money approach?

1.3. Purposes

The purpose of this research is as follows:

1. To study and analyze law enforcement against the illicit traffic of narcotics through the follow-the-money approach.
2. To examine and analyze the obstacles faced by investigators in enforcing the law on narcotics crimes through the follow-the-money approach.

2. Research Methods

This research is normative legal research (Soekanto, S., 2001: 6). The nature of the research is descriptive analysis (Marzuki, P.M., 2007: 93-95). The type of data used is secondary data sourced from primary, secondary, and tertiary legal materials (Fajar, M., & Achmad, Y., 2015: 156). Secondary data was collected using literature study techniques (“*library research*”) (Zed, M., 2008: 1). Furthermore, these data were analyzed using qualitative analysis methods (Bungin, B., 2009: 153).

3. Result and Discussion

3.1. Theory of Evidence

In Indonesia, the criminalization of money laundering has been going on for a long time. This can be seen by looking at the efforts to deal with money laundering in Indonesia, which began with the enactment of Law No. 15 of 2002 concerning the Crime of Money Laundering as amended by Law No. 25 of 2003 concerning Amendment to Law 15 of 2002 concerning the Crime of Money Laundering, which was also amended by a new law, namely Law No. 8 of 2010 concerning the Eradication and Prevention of Money Laundering Crimes (Anti Money Laundering Law).

Provisions regarding evidence in the Anti Money Laundering Law have regulated specific provisions regarding provisions for evidence carried out during examination at trial. The proving provisions are regulated in Articles 77 and 78 of the Anti Money Laundering Law, namely regarding reversed proving provisions.

The provision for reverse proof regulated in Article 77 Anti Money Laundering Law, states as follows: "*For examination at a court hearing, the Defendant is obliged to prove that his assets are not the proceeds of a crime*".

Furthermore, the provisions in Article 78 Anti Money Laundering Law are as follows: *1)* "*In the examination at the trial court as referred to in Article 77, the Judge orders the Defendant to prove that the assets related to the case do not originate or are related to the crime referred to in Article 2 paragraph (1); 2) The Defendant proves that the assets related to the case do not originate from or are related to the crime referred to in Article 2 paragraph (1) by submitting sufficient evidence*".

From the provisions above, efforts to prove the criminal act of money laundering committed by the perpetrator become easier. This convenience is because the burden of proof in the trial is on the defendant. This is the reason that reverse proof will be more effective in proving that the defendant is guilty or not. Likewise in proving investigations using the follow-the-money approach, law enforcement officers can apply reverse proof.

According to R. Soesilo, there are 4 kinds of proof systems or theories, namely:

1. "Positive Legal Proof System;
   According to this system, whether or not the number of pieces of evidence has been determined by law is wrong or not. According to this regulation, the judge's job is solely to check whether the amount of evidence that has been stipulated in the law already exists, if he does not need to ask what is in his heart (is he sure or not), the suspect must be declared guilty and sentenced. In this system, the judge's belief does not take part at all, but the law, which rules here.
2. System of Proof According to Negative Laws;
   According to this system, a judge can only sentence a sentence, if at least the number of evidence that has been determined is that the law exists, coupled with the judge's belief in the guilt of the defendant in the criminal incident he was accused of. Even though the evidence is complete, if the judge is not sure about the guilt of the defendant, then he must be acquitted. In this system, it is not the law that is in power, but the judge and that power are limited by law.
3. Free Proof System;
   According to this system, the law does not stipulate rules such as a system of evidence that must be obeyed by judges. This system also assumes or recognizes the existence of certain pieces of evidence, but these pieces of evidence are not stipulated in law, such as the system of evidence according to law. -positive law and negative statutory evidentiary system. In determining the types and amount of evidence deemed sufficient to determine guilt, the judge has complete discretion. It is free to turn on. The binding rule is that in his decision he must also mention the reasons.
4. A system of proof solely based on belief.
   According to this system, the judge is not bound by any particular evidence. He decides that the guilt of the accused is solely based on his convictions. In this case, the judge has complete freedom without being controlled at all. Of course, there are always reasons based on logical thinking, which result in a judge having an opinion about whether a situation is proven or not. The problem is that in this system the judge is not required to state the reasons and if the judge mentions the evidence he uses, then the judge can use any evidence. The existence of this system is that it contains too much reliance on the mere personal impressions of a judge. Supervision of judge decisions like this is difficult to

> do because the supervisory body cannot know the judge's considerations, which directs the judge's opinion towards the decision (Soesilo, R., 1985: 6-8).

After discussing the theories of proof in criminal procedural law, the question arises as to what system is currently used in Indonesia. Article 183 of the Criminal Procedure Code, stipulates: "*A judge may not impose a sentence on a person unless, with at least two valid pieces of evidence, he obtains conviction that a crime has occurred and that the defendant is guilty of committing it*".

Based on Article 183 of the Criminal Procedure Code, the criminal procedural law in Indonesia uses a system of evidence according to negative laws. Therefore, the proof system adopted is the "*negatief wettelijk stelsel*" proof system. The Wettelijk Stelsel negative proof system must: The error be proven by at least "two valid pieces of evidence"; and With the legal minimum evidence, the judge obtains confidence that a crime has occurred and the defendant is the perpetrator.

Regarding the evidentiary law regarding the handling of money laundering crimes, the Anti Money Laundering Law regulates the type and strength of evidence more broadly than the formulation contained in the Criminal Procedure Code. In the Anti Money Laundering Law, in addition to the evidence listed in Article 184 of the Criminal Procedure Code, it is also supplemented with other evidence as stipulated in Article 73 of the Anti Money Laundering Law, that valid evidence in proving money laundering is: 1) Evidence as referred to in the Criminal Procedure Code, namely: a. Witness Statement; b. Expert Statement; c. Letter; d. Instruction; e. Statement of the Defendant; and 2) Other evidence in the form of information spoken, sent, received, or stored electronically with optical devices or devices similar to optics and documents. Article 1 number 16 of the Anti Money Laundering Law, stipulates that Documents are data, recordings, or information that can be seen, read, and/or heard, which can be issued with or without the help of some means, either written on paper or any physical object other than paper or recorded electronically, including but not limited to a. writing, sound, or image; b. maps, plans, photographs, or the like; and c. letters, signs, numbers, symbols, or perforations that have meaning or can be understood by people who can read or understand them.

The use of the Anti Money Laundering Law is very urgent to effectively prove narcotics crimes. Moreover, law enforcers in Indonesia, be it the Police or the Attorney General's Office, are still being educated, raised, and practicing the old paradigm in evidence. Law enforcers in Indonesia still adhere to the follow-the-suspect paradigm. That is, to prove a narcotics crime, law enforcers rely more on the testimony of the perpetrator or other people who know it, where the most important thing is the witness. But this approach is not sufficient enough to prove the growing narcotics cases. Narcotics offenders who understand financial market instruments understand how banks work and know various investment products, it will be easy for them to cover up traces of the proceeds of narcotics crimes. By laundering the money, the crimes he committed will not be exposed.

3.2. Law Enforcement Theory

In general, law enforcement can be interpreted as an act of applying certain legal means to impose legal sanctions to guarantee the arrangement of the stipulated provisions, whereas according to Satjipto Rahardjo, that: "*Law enforcement is a process for realizing legal desires (namely the thoughts of the legislature formulated in legal regulations) to become a reality*" (Rahardjo, S., 1983: 24).

Conceptually, the essence and meaning of law enforcement lie in the activity of harmonizing the relationships of values that are translated into good principles embodied in a series of values to create, maintain and maintain social peace. Furthermore, he said the success of law enforcement may be influenced by several factors that have a neutral meaning so the negative or positive impact lies in the content of these factors. These factors are closely related to each other and are the essence and benchmark of the effectiveness of law enforcement. These factors, among others: "*Laws; Law enforcers, namely parties who form or apply the law; Facilities or facilities that support law enforcement; Society, namely where the law is applied; and cultural factors, namely as a result of work, creativity, and taste based on the human initiative in social life*" (Soekanto, S., 2005: 5).

The use of law enforcement theory is to measure the effectiveness of using the follow-the-money approach in law enforcement against illicit narcotics trafficking, by using legal elements (laws), law enforcers, facilities and infrastructure, society, and the culture that develops in society.

Money laundering investigations always begin with financial intelligence. It could be an in-depth analysis of a transaction prepared by the Financial Intelligence Unit (FIU) or simple information from the police. It is this identification, discovery, and analysis that ultimately forms the basis for a money laundering investigation. Usually, the FIU does not conduct investigations, they collect and analyze information that is passed on to law enforcement agencies who have the power and responsibility for concealing criminal acts (Broome, J., 2005: 375).

For money laundering investigations, James R. Richards put forward 4 basic stages in the investigation process, namely as follows: (Richards, J.R., 1999: 208-211)

1. Identification of Unlawful Activities

Most of the local money laundering investigations started as a result of investigations into illegal activities, such as drugs, gambling, smuggling, and others. Investigators need to ensure that unlawful activity is one of the special types defined as "unlawful activity" which gives rise to a case of money laundering and/or a case of misuse; known money laundering, confiscation, and laws requiring bank reporting. To prove a money laundering crime, the target must be involved in a financial transaction using funds from an “unlawful activity” (Richards, J.R., 1999: 208-211).

2. Identify and Track Financial Transactions

Identifying and tracking financial transactions is the “showing the money” part of an investigation. This stage is known in the world as following the money and following the suspect. As part of the final investigation, investigators must identify and trace the financial trail of the target's use:

a. “Documents confiscated during the search: looking for proof of receipt of money changers, broker reports (usually the target will only retain an envelope containing the broker's return address, which is sufficient information to initiate an investigation into accounts that can be held by the target), receipt of wire transfers), receipt of money postal orders, safety deposit box records, car records, credit card statements (overpaying credit cards provides quick access to target cash), casino membership cards, and documents related to travel agents (which are notorious for money laundering, the target of buying open return tickets, then selling those tickets later).
b. *Law enforcement databases: FinCEN's databases, accessed by state and local agencies through the FinCEN Gateway system, should be the starting point for all financial investigations.*
c. *Commercial databases: including credit and law bureau reports, or court proceedings (the latter can point to witnesses who have been sued or sued by the target, they can be a source of information about the target)”* (Richards, J.R., 1999: 208-211).

3. *Perform a Financial Analysis of the Target*

There are 2 (two) main financial investigation tools used to determine whether a target's spending habits reflect honesty. The former, known as “net worth analysis,” is generally used when the target has conspicuous assets, and “source and application of funds analysis” is generally used where the target has conspicuous spending habits (Richards, J.R., 1999: 208-211).

a. *Net Worth Analysis*

Net Worth Analysis is an investigative tool used to determine whether a target has acquired assets that are charging more than its income from “legitimate” sources to conclude whether it has income from “illegitimate” sources. This technique is useful when the target spending pattern reflects the acquisition and sale of tangible assets; where target spending habits are more temporary, such as maintaining a luxurious lifestyle, a “source and application of funds analysis” is more appropriate (Richards, J.R., 1999: 208-211).

b. Fund Application Source Analysis

Application of source of funds analysis is an investigative tool used to determine whether the target has acquired assets that are charging more than his income from "legitimate" sources to conclude whether he has income from "illegitimate" sources. This technique is useful when the target spending pattern is temporary (eg maintaining a luxurious lifestyle), where the target spending habits reflect the acquisition and disposal of tangible assets, a net worth analysis is more appropriate (Richards, J.R., 1999: 208-211).

4. *Freeze and Confiscate Asset*

The confiscation and confiscation of money laundering proceeds is beyond the scope of this discussion, but the key to success is time, as most money launderers do. In particular, those who act as intermediaries in the laundering cycle will collect funds over some time, then disband them at the end of that period. It would be futile to seize target businesses and bank accounts after large withdrawals have been made (Richards, J.R., 1999: 208-211).

In investigations and investigations of narcotics crimes, there are known follow-the-money and follow-the-suspect approaches. The follow-the-money approach has long been used in the United States and is also known as the anti-money laundering approach. This anti-money laundering approach was formally introduced by the United Nations in 1998 in the Vienna Convention, namely the Convention Against Illicit Traffic in Narcotics and Psychotropic Substances (Husein, Y., 2008: 62).

According to Djoko Sarwoko, argued that the follow-the-money approach is in the form of finding money/assets/other assets that can be used as evidence (objects of crime) and of course after going through financial transaction analysis and it can be suspected that the money is proceeds of crime, unlike the case with a conventional approach that focuses on finding the perpetrators directly after the initial evidence is found (Sarwoko, D., 2009: 1-2).

From the aspect of criminology, this thinking departs from the belief that the proceeds of crime are the "blood" that supports the crime itself (the lifeblood of the crime). Thus, if the "blood" of these crimes can be detected and seized by the state, the opportunity to reduce crime rates will be even higher (Indonesia Corruption Watch (ICW), http://www.antikorupsi.org/antikorupsi/?q=content/17834/waspadai-upayapenjegalan-ruu-pencucian-uang., accessed June 1st, 2023). The proceeds of crime are the blood that feeds the crime itself and at the same time are the weakest point in the chain of crime. Efforts to cut the chain of these crimes, apart from being relatively easy to do with the follow-the-money approach, will also eliminate the motivation of the perpetrators to repeat crimes because the purpose of the criminals to enjoy the proceeds of their crimes becomes hindered or difficult to do (Annual Report of the Financial Transaction Reports and Analysis Center (PPATK) 2010, 2011: 3).

In a book entitled The Land of the Money Launderers, Yunus Husein mentions several advantages of the follow-the-money approach, among others: (Husein, Y., 2008: 66)

a. "This approach has the priority to pursue the proceeds of crime, not the perpetrators of crime so that it can be carried out "quietly", more easily, and with less risk because it does not deal directly with perpetrators who often have the potential to put up a fight.
b. This approach pursues the proceeds of crime which will later be brought before the legal process and confiscated for the state because the perpetrators have no right to enjoy the assets obtained illegally. With the confiscation of the proceeds of this crime, the motivation for a person to commit a crime in search of the property is reduced or lost.
c. Property or money is the backbone of a criminal organization. Pursuing and confiscating assets resulting from crime will weaken them so that they do not endanger the public interest.
d. There are exceptions to bank secrecy provisions or other secrets from the reporting of transactions by Financial Service Providers (PJK) until further investigation by law enforcement. This will reveal the individuals or actors who are the masterminds of or receive money from money laundering crimes by looking at their financial conditions and financial transactions".

Investigations into money laundering crimes based on the Anti Money Laundering Law are based on Articles 68 to.d. Article 75. By using the follow-the-money technique, investigators usually compile the flows of funds to and from the target's account. Furthermore, wiretapping regarding discussions related to the flow of these funds,

whether it is payment or delivery of goods. Investigating these flows of funds requires a minimum of 6 (six) months. Then proceed with wiretapping, but it can also be done simultaneously. This very long time is because the financial analysis (financial analysis) that is carried out must be thorough, matching each account with other accounts.

Investigations into money laundering crimes using the follow-the-money approach are very effective without touching the perpetrators and without coming into direct contact with the perpetrators as the target of operations. This is useful to prevent officers from having physical contact with perpetrators of narcotics crimes who usually have multiple layers of protection, especially at the producer level.

3.3. Law Enforcement Analysis of Narcotics Illicit Trafficking Through Follow the Money Approach

The case file An. Abdul Jalil while at the investigative level by North Sumatra Police investigators had uncovered a network of illicit narcotics trafficking using the follow-the-money method. The follow-the-money approach will be able to reveal the perpetrators who receive the proceeds from selling narcotics by looking at their financial situation and financial transactions. In this case, suspect An. Mursalin alias Salim. With this approach, it can also reveal the mastermind behind the illicit trafficking of narcotics.

Based on the investigation and investigation of narcotics crimes using the follow-the-money approach to the perpetrators Abdul Jalil and Mursalin, a network scheme was found which can be seen in the chart below:

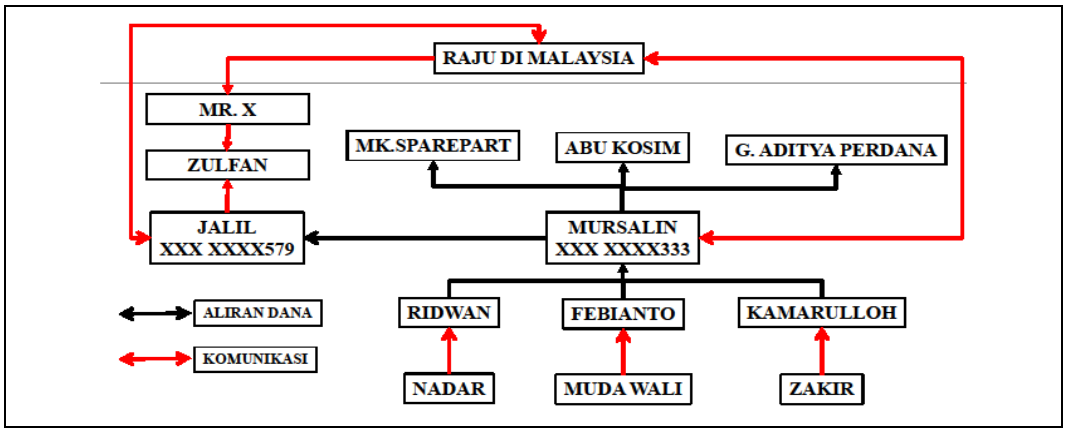

Chart 1: Network Scheme Revealed from Using Follow the Money Approach

Source: Processed Secondary Data

Based on this scheme, doubling the follow-money approach to reveal the Narcotics crime network, so investigators have evidence to attract other suspects. For example MK. Sparepart, Abu Kosim, and G. Aditya Perdana who received cash payments from Mursalin can be withdrawn as suspects.

The follow-the-money approach discusses financial flows being followed or traced to be used as evidence which is then confiscated. In handling narcotics crime cases, the follow-the-money approach can be used at the level of the investigation process where it is required to obtain many sources of information and find many facts or evidence so that the flow of funds can be traced. This is by Article 69 of the Anti Money Laundering Law, which states that: "*To be able to carry out investigations, prosecutions, and examinations in court proceedings against money laundering crimes, it is not obligatory to prove the origin of the crime first*."

From these provisions, it is reiterated that there is a strengthening of the follow-the-money approach where the target is not the original crime, but money. Thus, the investigation can formulate elements to find criminal acts. As part of the follow-the-money approach, the initial process starts with conducting investigations into suspected narcotics dealers by conducting an analysis of their financial transactions at the bank. This follow-the-money approach is used to prove that it is true that there are stages of money laundering. Because if money laundering

does not go through the stages of placement, layering, and integration, then it cannot be categorized as money laundering.

The flow of funds is the most important part and must be understood by investigators to ensure the truth of the facts to be used as legal evidence so that they can exercise their authority to detain people suspected of committing narcotics crimes. In essence, what underlies following the money is to go out into the field and get facts that are usually trusted and can be accounted for by looking at accounts suspected of narcotics crimes to direct how to prove the money came from narcotics crimes.

Thus, the follow-the-money approach in enforcing the law on illicit narcotics trafficking in Indonesia is part of the investigative process, namely gathering initial evidence and gathering facts (sufficient evidence) with a focus on targeting money or assets that are proceeds of crime. As stated by M. Yahya Harahap that the investigation has the aim of gathering initial evidence or sufficient evidence so that it can proceed at the investigation stage (Harahap, M.Y., 1988: 109). *Following the money is useful for helping to prove the existence of criminal acts of illicit drug trafficking related to buying and selling transactions, such as fund transfers, layering, and so on. After sufficient evidence is found, then proceed to the investigation stage by carrying out forced efforts.*

3.3.1. Advantages of the Follow the Money Approach

There are several advantages to the follow-the-money approach. First, the reach is farther, so it is felt to be fairer as seen in cases of narcotics crimes. Second, this plan prioritizes pursuing the proceeds of crime, not the perpetrators of crimes so that it can be carried out “quietly”, more easily, and with less risk because it does not deal directly with perpetrators who often have the potential to put up resistance. Third, this scheme pursues the proceeds of crime which will later be brought before the legal process and confiscated for the state because the perpetrators have no right to enjoy the assets obtained illegally.

With the confiscation of the proceeds of the crime, the motivation of people to commit crimes in search of property is reduced or lost. Fourth, wealth or money is the backbone of a criminal organization. Pursuing and confiscating assets resulting from crime will weaken them so that they do not endanger the public interest. Fifth, there are exceptions to bank secrecy provisions or other secrets from the reporting of transactions by Financial Service Providers until further investigation by law enforcement.

3.3.2. Weaknesses of the Follow the Money Approach

The Anti Money Laundering Law, which uses a criminal act approach, criminalizes money laundering, namely the act of hiding and disguising assets resulting from a crime so that it appears as if they are legitimate assets. There are several reasons for the weakness of the follow-the-money approach in eradicating crime. First, there is no common perception among law enforcers, for example between the police as investigators, the prosecutor's office as the public prosecutor, and the judges who try them.

Second, investigators of money laundering crimes still have limited human resources and expertise in carrying out financial investigations. Third, the public prosecutor (prosecutor), even though there are already guidelines for prosecuting cases using money laundering charges and predicate (cumulative) crimes, there is still a reluctance to apply them. The prosecutor prefers to use alternative or layered indictments with the first indictment of “narcotics crime” and the second indictment of “money laundering”. Fourth, the investigation time using the follow-the-money approach does not accommodate the detention period, where the investigation takes around 6 months, while the detention period is only 4 months at most.

Fifth, there is non-compliance by banking services to report suspicious financial transactions to PPATK. Sixth, PPATK after receiving a report on money laundering, conducting an analysis takes at least 3 months only for investigation. It's different for investigations.

The follow-the-money method is good because it is not supported by a legal umbrella, so the results also do not reflect law enforcement (*fiat justitia*) so it cannot be used as evidence because obtaining bank statements and wiretapping are done in ways that violate the law. If the follow-the-money approach is given a good legal umbrella, then the process of enforcing the law on narcotics crimes using the follow-the-money approach will also be good. Taking a follow-the-money approach will collide with laws and regulations, plus the authority of PPATK which has its authority to analyze suspicious financial transactions.

3.4. Obstacles Faced by Investigators in Upholding the Law of Narcotics Crimes Through the Follow The Money Approach

Law enforcement as a process, in essence, is the application of discretion which involves making decisions that are not strictly regulated by the rule of law, but have an element of personal judgment (Faal, M., 1991: 74). Based on this description, it can be said that disturbances in law enforcement may occur if there is an unequal "trinity" of values, rules, and patterns of behavior (Seokanto, S., 2005: 7).

Based on the research that has been done, answers to problems regarding the inhibiting factors of legal detention of narcotics crimes are obtained by using the criminal approach method carried out by the police, the Directorate of Narcotics of the North Sumatra Regional Police found various obstacles, as follows:

3.4.1. Barriers to Legal Substance (Standard Operating Procedure Regulations (S.O.P)

In terms of handling general criminal cases, apart from being regulated in the Criminal Procedure Code (KUHAP), the National Police also issued Regulation of the Chief of Police of the Republic of Indonesia No. 3 of 2014 concerning Standard Operational Procedures for Investigating Criminal Acts.

In contrast to the handling of narcotics criminal cases using the follow-the-money approach, the National Police have not issued Standard Operating Procedures (S.O.P) regarding Technical Instructions and Implementation Guidelines. The SOP needs to be made because not every investigator understands what must be done to use the follow-the-money technique in carrying out investigations and investigations.

As an example raised in this study, suspect An. Abdul Jalil, whose first case was only convicted as a person who knew about narcotics crimes but did not report them, was sentenced to 1 (one) year in prison. However, in the next case, An. It turned out that using the follow-the-money approach, it turned out that the suspect Mursalin alias Salim had a flow of funds to and from the suspect Abdul Jalil, so based on this, an investigation was carried out and an investigation into his narcotics crime. Finally, the case file in question was returned to the Medan District Court, but it had not yet entered the examination before the trial of defendant An. Abdul Jalil passed away. Therefore, the case was stopped by law.

3.4.2. Legal Structure Constraints

3.4.2.1. Personnel Constraints

Investigators from the North Sumatra Regional Police admit that there are still deficiencies in terms of human resources. This is a deficiency/obstacle in completing the process of handling cases of law enforcement for narcotics crimes by using follow the money. The number of investigators at the Narcotics Directorate of the North Sumatra Police who can use the follow-the-money method is only 4 people. These investigators also do not receive uniform training and education programs regarding money laundering. Therefore, additional personnel is needed in the North Sumatra Police Narcotics Directorate.

In addition to adding personnel, training, and certification of investigators are also needed. Certification should be carried out by a Professional Certification Agency from the National Professional Certification Agency, abbreviated as BNSP. BNSP is an independent institution formed by the government to carry out guarantees of quality and competence in all professional fields in Indonesia through competency certification.

3.4.2.2. Investigation Time Constraints

Carrying out investigations and investigations into narcotics crimes by using the trick of money, requires a lot of manpower/human resources and also takes a long time. This is due to a financial analysis conducted by Investigators at the Directorate of Narcotics of the North Sumatra Police. Financial analysis requires foresight and caution, so it takes a long time to do the analysis.

In the Anti Money Laundering Law, there is Article 71 which states that blocking the assets of a perpetrator is carried out no later than 30 working days. In this case, the problem is the process of handling money laundering cases which requires quite a long time based on the level of complexity of the case. If within 30 days the case investigation has not been completed, then the offender's account containing assets known to be the proceeds of crime will be disbursed again. This could be a new loophole for perpetrators to reuse their assets.

In terms of the use of the Narcotics Law, it is clear that the criminal act being investigated is a narcotic crime. Talking about narcotics crimes, the procedural law provisions that apply are Criminal Procedural Law. The Criminal Procedure Code stipulates that investigators can detain for a period of 20 days (*see*. Article 24 paragraph (1) Criminal Procedure Code) and the investigator may request an extension from the public prosecutor for a maximum period of 40 days (*see*. Article 24 paragraph (2) Criminal Procedure Code). After the said 60 days, the investigator must have released the suspect from detention by law (*see*. Article 24 paragraph (4) Criminal Procedure Code).

At the investigative level, in the context of arresting and detaining people suspected of committing abuse and illicit trafficking of narcotics and narcotics precursors. The exercise of the authority to arrest is carried out for a maximum of 3 x 24 hours (three times twenty-four hours) from the date the arrest warrant is received by the investigator and can be extended for a maximum of 3 x 24 hours (*see*. Article 74 Narcotics Law). However, regarding the authority of detention by investigators, unfortunately, the Narcotics Law does not provide special provisions such as arrests.

If you use the rules according to the Criminal Procedure Code, then investigating narcotics crimes using the follow-the-money approach will take a long time because of the financial analysis of the offender's accounts. In addition, the piling up of work due to a lack of personnel causes investigators to be too exhausted to apply the follow-the-money approach in narcotics crime cases.

3.4.3. Legal Culture Barriers

Departing from law enforcement on Narcotics crimes using the approach of following money which takes a long time, the next legal obstacle is related to the legal culture of each party. The obstacles to the legal culture are:

a. Requests for checking accounts from banks related to where the perpetrator is a customer. The request for a checking account is not carried out according to the procedure, because the time needed will take a very long time if it is done by correspondence. Therefore, investigators asked for the perpetrator's checking accounts in ways that were not by procedures. This kind of legal culture is an obstacle for investigators.
b. Wiretapping is carried out without procedures by applicable regulations.
c. Financial Service Providers do not report bank customers who carry out Suspicious Financial Transactions because if this is reported to Indonesian Financial Transaction Reports and Analysis Center (INTRAC), the said bank's customers will decrease and they will no longer trust the bank. The above is by the reporting obligations of Financial Service Providers as contained in Article 23 too.d. Article 25 of the Anti Money Laundering Law.
d. Financial Service Providers also do not carry out their obligations related to the contents of transactions where funds are intended for use and sources of funds used by INTRAC regarding transactions above Rp. 500 million. The above is by the provisions on the principle of recognizing service users as contained in Articles 18 to.d. Article 22 of the Anti Money Laundering Law.

The follow-the-money approach is effective in uncovering the illicit traffic of narcotics. The approach method is good but it is not supported by a good legal umbrella either, so the result is not fiat justitia (investigation). So it cannot be used as evidence because the evidence obtained was obtained illegally. If given a legal umbrella it will be even better and it is hoped that it can support the anti-money laundering regime in Indonesia.

4. Conclusions

Law enforcement agencies combat the illegal drug trade by employing the follow-the-money strategy, which involves freezing the perpetrator's financial accounts. This approach helps uncover individuals involved in narcotics crimes and trace the origin of the funds obtained by the perpetrator. Additionally, it minimizes direct interactions between law enforcement officers and drug dealers, reducing potential conflicts. However, gathering evidence to substantiate allegations of narcotics trafficking can be challenging. Therefore, it is crucial to implement a criminal approach (follow the money) within the North Sumatra Regional Police's Resort Police units to facilitate the disclosure of these illicit activities.

In the process of investigating narcotics crimes using the follow-the-money approach, the Narcotics Directorate of the North Sumatra Police encountered several obstacles. These include the lack of regulation on investigation techniques using the follow-the-money approach, inadequate personnel, limited knowledge of investigators regarding money laundering, the absence of investigator certification, time constraints in analyzing financial statements, and the failure of Financial Service Providers to report suspicious financial transactions. To address these issues, the following recommendations are proposed: *First*, Amend Law No. 8 of 2010 to include procedures for using the follow-the-money approach; *Second*, Establish internal regulations within the police force to guide investigations using the approach; *Third*, Increase the number of personnel in the Narcotics Directorate to improve effectiveness; *Fourth*, Establish cooperative relationships with Bank Indonesia and the Financial Transaction Analysis Reporting Center (INTRAC) to facilitate analysis of financial transactions; *Fifth*, Create a legal basis, such as a memorandum of understanding, if amendments to the law are not possible, to address the certification issue; *Sixth*, Impose strict sanctions on Financial Service Providers (PJK) for non-compliance with Know Your Customer (KYC) principles and failure to report Suspicious Financial Transactions to INTRAC.

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'Living on the Edge': Examining the Socio-economic Issues of India's Transsexuals

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Abstract
Transsexuals, the subset of transgenders, constitute one of the most discriminated and marginalised communities in India. Given the deeply entrenched heteronormative values in Indian society, which essentializes binary beliefs about sex and gender, any transgressions of these values and beliefs invariably evoke societal backlash. This study examines how heteronormativity, which fuels transphobia, impinges upon the lives of the transsexuals – both male-to-female (MtF) and female-to-male (FtM) transsexuals. Through narrative inquiry, the study sheds light on how transsexuals, despite the burgeoning legal provisions for protection of their rights and entitlements, continue to endure various social and economic infirmities. Ensuring equality for transsexuals, or for that matter the trans peoples, calls for, *inter alia*, confronting gender essentialism and mending the gap between law and implementation.

Keywords: Discrimination, Gender, Identity, Transsexuals, Transgenders, Socio-Economic

1. Introduction

Sexual minorities or more commonly known as lesbian, gay, bisexual, transgender, and queer (LGBTQ) community – whose sexual identity or characteristics are different from the majority population – face a myriad of problems and issues. They have been largely kept out of the broader socio-economic and political life of a society. Discriminations against them range from denial of rights as citizens, right to self-identification, basic dignity, and body autonomy to deprivation of equal economic opportunities, education and access to healthcare (Cruz, 2014; White Hughto et al., 2015). As such, sexual practices, orientations and gender identity become an important determinant of a person's identity, life chances and access to socio-economic and political privileges. The situation of sexual minorities or the LGBTQ community in India is also no exception to this universal trend. They continue to remain a subject of relentless discrimination – both within and outside their homes. In the light of this, this study seeks to examine the socio-economic conditions of transsexuals in the context of India.

The study becomes important in the backdrop of the renewed efforts towards legal reforms and institutional measures initiated for ameliorating the plight of the sexual minorities, including the transsexuals. These legal

reforms and institutional measures, elaborated in the proceeding section, reflect the increasing recognition of the problems faced by various groups of sexual minorities in the country. As such, it becomes incumbent to examine if these legal and institutional measures have really made a difference in the lives of the sexual minorities. A transsexual is a person who does not identify with the birth sex and assigned gender. It can also be referred to as a condition marked by the incongruence between the birth sex and the gender identity. This condition is generally accompanied by a strong desire to bring into congruence the physiological sex and the preferred psychological gender through surgical or hormonal interventions (Gooren et al., 2007).

The study is qualitative in nature. In-depth interviews with transsexuals were conducted during the period of March to November 2021 – involving both telephonic and physical interviews. Purposive and snowball sampling procedures were used to recruit respondents (thirty six of them) for the study. The study is mainly done in the cities of Bengaluru and Ahmedabad. The interviews were conducted only after due consent of the respondents was obtained. The interviews were conducted with the aid of an interview guide, which contains a grouping of topics, issues and questions to be covered during the interviews. This ensured the flow of the interview, maintained control over the pace and direction of the interview.

The article is structured into five main sections, including this introduction. The second section deals with transsexuals and its cognate concepts. The third section critically examines the legal frameworks concerning the transsexuals or sexual minorities – the past and the contemporary legal developments in India. The fourth section examines the socio-economic conditions of the transsexuals. These are examined in relation to the problems confronted within the family setting, migration and its concomitant problems and the educational problems, focusing on its implications for economic and job conditions. The fifth section provides the summary and conclusion of the study.

2. Transsexualism: Conceptual Terrain

The general tendency for people is to identify identity with sex. Sex connotes a biological and physiological attribute of males and females; gender connotes the non-physiological or socially constructed attributes of men and women. The former is centred primarily on the reproductive organs while the latter is centred on the cultural expectations and roles for man and woman. Embedded in the notion of gender are the cultural expectations of masculinity or femininity. This conceptual distinction between sex and gender is instructive as differences in the behaviour of man or woman do not necessarily stem from physiological attributes of sex (Lips, 2020, p. 7). The misalignment of gender identity and the sex-based body is transsexuality (Bettcher, 2014). Transsexualism implies that gender is not pre-determined by sex or at the time of birth. A person may resist or disown male identity or female identity. This connotes a desire to exercise a sense of agency to define one's own gender identities.

Within the broader society, including medical and scholarly community, transsexualism has long been deemed as a mental disorder. The 5th edition of the American Psychiatric Association (APA) has however removed transsexuality as a mental disorder (APA, 2013). By and large, there is an increasing emphasis on, to borrow Atienza-Macia's (2015, p. 575) words, "depathologization of transsexuality as a mental illness." Writing way back in 1966, Harry Benjamin took issue with psychoanalysis and instead advocated hormonal or surgical treatment to achieve congruence between body and the mind (Benjamin, 1966). Contrary to the tendency to assume transsexualism as a product of socialization, many transsexuals contend that they "have a fixed, inborn gender and that they were simply born into biological bodies that do not match their true being" (Lenning and Buist, 2013, p. 46). As such, transsexualism is now increasingly seen or understood as gender identity disorders (GID), marked by a persistent desire to undergo sex reassignment surgery (SRS). In this sense, transsexualism is deemed as a condition that requires medical treatment (hormonal or surgical treatment) to attain the desired gender (Sutter, 2001). However, there are also cases wherein transsexuals do not wish to alter their biological sex and are content with living as the third sex. But an overwhelming majority of them wish to undergo SRS. After undergoing SRS, many of the transsexuals do not wish to identify as trans man or trans woman; they simply wish to identify themselves as a man or a woman (Bettcher, 2014).

While the question of whether gender is immanent or rather a constructed one may be a matter of enduring debate, transgender community, including transsexuals, nevertheless share one thing in common. They all hold the view that the entire process of realizing that one's own gender is not congruent with one's biological sex, and the quest for achieving congruence between the two, is a traumatic one. However, several studies have noted that transsexuals who have undergone successful SRS experience more happiness and a sense of satisfaction than those who have not undergone SRS (Fallahtafti et al., 2019; Kailey, 2005), with some thanking, and giving credits to, medical science that makes such transitions possible (Lenning and Buist, 2013).

3. Legal Frameworks governing Sexual Minorities

Sexual identities that go beyond two gender options, male and female, have had a long historical presence in Indian society. Transgenders, for instance, have been known historically by various names – Hijra, Aravani, Kothi, Jogappas, and Shiv-Shakthis, among others (UNDP, 2010). As per the 2011 Census, India has about half a million transgender peoples. The actual population may be on the higher side as many transgender would be hesitant to come out of the closet and reveal their true identity for the obvious reason of its associated social prejudice and stigmatization. A common feature of the transgender community is that they are among the most discriminated and neglected communities in the country. They are overwhelmingly working in informal sector, predominantly in stigmatised jobs such as, *inter alia*, prostitution, begging, mendicancy, and singing and dancing in bars (HRLN, 2015). Many also face the problems of homelessness, landlessness, exclusion from formal employment sector, and poor health conditions, among others.

The colonial British administration passed the *Criminal Tribes Act*, 1871, which identified or listed many tribes in India as criminal tribes. It was meant to regulate and control the pastoral people. Soon after, the transgender community, the *Hijras*, were deemed as deviant and criminal groups. As per the Section 377 of the *Indian Penal Code*, 1869, eunuchs were criminalized. Post-colonial India continued to retain this law, which criminalizes any sexual acts between same sex people by terming it as "unnatural" or "against the order of nature." In fact, decriminalization of same-sex sexual relations, which in practice means removing Section 377 of the IPC, has been the rallying cry for the LGBTQ movements in India. In tune with the times, several legal reforms and institutional measures have been introduced in India to ameliorate the plight of the transgender communities.

In 2014, in its significant ruling in *National Legal Services Authority v Union of India and Others* (2014), the Supreme Court of India (SCI) upheld the rights of transgender people to their self-identified gender, enjoined the Government of India (GoI) and the state governments to initiate the required steps to legally recognise their choice of gender identity (Jose & Vinod, 2014). The ruling drives home the point that a person's sexual orientation is intrinsic to an individual's personality, dignity and freedom. Further, the SCI's ruling in 2018 struck down Section 377 of the Indian Penal Code (IPC) in the *Navtej Johar vs Union of India*, 2018. The ruling, which places a premium on the individual dignity and choice, stipulated that criminalizing consensual same-sex sexual relations between adults is unconstitutional (Gupta, 2006). It was well-received among the LGBTQ community and the civil society and human rights circles. Section 377 has been widely censured as the main villain that violated the rights of transgender communities; the law is known for its rampant misuse to blackmail, extort and harass the LGBTQ people (Baset, 2018).

Aside from aforesaid significant Court rulings, there have also been legislative efforts and institutional measures – *notably the Transgender Persons (Protection of Rights) Act*, 2019. The key takeaways of the Act are: (i) prohibition of any discrimination against the sexual minorities with regard to, *inter alia*, access to education, healthcare, socio-economic opportunities, and employment; (ii) recognition of the right to self-perceived identity; and (iii) recognition of the right of movement, own property and the right to hold and stand for public or private office. Further, the Act requires a transgender person to apply to the district administration a certificate of identity as a transgender person. If a transgender is desirous of getting legal recognition as a trans man or trans woman, the person is obliged to submit documentary evidence of having undergone SRS (Sawant, 2017).

The *Transgender Persons (Protection and Rights) Act*, 2019 has been criticized by scholars and the transgender community. The aforementioned provisions of the Act, such as obligating one to submit proof of SRS, among

others, are seen as violating the body integrity, autonomy, placing huge financial burden, and exposing them to the mercies of the corrupt bureaucratic system (Singh & Singh, 2019). Several provisions of the Act are considered detrimental to the fundamental rights of transgender community. Since the time the bill was first tabled in the Parliament in the form of *The Transgender Persons (Protection of Rights) Bill, 2016*, it evoked widespread censure and criticisms. First, the bill is seen as denying the right of people to self-determine their gender identity (Jos, 2017). Second, the requirement of a "certificate of identity" or "transgender certificate" to be issued by the administrative authority, renders "the process of gender identification and reassignment cumbersome and intrusive" (Jain, 2020). The lacuna with this is that it does not take into account the possibility of the bureaucracy lacking the requisite expertise to evaluate the application for transgender certificate. Third, the Act is also seen as creating a hierarchy between the trans community and the cisgender by prescribing a more lenient punishment for abusing transgender persons. For instance, abusing trans community would invite a jail term ranging from six months to two years; the quantum of punishment for the same crime against cisgender can be life sentence or even capital punishment. Finally the Act refrains from providing any affirmative action measures concerning education, healthcare and other related rights.

To be sure, the extant legal framework meant to address the plight of sexual minorities suffers from various shortcomings. However, the passing of laws itself is evident of the significant gains, if not satisfactory, that have been made with regard to the protection of the sexual minorities. This is also borne out by the proactive efforts of the Ministry of Home Affairs (MHA) in line with the *Transgender Persons (Protection of Rights) Act*, 2019. On January 10, 2022, the MHA, for instance, had issued an advisory to all state governments to undertake all the necessary efforts to prevent any acts of discriminations against the sexual minorities in prisons and other correctional institutions (GoI, 2022). The Advisory includes, *inter alia*, the right of the individual to self-perceived identity, provision for suitable accommodation and facilities in accordance with self-identification, maintenance of registry to include transgender as a category apart from male and females, adequate healthcare, and sensitization of the prison personnel.

4. Socio-economic Conditions of Transsexuals

Most, if not all, societies expect their members to conform to societal norms and regulations. As structural functionalists would argue, such conformity to norms and regulations would facilitate social cohesion, stability and order. Any deviations from such societal norms are deemed as posing threats to the society. Similar is the case with the social structures that determine gender identities and roles. As alluded to previously, in most societies, dominant gender identities and their associated roles and expectations are expected to conform to the two exclusive gender categories – male and female. This binary thinking about gender identities is quite entrenched in the society – be it in the primary institutions (say, family) or secondary institutions (say, schools). The obvious corollary of this is that transsexual identity or any other transgressive identities comes into confrontation with the dominant binary identities – male or female. This provides the overarching context as to why the transsexuals or for that matter any other categories of sexual minorities had to endure various hardships and challenges in their quotidian lives – be it in their social, economic and political life (Bhattacharya & Ghosh, 2020). These hardships and challenges began right from the family to workplace. This study specifically focuses on the issues and problems of transsexuals within the context of the family, their migration and its concomitant problems and problems of education.

4.1. Family Rejections and Its Associated Problems

Family constitutes the most important social institution for nurturing community values and norms. It offers the primary context for socialization and adolescent well-being. It offers its members social, emotional, and financial stability – and also acts as a social and economic unit. Given the entrenched social norms and values, families expect their members or children to conform to the dominant conceptions of gender identities. Any transgression of such gender norms and roles are reviled. The relationship between sexual minorities – such as transsexuals – and their parents come under severe strain or tensions when their sexual identity or orientations come out of the closet (Patterson, 2000; Tharinger & Wells, 2000). A study by Riggs et al. (2018) indicated that non-binary people are more likely to face family violence than other individuals. Studies have also demonstrated the association

between parental rejection and health and mental problems of adolescents, including recourse to drug abuse. Family members may even resort to intimidation or physical harm for failing to conform to dominant gender norms. Few studies have however demonstrated how sensitization of parents regarding the needs of the child (who transgress dominant gender identities) help in improving the relations with their children (Ryan et al., 2010). This underscores how family can get reduced to a space for discrimination and abuse (Sethi & Barwa, 2018).

This study has also affirmed the persistent discriminations against transsexuals within the context of family. Out of the 36 respondents in our study, 26 of them reported having been expelled from their family after revealing their gender identities or sexual orientations. And most of them indicated having faced physical violence from their immediate family members. A respondent says,

> The disclosure of my gender identity which does not conform to my biological sex made my life within the family quite difficult. Since I was a kid, I love to get dressed up in female attires – putting lipsticks, adorning the sarees of my mom, and enjoying doing domestic chores like sweeping and cooking – which invited resistances and anger of my parents. In my family, I had been given a step-motherly treatment, at times involving physical violence, while my other siblings were treated with love and affection. The rejection of my sexual identity deprived me of happiness and sense of belonging to my family. All I wish is for my family to accept me as I am (Transwoman, Personal Communication, 8 March, 2021).

Within the family, the harassment of transsexuals takes various forms. The common form of harassment reported by my respondents includes, *inter alia*, being coerced to dress as per their sex assigned at birth. Any deviation from this invites verbal harassment and disapproval.

This underscores the vexed relationship between transsexuals and their family members. This is in tune with several studies that reported that sexual minorities face lower level of support from the family (Factor and Rothblum, 2008; Klein & Golub 2016). The fear of inviting the wrath of family members always weighs heavily in the minds of the transsexuals when taking a decision whether to disclose or not to disclose their sexual identities. Indeed, fearing rejection by kith and kin, most of our respondents reported about delaying their disclosure of their sexual identity. However, once that disclosure is made, they have a sense of emancipation. Despite getting a backlash from family, the disclosure enables them to live in their truth or true self. Underscoring the importance of coming out of the closet, a respondent argues:

> The truth is that I had for long period lived a life of pretension out of fear of upsetting or angering my family members, especially my aging parents. More than my own, I cared for my family image in the society and had long suppressed my own identity. But nothing good came out of that pretentious life. How long can we hide our true identity and live our life for the sake of pleasing others, even if that includes your family? We can afford to please others only if we are happy and true to ourselves. Though my parents were really hurt and resentful of my sexual identity, I felt a sense of liberation once I disclosed my true identity and began to live my life as such. It is of course never easy to come out of the closet; but living a false life was even more torturous. As such, it is always better and more meaningful if we live our own true lives. I have never once regretted coming out in the open; the same feeling applies to all members of my ilk (Transman, Personal Communication, 9 March, 2021).

Family's refusal to accept the claimed gender identity of transsexuals has implications on their health. Our respondents indicated various mental health issues such as depression, post-traumatic stress disorder (PTSD, and suicidal tendencies. They also confront on a daily basis the problems that include, *inter alia*, shame, fear of being rejected by friends and kith and kin, adaptation issues, access to public spaces, and difficulties of coming to terms with their own gender identity which stands in opposition to the identity foisted upon them based on their biological sex. This is in tune with studies that found that sexual minorities or LGBTQ community have poorer physical and mental health conditions that their heterosexual counterparts (Lick et al., 2013; Meads, 2020).

Access to public health and other opportunities are also contingent upon having certain documents. However, as resistance runs deep in the family against transsexuals altering their gender identity as per their choice, they have

difficulties in getting the required documents. This hampers their access to education, healthcare, and mobility. At times, they are even portrayed as sinful people, bringing religion or religious belief systems into context. The common refrain among family members is that it is a sin not to conform to gender binary of male and female which is explained as the only two gender identities sanctioned by God. In ideal sense, family is supposed to be a space that nurtures love, empathy and emotional support. In the absence of supportive family, transsexuals develop negative or low self-perceptions, struggle to value themselves or care about their health. Our respondents have also overwhelmingly indicated internalized transphobia in the sense of having discomfort with one's transsexual identity. Internalized transphobia can be attributed to the internalization (via socialization) of the society's dominant gender norms.

4.2. Migration and Its Associated Problems

Transsexuals are mostly discriminated within the family space. Various studies have also indicated how disclosure of one's transsexual identity can lead to being expelled from the family home (Porter & Haslam, 2005). As such, migration of people who deviate from dominant gender binary (male and female) may occur largely to escape discrimination and ill-treatments within the family and societal backlash. The term "sexual migration" is commonly used to connote this phenomenon. It refers to the migration prompted by "repression, oppression, persecution" due to one's sexual orientation (Toro-Alfonso et al., 2012, p. 59). In a further elaboration, Carrillo (2004, p. 59) sees sexual migration as

> motivated, fully or partially, by the sexuality of those who migrate, including motivations connected to sexual desires and pleasures, the pursuit of romantic relations with foreign partners, the exploration of new self-definitions of sexual identity, the need to distance oneself from experiences of discrimination or oppression caused by sexual difference, or the search for greater sexual equality and rights.

Other factors of migration, such as economic and educational, are not totally absent, but sexuality is the prime factor for the migrations of sexual minorities, including transsexuals. Our study also mirrors the migrations of transsexuals under similar circumstances – coerced to migrate due to discrimination based on sexuality. Most of the respondents indicated having left their parental homes to live their own independent lives and to escape discrimination and even violence within the family setting. An account of a respondent goes:

> My family regarded me as a misfit in the society. Societal values are so internalized that my family always come under the pressure of the society. They always tend to agree with the broader societal norms and regulations. Even if I am death, my family would have deemed it as better as I have always been deemed as bringing shame and dishonor to the family. For this reason, for my own desire to live a more autonomous life and to escape daily torture, and discrimination and prejudice, I left my parental home (Transwoman, Personal Communication, 23 June, 2021).

Sexual migration (be it intra-national or international) is usually aimed at achieving gender affirmation, i.e. the iterative process whereby a trans people attains social affirmation of their gender identity, expression and practices (Reisner et al., 2016). Gender affirmation, as Sevelius (2013) says, is of utmost importance for the trans people in order to obtain acknowledgement, recognition and bolstering their gender identities. Sexual migration to attain gender affirmation is usually towards urban spaces. Urban spaces are often portrayed as offering anonymity, more inclusive environment, tolerance, and acceptance. However, these sexual migrations may not necessarily have positive outcomes. Several studies have indicated that sexual migration for gender affirmation has its own challenges, such as, *inter alia*, resettlement issues, structural violence based on transphobia, poverty, and low-income (Enchautegui, 2012).

Our study has also mirrored these challenges associated with sexual migration for gender affirmation. Respondents have indicated encountering diverse problems and challenges – homelessness, difficulties in finding accommodations, economic hardships and access to public welfare services, among others. In urban spaces, they struggle to find suitable accommodation given the broader societal prejudice and discrimination against them. Landlords show disdain for transsexuals and refuse to rent out their properties to them. Landlords' refusal is mainly influenced by the fear of inviting censure and criticisms from the society. Families may also be wary of their kids

coming under the influence of the transsexuals. The problem of finding accommodation or its related problems is captured by the observation of a respondent:

> It is pretty difficult for us to have a settled life. I have changed my rented accommodation three times in a year. In all three cases, I was evicted and did not leave out of my own free will. During my stay in any of my previous rented accommodation, neighbors were always wary of interacting with me. It was not difficult to read their disdainful attitudes towards me and my ilk (Transman, Personal Communication, 27 July 2021).

Homeless transsexual migrants have resettlement issues in the new environment, particularly adjusting with new culture and language. They also have problems having access to public welfare services. Many work in the informal sector – as domestic helpers, construction workers, sex work, and street vendors. The informal sector/economy is marked by low income, irregularity of employment, and susceptibility to exploitation, among others (ILO, 2014). The unregulated nature of informal work means that transsexuals' problems and hardships hardly received the attention of the government.

But by and large, our respondents express no regret having left their family homes or places of their origin. They specifically argue that life is better in their current places because of the anonymity, better environment to earn livelihood that urban spaces offer – unlike their places of origin wherein almost everyone knows each other. Urban spaces provide them the opportunity to build new networks and solidarity among the trans people themselves. Many admitted to having received one form of help or another from their fellow trans peoples. Further, they are also able to display their own identities – be it dressing, choice of friends, and in workplaces where they do not always come under censure – more freely.

Some of our respondents have also expressed their desire to travel to other countries that have socio-cultural structures that are more tolerant towards trans peoples. Migrations to these countries are deemed as the ultimate dream where life can be lived without having to face daily societal rejections. It is noteworthy here to note that there are certain countries where trans status is a legitimate ground for granting refugee status. In his study of the social acceptance of LGBTQ people in 175 countries, Andrew R. Flores listed Iceland, Norway, the Netherlands, Sweden, and Canada as the most accepting countries (Flores, 2021). Other stream of literature however points out the complex interplay of race, ethnicity, national origin and religion, among others, in shaping acceptance or denial of refugee status (Oude Breuil, 2014). This underscores that structural discriminations against trans people, irrespective of places and societies, would remain a major challenge in the foreseeable future.

4.3. Educational Status and Challenges

In general, education constitutes one of the important determinants of life chances. That there is a general discrimination and prejudice against trans peoples or other sexual minorities is a social fact. Educational attainments have linkage with the kind of life chances and opportunities that may accrue to a person. Possessing the requisite or favorable educational qualifications and skills mitigate the challenges and problems that trans peoples face. Srikummoon et al (2022, p.10), for instance, alludes to the fact that Thai society "accepts transgender people conditionally, provided that they are beautiful, wealthy, and successful." This implies that though the broader structural discrimination and barriers may persist, having the requisite educational attainments can contribute to improving the life chances or socio-economic opportunities of the trans peoples.

Several studies have also established that the predominant discrimination and prejudiced against trans peoples or sexual minorities adversely affect their educational attainments (Pearson & Wilkinson, 2016). A study by D'Augelli et al (2006) has indicated that more than 80 percent of students belonging to sexual minorities have faced violence and discrimination in educational institutions. Further, unfavorable institutional environments may also engender a feeling of disconnectedness to learning (Akerlof & Kranton, 2002) and may lead to disengagement altogether from further educational pursuits (Rankin et al., 2010). Given this, it is no wonder that low levels of educational attainments are reported for sexual minorities or trans peoples than cisgenders. Despite the constitutional principles and provisions that call for equal treatment of all persons, such principles and provisions

are hardly put into practice. This is attributable to the fact that whether law is put into practice or enforced is dependent upon the broader moral values that prevail in a given society. And given the dominance of moral values that place a premium on male-female categorisation, laws that are meant to emancipate the sexual minorities or trans peoples are often relegated to the periphery.

Our study has also indicated the manifold problems and challenges pointed by the extant literature as teased out above. Out of our thirty-six respondents, only 5 have educational attainments to the level of graduation and above. The rest 31 of them have only managed to complete their high school level education. A common reason for these low educational attainments is related to structural discrimination against them because of their non-conformity to the dominant gender constructions of the society. In particular, the lack of support from family, social stigma, and the unfavorable school environment are cited as the primary factors behind their low educational attainments. A respondent who has completed high school level education has this to say:

> I managed to complete my high school level education simply because of my determination against all odds. More than education, my family and relatives were more interested in my conformity to the society's gender construction of male and female binary than my education. Education became secondary to my parents and relatives who only put pressure on me to conform to my male gender identity assigned at birth. Even trivial matters like buying books and school uniforms were made contingent upon my acceptance, and living accordingly, of the male identity assigned to me at birth. Not just from my family, my school friends and neighbors used to make fun at my expense. As such, even going to school was a daily suffering (Transwoman, Personal Communication, 21 June, 2021).

Transsexuals usually face problems of adjustment and acceptance among peer groups and the broader society. Even in formal social spaces, such as educational institutions, the environment – be it physical or social environment – is not conducive for them. Infrastructure arrangements such as the provisions of toilets do not account for the needs of trans peoples. They usually got the blame for leading a solitary life, not mingling with peers and for lack of enthusiasm in participation in school functions, among others. At times, they experience mistreatment in the form of hate speech and sexual harassment from peers, fellow students, and even the school teachers and staff. A transwoman respondent narrated about the travails of being subjected to daily moral sermons from teachers:

> Going to school for me was more of an occasion to listen to the moral sermons delivered by one teacher or another. Cloaking their sermons as motivated by their concern for my well-being, my teachers used to implore me to remain true to what they deemed as my true male identity, arguing that any deviation from it went against our culture, nature, and religion. A teacher even deplored me for not honoring the sensibilities and dignity of my parents. They think that my sense of gender identity is a psychological problem which can be corrected through counselling and moral sermons. The fact that I am a woman trapped in a man's body is hardly given attention (Transwoman, Personal Communication, 22 June, 2021).

Low educational attainments have profound implications on their economic status. Most of the respondents reported about how their daily life is a constant struggle to get or retain their jobs. In an indication that the educational attainments determine their job profile, a total of 5 respondents who have completed graduation and above have higher income and more satisfying jobs. They mostly work find employment in non-governmental organisations, private companies, medical profession and educational institutions as teachers. In a sign that they have better economic standing, 4 of them claimed to have done SRS. A transman respondent says:

> After completing my 12th standard, I financed my own education, pursuing higher education in naturopathy. Now I work as a naturopathy doctor earning enough for my sustenance and even giving occasional financial support to my own relatives, who had earlier rejected me. Despite all the hardships that I have faced due to my own gender identity, I pursued my education with determination and carved out a space for myself (Transman, Personal Communication, 5 March, 2021).

The majority of the respondents (twenty-five of them), however, work in the more unregulated informal sectors. They work employment mostly in beauty parlors, cosmetic and garment shops, daily wage earners as labourers,

housemaids, and sex work or prostitutions, among others. None of our respondents are however jobless. But they all express their preference for government jobs. Security of jobs and better salary are cited as reasons for their preference. Further, they also point to the prevalence of discrimination, subtle or otherwise, in their workplace. Further, they all expressed their resentments against the lack of efforts on the part of the government to implement reservation for transgenders as ruled by the Supreme Court in 2014, which called for categorisation of transgender as Other Backward Class (OBC). They also resent the law that requires a transgender to produce proof of having undergone SRS to claim transgender identity. This, to them, is a major barrier for them as they put further economic burden of them.

5. Concluding Remarks

It is axiomatic that transsexuals constitute one of the most discriminated and marginalised groups in India. Given the deeply entrenched heteronormative biases in the collective psyche and practices of Indian society, which essentializes binary beliefs about sex and gender, any transgressions of these values and beliefs invariably evoke societal backlash. As explicated in the preceding discussions, this is evident in the enduring discriminations, social stigma and prejudices against the transsexuals in multiple settings – within the family and public spaces, such as educational institutions and workplaces. Fueling transphobia or gender-based discrimination, gender essentialism has profound implications on transsexuals' educational attainments, health and employment opportunities, among others. To be sure, there is no gainsaying the strident gains made by the indefatigable efforts of the trans communities, individuals and gender-justice movements towards greater recognition of the rights and entitlements of sexual minorities. The catch however is that – despite umpteen favorable SCI rulings, legal reforms and greater governmental efforts towards institutional protections – no real, visible change has occurred on the plight of the sexual minorities. This, therefore, calls for a more focused interrogation of gender essentialism and efforts towards mending the gap between law and implementation.

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