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# A Critical Appraisal of the New Bail Regime Under the Administration of Criminal Justice Act, 2015 – An Examination of American Experience

Gambo Abdulsalam[1], Ibrahim Sule[2]

[1] PhD. (Research Fellow) A.B.U., BL., is a Senior Lecturer Nigerian Law School Kano Campus, Bagauda Kano. Email: abdussalamgambo2@gmail.com, Cell Phone No. 08034506024
[2] PhD. (research Fellow) University of Utara, Malaysia, Deputy Director of Academics, Nigerian Law School, Kano Campus, Bagauda; Chevening Scholar and Fellow, IBA. Email ibrahim.sule@nigerianlawschool.edu.ng; Cellphone No. +234 7044445656

**Abstract**
When the Administration of Criminal Justice Act,2015 was enacted, the purpose among others, was the protection of the rights of the suspect/defendant and the society from crime. In the prosecution of its purpose, the Act provides for the defendant's right to bail subject to the discretion of the court to stipulate deposit of money among other terms as a condition for the bail. Furthermore, the Act provides for the establishment of professional surety regime whereby registered bondsmen are allowed to stand surety for defendant on the payment of fees to be determined on agreement with the defendant. The consequence is the growth of bail industry at Abuja and other cities of Nigeria, where bondsmen force relations of defendants to contribute money in payment of their charges in the same manner as ransom is contributed to kidnappers for the freedom of their loved ones in detention. In this paper, the writer appraised the security implication of the new bail regime on Nigeria and its implication on the right of the defendant to presumption of innocence enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In the course of so doing, the writer uses the doctrinal research method and drew from the American experience on the subject before arriving at conclusion.

**Keywords:** Criminal Justice, Sanction Model, Children, Conflict, Bail

## 1. Introduction

It is a matter of common knowledge that the Administration of Criminal Justice Act, 2015, was enacted for the purpose of ensuring the effective and efficient management of the criminal justice institutions in Nigeria, ensuring the speedy dispensation of justice, protection of the society from crime, the protection of the right and interest of the suspect, the defendant and the victim of a crime (Section 1(1), Administration of Criminal Justice Act, 2015)
In the prosecution of its purpose, the Act provides for the right to bail for every person suspected or accused of having committeed an offence, particularly non capital offences subject to certain exceptions and the fulfilment of certain conditions that may be imposed by the court or other authorities in custody of the person (Sections 161,162, 163, 164 & 165, *Administration of Criminal Justice Act*, 2015).

This idea of bail, stems from the entitlement of every person to the right to personal liiberty and to the right to presumption of innocence ( i.e. a presumption which recognizes the importance of the individual in the hierarchy of values under the Constitution of the Federal Republic of Nigeria, 1999 as amended). It means that the dignity of individual must not be demeaned by infringement on his liberty unless he is proven guilty beyond reasonable doubt for an offence (*Paul vs The State* (2019).

Before the advent of the Administration of Criminal Justice Act, 2015, bail enjoyment was seen as free and therefore, no court was allowed to stipulate deposit of money as a condition for bail (Sections 345, 346 & 347, Criminal Procedure Code Cap. C6, *Laws of the Federation of Nigeria,* 2004.). The law did not allow such stipulation because, doing so, would be inimical to the purpose of the Constitutional presumption of innocence (*Eyu vs The State* (1988). This wisdom of the law notwithstanding, the Administration of Criminal Justice Act, 2015 now provides for a bail regime which allows court to stipulate deposit of money as a condition for bail (Section 165(2) & 181(1), *Administration of Criminal Justice Act,* 2015).

The consequence of this development is the growth of bail industry at Abuja and other states of the Federation where bail agents charge scandalous fees to stand surety for suspects or defendants as the case may be. Depending on the nature of the case, these bail consultants, who seem very well known to the courts, charge between ten to a hundred Million Naira to stand surety for suspects and defendants. With this development, several families whose loved ones have the misfortune of been associated with offences, have to contribute money to those bail contractors to secure the freedom of their relations almost in the same manner as contribution is made to pay ransom to kidnappers (Olusegun A., (2019). Those who lack capacity to pay for the charges, usually stay in detention centres to suffer the indginity of imprisonment pending the hearing of their case on a charge of which they may be innocent.

In view of the foregoing development, this paper critically examines the security implication of the introduced money bail system to Nigeria in relation to the purpose of the Act, the right of the defendant to the presumtion of innocence and fair hearing under the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In the course of so doing, the paper drew from the American experience on the subject before arriving at conclusion. The paper then makes recommendations for the review of the Act to enhance fairness of the bail system in the overall interest of the Nigerian society.

## 2. Meaning, Nature and purpose of Bail

The term bail has not been defined by any of the rules of criminal procedure in Nigeria, including the Administration of Criminal Justice Act, 2015. However, the term has been defined by the Black's Law Dictionary as a recognizance or bond taken by a duly authorised person to ensure the appearance of an accused at an appointed place and time to answer the charge made against him. In other words, it is the art of obtaining the release of oneself or another person from custody by providing security for a future appearance in court (Bryan A.G., (2014)).

The stages at which a person may be granted bail in his sojourn within the administration of criminal justice system in Nigeria, are basically three. The first stage is the stage of arrest and interrogation of a suspect at the police station or any other authorized place of detention for the purpose of investigation. The type of bail granted at this stage, is granted pending the conclusion of investigation and is generally known as administrative bail within the judicial cycle (Akin I., Clement N. (1992). The second stage, is a stage where someone suspected of an offence has been charged to court for the purpose of trial. At this stage, the person so charged or his relations and friends, may apply for his bail pending trial. In both mentioned stages above, bail is a basic Constitutional right subject to the discretion of the court to be exercised in the light of the facts and the circumstance of a particular case (*Abacha vs The State* (2002).)

This is so because at those stages, a person accused of a crime is presumed innocent until proven guilty in a court of law (*Obekpa vs. C.O.P.* (1980).

The third stage in which a person may be granted bail, is the stage after trial, conviction and sentencing. Here, the law allows any person so convicted and sentenced to appeal against his conviction or his sentence or both and subsequently apply for a bail pending the hearing of the appeal. This kind of bail is not normally granted as of right but, upon the satisfaction of certain special conditions acceptable under the law. This is so because, at this stage, an applicant for bail has lost his right to the presumption of innocence due to his conviction and sentence for an offence (*Meregini vs F.R.N.* (2018)).

The purpose of bail, whether granted pending trial or pending appeal, is not to set the accused person free for all times in the criminal process, but to release him from the custody of the law and to entrust him to appear at his trial or appeal at a specific time and place (*Suleiman vs. The Commissioner of Police* (2008)). For the bail pending trial, the object is to grant a pre -trial freedom to an accused whose appearance in court can be compelled by a financial sanction. The freedom is temporary in the sense that it lasts only for the period of the trial. It stops on the conviction of an accused or his acquittal as the case may be. Therefore, the idea of bail, particularly pending trial, is the creation of a balance between the public interest in ensuring that persons who commit offences are punished and the accused right to personal liberty. In other words, the grant of bail to an accused, is aimed at the preservation of his fundamental human right to personal liberty, to the presumption of innocence and his overall right to fair hearing pending the outcome of a case against him.

**3. Considerations for the Grant of bail**

In the consideration of an application for bail, the court usually considers certain factors which where not expressely stated by the law before the advent of the Administration of Criminal Justice Act, 2015. However, the factors are now provided by the Act to include – whether the accused will not commit another offence while on bail, whether the accused will not attempt to evade his trial, whether the accused will not attempt to interfere or influence the investigation of the case or intimidate witnesses, whether the accused will not attempt to conceal or destroy evidence, whether the accused will not jeopardise the purpose of investigation and or the objectives, purpose or functions of the administration of criminal justice system (Sections 162 & 163, *Administration of Criminal Justice Act*, 2015). As the grant of bail is at the discretion of the court, the court may still consider factors such as the nature of the charge, the nature of evidence against the accused,severity of the punishment, the previous criminal record of the accused, if any, the probability of guilt, detention of an accused for his protection, the necessity to procure medical or social report pending the final disposal of the case, and the security of the state *etceter (Metuh vs F.R.N. (2020)).*

Prevalence of an offence at a particular time and place, used to be a factor of consideration in deciding application for bail pending trial. But, the consideration of the same as a factor, was disapproved as unconstitutional by the Supreme Court in the case of *Suleiman vs. C.O.P (*(2008)) and the Court of Appeal in *Sule vs. The state (*(2007)). In the view of the courts, the consideration of that factor in deciding bail application will be inimical to the purpose of the Constitutional presumption of innocence and will allow the use of sentiment in making judicial decisions. In Sule's case, the appellants who were students of Kwara State polytechnic were denied bail by the trial High Court on the ground that the offence of cultism of which they were accused was prevalent at tertiary institutions in Nigeria and same needs be controlled. On appeal to the Court of Appeal, the Court of Appeal set aside the ruling and granted the accused/applicants bail. Delivering his ruling, Ikongbeh J.C.A., held that the menace of cultism and illegal possession of fire arms amongst the youth of tertiary institutions in Nigeria is no doubt worrisome and same needs be controlled. However, such ideal should not be the reason why constitutionalism should be abandoned in the fight against crimes. In the view of the learned law lord, abandoning the path of constitutionalism in a bid to curtail a perceived anti social behavior, is as dangerous, if not more dangerous than the anti social behavior sought to be curtailed. In such a situation, according to the lord, the nation risk enthroning the Rule of Man, or, rather, the Rule by sentiment, rather than the Rule of Law.

It should be noted at this juncture that of all the mentioned factors of consideration in the bail decision pending trial, the most important factor is whether the accused, having regard to the facts and the circumstances of a given case, will be available to stand for his trial if released on bail. This was stressed by the decision of the Supreme Court in the case of *Sulaiman vs C.O.P (*(2008)) :as follows:

> The main function of bail is to ensure the presence of the accused at the trial. That is the cynosure of all the criteria. It is the centre piece. And so this criterion is regarded as not only the omnibus ground for granting or refusing bail but, the most important. The second criterion … is the nature or gravity of the offence. It is the belief of the law that the more serious the offence, the greater the incentive to jump bail, although this is not invariably for all times true. For instance an accused person charged with murder as in this case, is more likely to flea from the jurisdiction of the court than one charged with affray. The distinction between capital offences and non capital offences in one way 'crystallized from the realization that the atrocity of the offence is directly propotional to the probability of the defendant absconding'… The above is subject to the qualification that there may be less serious offence in which the court may refuse bail, because of its nature.

Where therefore, the court is satisfied that an accused is entitled to bail having regard to any of the above mentioned factors, the law requires the court to release him on a non excessive or liberal term that could be satisfied having regards to the facts and the circumstance of a particular case (Section 165(1) of the *Administration of* Criminal Justice Act, 2015).

For the bail pending appeal, the court considers factors such as whether there is existence of special circumstances that will justify the release of the convict on bail (*Bamaiyi vs. The State* (2001)). These special factors include the nature of the appeal, the physical or mental health of the applicant, whether the trial, conviction and or the sentence is or are manifestly contestible, the length of the sentence passed on the appellant, whether the appellant is a first time offender, and whether the appellant had earlier jumped bail *etcetera (Meregini vs F.R.N.* (2018) ).

In any application for bail, the most important decision is the determination of the criteria to be used or invoked by the court in considering the application before it. This is so because, the bailability of the applicant depends largely upon the weight the court attaches to one or several of the criteria open to it as explained above (*Suleiman vs. The Commissioner of Police* (2008)). The determination of the criteria is quite important because the liberty of the individual concerned stands or falls by the decsion of the court. In performing that judicial function, the court wields a very extensive discretionary power, which must be exercised judicially and judiciously. In exercising discretion to grant bail, the court is bound to examine the bail application, which is usually in writing, together with the affidavit in support to understand the grounds upon which the application is based. The court is then expected to consider the evidence on the affidavit only without considering any extraneous matter. The court cannot exercise its whims indiscriminately. There is similarly no room for the court to express its sentiments. It is a hard matter of law, facts and circumstances which the court considers without being emotional, sensitive or sentimental (Section 179(1), *Administration of Criminal Justice Act*, 2015).

## 4. Conditions for Bail

Conditions here means the stipulations upon which an accused may be granted bail. As opposed to the factors of consideration before the grant of bail, conditions are the terms upon which an accused may be released on bail. They are the terms of a tripatite bail contract entered between the accused, his surety and the court for the purpose of ensuring his appearance before the court for his trial. A person may be granted bail on self recognizance in minor offences. In more serious cases, an accused may be granted bail upon the condition that he executes a bail bond in certain fixed sum of money to be forfeited to the court if the bail conditions are breached (Section 179(1), *Administration of Criminal Justice Act*, 2015). At the discretion of the court, the court may require the accused to deposit a sum of money as a condition for his bail. In addition, an accused may be required to provide reasonable and respectable sureties to stand for his bail. The sureties may be required to be resident owners of properties within the jurisdiction of the court *etcetera* (Section 345, Criminal *Procedure Code Cap. C42,* Laws of the Federation of Nigeria, 2004). As the right to bail aims at granting an accused the unhampered opportunity to the preparation for his defence, and serves to prevent infliction of punishment on him before conviction, what ever bail condition placed by the court shall not be excessive (Section 165(1), *Administration of Criminal Justice Act,* 2015). This is so because an accused is presumed innocent until proven guilty, and is entitled to the enjoyment of his freedom pending trial. Therefore, a bail condition set at a figure higher than an amount reasonably expected to ensure the presence of the accused before the court, does not enjoy the approval of the law.

The above legal requirment on the condition of bail notwithstanding, the sad news in Nigeria is that stringent bail conditions have been identified among factors responsible for prison congestion in the country. For example, in a field survey conducted at Abakaliki Prison, Ebonyi State 90.2 percent of the awaiting trial inmates interviewed responded that they were in detention because they could not satisfy the bail conditions placed on them by the court. This is mostly because huge sums of payment are often included in the bail conditions that scared sureties from attempting to stand for their bail (Okorie Ajah et. al., (2020)). In some cases, an accused charged with commiting misdemeanor or a simple offence is given a bail condition to provide a civil servant of grade level 15 and above as a surety. Sometimes, the accused are asked to provides sureties with three years tax clearance who are also landed property owners in the highbrow areas of the Nigerian cities such as Lagos *etcetera*. These conditions are often pronounced in open court but, waived in the chambers after receiving gratifications.

## 5. Critique of Issues and Challenges

As mentioned in the introduction to this paper, before the advent of the Administration of Criminal Justice Act, 2015, the Criminal Procedure Act, and the Criminal Procedure Code applicable to the Southern and the Northern States respectively, did not allowed the court to require the deposit of a fixed amount of money as a condition for bail. The Criminal Procedure Act in particular provides:

> Before any person is released on bail under Section 340, 341 or 342, he shall execute a bond for such sum of money as the officer in charge of the police station or the court thinks sufficient on condition that such person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court and if he is released on bail, the sureties shall execute the same or another bond or other bonds containing conditions to the same effect. When any person is required by any court or officer in charge of a police station to execute a bond with or without sureties, the court or officer may, except in the case of bonds to be executed under chapter VII, permit him to deposit a sum of money to such amount as the court or officer may think fit in lieu of executing such bonds (Section 347 Criminal *Procedure Code Cap. C42)*.

By the above Sections of the Criminal Procedure Code, it can be seen clearly that the court is not allowed to on its own motion order for the deposit of money as a condition for bail because, doing so will be derogatory to the purpose of the presumption of innocence under the Constitution of the Federal Republic of Nigeria, 1999 (Section 36(5), *Constitution of the Federal Republic of Nigeria,* 1999 (as amended)). In *Eyu vs The State (*(1988)*,* the appellant who was charged with the offences of issuing a Dishonoured Cheque for N400,000.00 contrary to the Dishonoured Cheque (Offences) Act No. 44 of 1977, obtaining by false pretence and Stealing under Section 419 and 390 of the Criminal Code respectively, applied for his bail at the High Court of Enugu State. The prosecution opposed the application on the ground that the appellant has a bad criminal record with number of cases involving her still under investigation and the prosecution thought that she might jump bail. Despite this objection, the application was granted by the court on two conditions that the applicant deposit the sum of N400,000.00 Naira into the court and enter into a bond with a surety in the sum of N5,000.00 each to stand for her. The applicant was displeased by these fixed conditions and therefore, appealed to the Court of Appeal for the review of the same. After hearing the appeal, the Court of Appeal ruled as follows:

> As I pointed out earlier, the lower court did not refused bail. It must thus have satisfied itself that the accused would come back to take her trial. But why was the appellant asked to deposit the sum of N400,000.00 in court? This incidentally was the same amount the appellant was alleged to have stolen.
>
> While a court must in the consideration of the question of bail consider the strenth of the evidence against an accused, it must be born in mind that the case is not at that stage been tried. The appellant in this case had pleaded not guilty to charge NoME/323C/88. When an accused pleads not guilty, he is deemed to have put himself upon his trial… Since there is a presumption of innocence in favour of an accused, it seems to me odd and oppressive that the appellant in this case had been called upon to deposit a sum of N400,000.00 as a condition for bail. Is it not possible that she may at the end of the day be found not guilty of the offence? Why ask her then, to deposit the very sum she was alleged to have received under false pretences?
>
> If the sole purpose of granting bail, is to enable an accused come back to face his trial, I do not see that it is necessary to introduce a test of pecuniousity to attain that end. For even an accused who is able to deposit N400,000.00 may still jump bail.

The above laudable statement of the law notwithstanding, the Administration of Criminal Justice Act, 2015 has now established a bail regime where the court is allowed to demand for a deposit of money as a condition for bail under the provisions of Section 165(2) which provides that "the court may require the deposit of a sum of money or other security as the court may specify from the defendant or his surety before the bail is approved". To ensure the effectiveness of the introduced system of money bail, the Administration of Criminal Justice Act, 2015 provides for the establishment of surety regime where a person who cannot meet the terms of a money bail imposed on him may secure the assistance of professionally registered bondsman to settle the bail term and act as his surety. The Act also confers authority on the Chief Judge of the Federal High Court and that of the High Court of the Federal Capital territory, to make regulations for the licencing of corporate bodies or persons to act as bondspersons within the jurisdiction of the court in which they are registered. The bonds persons when registered, may undertake recognizance, act as surety, or guarantee the deposit of money as required by the bail condition of an accused granted bail by the court within the division or district in which he or she is registered. The relevant Sections of the Act provides:

The Chief Judge of the Federal High Court or of the High Court of the Federal Capital Territory, Abuja may make regulation for the registration and licencing of corporate bodies or persons to act as bondspersons within the jurisdiction of the court in which they are registered (Section 187(1), *Administration of Criminal Justice* Act, 2015).

> A person shall not engage in the business of bail bond services wihtout being duly registered and licenced in accordance with the Sub Section one of this Section.
> A person who engages in bail bond services without registration and licence or in contravention of the regulation or terms of his licence is liable to a fine of five hundered thousand Naira or imprisonment for a term not exceeding 12 months or to both fine and imprisonment.
> A bond person registered under Sub Section one of this Section may undertake recognizance, act as surety, or guarantee the deposit of money as required by the bail condition of a defendant granted bail by the court within the division or district in which the bondsman is registered.
> A person or organization shall not be registered as a bond person unless the person is, or the organization is composed of persons of unquestionable character and integrity and deposit with the Chief Judge sufficient bank guarantee in such amount as may be determined by the Chief Judge in the regulation, having regard to the registered class or limit of the bondsman's recognizance.
> A registered bond person shall maintain with a bank or insurance company designated in his license, such fully paid deposit to the limit of the amount of bond or recognizance to which his licence permits him to undertake (Sections 187(2)-(7) Administration of Criminal Justice Act 2015).

The above established system of money bail in the view of the writer, is not suitable in a country such as Nigeria – where the judicial process works at a snail rate, where the judiciary is still yearning for independence (Oladele O.O., (2017), where the process of the appointment and removal of judges is not free from political influence, where judges cannot dispense justice free from economic pressure, where poverty is at the highest ebb, where the Police have turned into a debt recovery agency, where corruption has become a persistent cancerous phenominon (Akande I.F., (2021), and where the citizens prefer using the criminal justice process for the settlement of private conflict and the witchunting of their perceived enemies. This last symptom, was reflected in the case of *Kure vs C.O.P (*(2020) *)*.

In that case, the appellant a veterinarian entered into contract with the Ministry of Culture and Tourism, Rivers State, through one Mrs. Sokari Davies, the Director of Tourism, to supply a calf giraffe in the sum of 3.5 Million Naira only. The said sum was paid into the account of the appellant domiciled at the United Bank for Africa (UBA). Appellant promised to deliver the calf giraffe in two weeks but unfortunately failed to do so after the passage of several months due to a reason beyond his control. Mrs. Sokari, who stood in for the Ministry of Culture and Tourism, Rivers State then decided to check whether the money deposited into the account of the appellant was still intact. To her surprise, she discovered that the appellant had been making a piecemeal withdrawal of the money leaving a balance of N1, 000,000.00 (one Million Naira) only in to the account. She then went to court and sought for an order *ex parte* where a lien was placed on the account to prevent the appellant from withdrawing the balance.

However, instead of continuing to pursue her grievance against the appellant at the civil court as started, Mrs. Sokari subsequently reported the appellant to the police where he was arrested and prosecuted for the offences of Cheating and Criminal breach of trust under Section 322 and 312 of the Penal Code at the Chief Magistrate Court, Kaduna, where the transaction took place. Upon his conviction by the Chief Magistrate Court, the appellant appealed to the High Court, Kaduna State where the conviction was affirmed. Dissatisfied, the appellant appealed to the Court of Appeal, Kaduna Division which also affirmed the conviction. On further appeal to the Supreme Court, the Supreme Court set aside the conviction and acquitted the appellant for both the offences holding that the issue in the case was civil in nature and the appellant shouldn't, in the first place, have been tried for any offence on the basis of the same whatsoever. The Court ruled and stated per Abba Aji Jsc. thus:

> As I went through the facts of this case, I was wondering how a purely civil matter could easily metamorphose and transubstantiate into a purely criminal case. The end result now is that the Appellant has suffered irreparable damage, disgrace, shame, odiousness and untold hardship in the hand of the Police that is constitutionally and legally saddled with the prosecution of criminal offences.
>
> The Police have muzzled the rights and freedom of Nigerians even where cases are clearly outside their jurisdiction, power or corridor. If this is not curbed, everybody including the judicial officers will suffer always from floodgate of civil matters being hijacked by the police and transmuted into crimes. If this is not tackled, everybody would have suffered in the merciless hand of the Police which have become a law unto itself in this country… There is no known law where a breach of an agreement between two parties which has no element of criminality, can result in a criminal charge and subsequent conviction. At best, it can be a breach of a contractual relationship, which criminal law lacks legal capacity or competence to enforce and punish.

From the understading of the writer in the course of attending various conferences towards the making of the Administration of Criminal Justice Act and Law of the states, the decision to allow ordering payment of money as a condition for bail, is aimed at helping those accused persons who could not get human sureties to stand for their bail. This may be due to the moral associated with their cases or any other reason. The experience of Abubakar Bello Masaba, the strong muslim husband of at least 86 women arrested for breaking the Islamic Marital Code and who could not secure human sureties to stand for his bail, was cited as an example. The makers of the Administrtion of Criminal Justice Act, 2015 thought that by providing the money alternative, a bouyant accused person can use money as a bond for his pre-trial freedom where no surety is availabe to stand for his bail. On the other hand, an indigent accused will have the liberty to approach the services of professional bond persons to assist him secure his liberty for fees. Their other reason is the need for the control of the illegal practice of charge and bail, prevalent at the Magistrates and other lower courts bail process, prior to the enactment of the Act. Like the non interventionists, the makers of the Act thought that by introducing the controlled system of a charge and bail, no accused released in the hand of a registered bondsman will escape justice. If he does, the registered professional bondsman who stood surety for his bail, will be responsible to the forfieture of his bond; and be accountable to produce the accused for the purpose of his trial.

However, the question here is, whether the old bail regime under the Criminal Procedure Code and the Criminal Procedure Act were oblivious to the plight of an accused who may not secure human sureties to stand for his bail? Answer to this question is in the negative because, the then system has allowed the court to accept the deposit of money from accused as an alternative to sureties (Section 347, Cr*iminal Procedure Code, Cap. C42,* Laws of the Federation of Nigeria, 2004). The only exception was that the court was not allowed to fix deposit of money as a condition for bail in protection to the right of an accused to personal liberty and to the presumption of innocence (*Eyu vs The State* (1988). An accused may even be allowed on bail based on self recognizance under the old system (Section 340(3), *Criminal Procedure Code Law*, Cap C42, Laws of the Federation of Nigeria, 2004). To this effect therefore, the argument of the proponent of money bail under the Administration of Criminal Justice Act, does not hold water in the view of the writer.

As for the introduction of the bondsmen into the bail system, it is the view of the writer that the system will cause more problem than it seeks to resolve. This is so because, corrupt court officials may be tempted to becoming owners of bond companies; or be inclined to accept bond only from the bondsmen who have cooperation with

them for personal gain. A situation like this, which is a possibility in Nigeria, will be detrimental to the interest of the accused and the system in general. As the bond companies are business oriented, expectation is that their services will be offered for money considerations only (Sections 187(2)(6) & (7), *Administration of Criminal Justice Act*, 2015). No moral burden or consideration is attached to their work because they need not even be related to the accused. Thus, in the making of the bail agreement with the accused, the bondsmen may be tempted to exploit the accused and the accused who is in the disadvantaged position, will be amenable to submit to the exploitation. His precarious condition will open him to submit to the unwholesome demand of the bondsmen in desparation for his freedom against a charge of which he may be innocent. At every point where an accused fails to submit to the exploitation of a bond person, the bond person may refuse to stand for his bail. Where the surety contract has been entered, the bondsman may at any time withdraw his bond and apply that he be discharged from his obligation under the bail contract. The accused may then be arrested and sent to detention pending the provision of a new surety. A bondman who personally believe that an accused is planning to jump bail, may arrest and take him to the police as he deems fit. All these discretions to the bondsmen,exposes the accused to explotation and poses a great danger to the realisation of his right to personal liberty and presumption of innocence under the Constitution.

From the research of the writer, the idea behind allowing the bondsmen power over the accused under their suretyship, was derived from the Common Law as explained by the U.S. Supreme Court in the case of *Taylor v Taintor*. In that case, the court explained that:

> When bail is given, the principal is regarded as delivered to the custody of the sureties. Their dominion is a continuance of the origninal imprisonment. Whenever they choose to do so, they may sieze him and deliver him up to their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State, may arrest him on the Sabbath and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. Non is needed. It is likend to the re-arrest by the Sheriff of an escaping prisoner… It is said: "The bail have their principal on a string and may pull the string when ever they please,and render him to their discharge".

The above pervasive power, was based on the private contract between the accused and the bondsmen not because the bondsman stands in the stead of the State. The ancient justification for the power, was the return of a run away slave and the paucity of law enforcement agencies at Europe in those days (Ramsy C., (1970). However, in the present twenty first century, the business of law enforcement has become the professional business of the law enforcement agencies whose discharge of duty is expected to be driven by the urge to promote public safety and ensure the protection of human rights rather than the need for financial gain. Hence, the ancient power to the bondsmen at Common Law has clearly no place (Section 4, *Police Act,* 2020). A free society such as Nigeria, cannot be right to expose the liberty of its members to the whimsical exploitation of the bondsmen for personal gain rather than the safety of the state and its citizens. This is more so, if the country is serious in the promotion and the protection of the fundamental rights of its individual citizens as professed by section 1(1) of the Administration of Criminal Justiced Act, 2015 .

In the view of the writer, the power of arrest granted the bonds men against an accused is inimical to the full realisation and enjoyment of the right of an accused to presumption of innocence. The writer holds this view because such power, exposes an accused to exploitation, arbitrary arrest and detention pending trial at the whims of the bondsmen. The consequence may be the anger of the poor accused against the system as unjust, inhuman and discriminatory as happened at the United State of America from where the system was borrowed (Ramsy C., (1970). This may in turn lead to frustration, a factor influencing criminal behaviours that may lead to the destruction of the society.

## 6. An Examiniation of the American Experience

At the United State of America from where the system of money bail was borrowed by the Administration of Criminal Justice Act, 2015, the system has been abandoned since the year 1961 due to its established deficiencies and negative implications on the accused right to presumption of innocence and overall realization of the right to

personal liberty. It was abandoned because, the system was considered discriminatory against the poor who usually suffer incarceration for his inability to settle his money bail condition. It was considered costly because the government must pay to detain and feed those offenders who are unable to make bail but who would otherwise remain in the community prisons. It was considered as unfair because, it was reaslised that a higher propotion of detainees at America receives longer sentences than people released on bail. The system was at the same time considered dehumanizing because innocent people who cannot make bail suffer and even commit suicide in the then United States deteriorated jail system.

As the function of bail lies in ensuring the presence of an accused before the court for his trial, the American courts now favour granting bail to an accused on recognizance in the vast majority of cases. Except where the court is apprehensive that an accused will not appear for his trial, or where the court lacks verifiable information about an accused or in the most violent crimes, where the safety of the state is threatened, those accused of crimes are as much as possible allowed bail on recognizance without any money condition.

Highlighting the nature of the money bail system at America, and the reasons which led to the reform of the system at the States, Larry stated as follows:

> At America, Bail is usually considered at a hearing that is conducted shortly after a person has been taken into custody. At the hearing, such issues as the crime type, flight risk, and dangerousness could be considered before a bail amount is set. Some jurisdiction have developed bail schedule to make the amount of bail uniform based on crime and criminal history. There are numerous other junctures during which bail is considered.
>
> Because many criminal defendants are indegent, making bail is a financial challenge that if not met can result in a long stay in a country jail. In desperation, indigent defendants may turn to bail bondsmen. For a fee, bonding agent lends money to people who cannot make bail on their own. Typically, they charge a percentage of the bail amount. For example, a person who is asked to put $10,000.00 will be asked to contribute $2,000.00 of his own and the bondsman cover the remaining $8,000.00. After trial, the bondsman keeps the $2,000.00 as his fee.
>
> Powerful ties often exists between bonding agents and the court with the result that defendants are steered toward particular bonding agents. Charges of kick backs and cooperation accompany such arrangement. Consequently, efforts have been made to reform and even eliminate money bail and reduce the importance of bonding agents. Until the early 1960s the justice system relied primarily on money bonds as the principal form of pre-trial release. Now Many States allow defendants to be released on their own recognizance without any money bail.

Release on recognizance, was pioneered by the Vera Institute of Justice in an experiment called Manhattan Bail Project, which began in 1961 with the cooperation of the New York City criminal courts and local law students. It came about because accused with financial means were able to post bail to secure pretrial release; while indegent accused remained in custody. The project found that if the court have sufficient background information about an accused, it could make a reasonably good judgement about whether the accused would return to court for his trial. When release decisions were based on such informations as the nature of the offence, family ties, and employment record rather than money, most defendants returned to court when released on their own recognizance. The result of the Vera Institute's initial operation showed a default rate of less than 0.7 percent only. The bail project's experience suggested that releasing a person on the basis of verified information more effectively guaranteed appearance in court than did money bail.

The success of the ROR programme in the early 1960s at America, resulted in bail reforms that culminated with the enactment of the America's Federal Bail Reform Act of 1966, the first change in the Federal Bail Laws at America, since 1789. This legislation sought to ensure that release of an accused will be granted in all non capital cases in which there was sufficent reasons to believe that the defendant would return to court. The law clearly established presumption of ROR that must be overcomed before money bail is required and stressed the philosophy that release on bail should be under the least restrictive conditions necessary to ensure court appearance *et cetera.* By the year, 1984 under the Bail Reform Act of 1984, factors such as the seriousness of the offence, the wieght of the evidence, the gravity of the punishment, the court appearance, history of the accused, and prior conviction of the accused become the most important factors of cosideration in deciding bail applications in America. Once

the court is satisfied that an accused is entitled to bail in a given circumstance, he or she will be allowed to proceed on self recognizance bail without the necessity of making the deposit of a sum of money as a condition for his bail.

If research about the efficacy of money bail at America shows negative consequences and has forced the country to abandon the system, to a system of release on recognizance, why then should Nigeria, a reputed country of poor and corrupt population, imbibe the system at the 21st century. This system of money bail is not suitable to Nigeria because, even without the legal sanction, it has been difficult, if not impossible for accused to secure bail wihtout paying gratification to the police, and other officials involve in the process due to corruption with negative consequences on the right of the accused to fair hearing. The legalisation of money bail therefore, provides incentive to those corrupt practices rather than controlling it. From as far back as 1996 in Nigeria, the Civil Liberty Organization report on the prevalence of corruption in the bail process at the Magistrate and Customary courts of Southern Nigeria, observed as follows:

> A practice that has acquired notoriety is the extortion of gratification from accused persons in the criminal justice process either before the grant of bail or at the approval of surety stage. Most magistrates charge a fixed percentage of bail sums, notoriously ten percent. This is clearly against the spirit of Section 32 now (S.35) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Article 6 of the African Charter on Human and People's Right which entitles everyone to his personal liberty except for reasons laid down by law or for coming within one of the provisions of section 32(1)(a) to (f) (Onyekpere E., (1996).

Until the present day in the experience of the writer in practice, bail is granted mostly to only those accused that can pay stipulated sums of money as gratification to be shared by the magistrates, police officers, legal practitioners and other officials having a role to play in the process. In some cases, after the bail is approved, the accused and or his surety has to pay for the production warrant to be filled otherwise, the accused may not be released as expected. The Court clerk working in collusion with the Magistrate may inform the surety that the warrant has to be photocopied as the stock of the same has finished. It is also not uncommon for instance to hear a Magistrate pronounces in open court that the accused is admitted to bail in certain sum of money with reliable sureties one of whom shall be a first-class emir, an officer of the rank of a director in the civil service *etcetera*. The sureties may be required to be resident owners of properties within the jurisdiction of the court.

However, it is also not unusual to hear that after meeting the magistrate in camera, the bail conditions have been relaxed or waived for the gratification of it. In the view of the writer, these negative practices can be checked not by providing additional incentive of legalization or decriminalization but, through the improvement of the standard of living of the judiciary, provision of facilities, rigorous supervision of their work and purposeful law enforcement in the fight against corruption.

**7. Conclusion**

Ordinarily, bail is a pretrial right subject to the discretion of the court. In the exercise of the discretion, the court usually requires an accused to enter into a guarantee that a certain amount of money will be paid or property forfeited if the accused fails to appear for his trial or breached any of his bail conditions. What is then contemplated by bail is the procurement of the temporary release of a person from legal custody by making undertaking that he or she will appear at a designated time and place as may be required by the police or the court for the purpose of his trial. In the effort of the court to ensure the presence of an accused for trial, it is not necessary that he be required to deposit an amount of money as a security. In the bail pending trial in particular, stipulating deposit of money as a condition for bail will amount to convicting an accused pending trial contrary to the purpose of the right to presumption of innocence under the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The system is not only inimical to the purpose of the Constitutional presumption of innocence but, the purpose of the Act in the protection of the right of suspects and accused as expressed in Section 1(1) thereof. Thus, based on the foregoing discussions, the paper finds as follows:

i. That by implication, the system of money bail introduced by the Administration of Criminal Justice Act, 2015, presumes an accused guilty; and is derogatory to the purpose of the Constitutional right to personal liberty and to presumption of innocence; and the purpose of the Administration of Criminal Justice Act itself in Section 1(1) thereof.

ii. That by the norms of criminal justice adopted by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) the protection of individual liberty' takes precedence over the need for the punishment of criminal offenders. This in essence, is the reason why an accused is presumed innocent and provided with the right to bail and fair hearing under the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

iii. That the introduction of professional sureties into the bail system in Nigeria discriminates against the poor, will cause prison congestion, and will serve a catalyst for the production of more crime into the society.

Based on the above findings, it is recommended as follows:
That the liberty granted the court in fixing money deposit as a condition for bail should be reversed. In its place, there should be a return to the status quo under Section 347 of the Criminal Procedure Code as done by Katsina State (Section 162, *Administration of Criminal Justice Law of Katsina State,* 2021).

i. That in tackling the challenge of corruption prevalent in the bail process in Nigeria; the government should be more proactive in discharging its responsibilities to the officials having a role to play in the process. More focus should be placed in the provisions of facilities and improvement of the welfare of staff through home grown and favorable programs that will ensure effective discharge of their duties and the quick dispensation of criminal justice in the country rather than introducing measures that will compromise the right of defendants to fair trial.

ii. That the bondsmen should be removed from the surety system in Nigeria. In their place, release on recognizance should be encouraged and that advantage of the current technological development in the area of the National identification number (NIN) should be taken in tracking the data of every Nigerian accused and their sureties for the purpose ensuring presence in court for trial.

iii. That in place of bondsmen, strong bail institution professionally staff with adequate man power, direct funding and control of government should be established to supervise accused in conjunction with the court and the police on their compliance with bail terms imposed pending trial.

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# *Sayam* as a Sanction Model Against Children in Conflict with the Law in Aceh

Muhammad Nur[1], Harun[2], Safrida[3], Alief Farhan[4]

[1] Lecturer at the Faculty of Law, Malikussaleh University. Email mnur@unimal.ac.id
[2] Lecturer at the Faculty of Law, Malikussaleh University. Email harun@unimal.ac.id
[3] Student at the Faculty of Law, Malikussaleh University Malikussaleh University.
[4] Student at the Faculty of Law, Malikussaleh University Malikussaleh University

**Abstract**
The Acehnese people use the sayam sanction approach to conflict resolution. Sayam is an Acehnese cultural framework influenced by Islamic values, which are still being implemented and were strengthened by Aceh Qanun Number 9 in 2008. This descriptive study of sayam as a model of sanctions for children in conflict with the law aimed to describe the characteristics of an individual involved, situation, symptom, or group in society. The juridical review is used because various factors influence applicable legal rules. According to the study's findings, the resolution of cases involving children in conflict with the law in Aceh is still carried out using sayam sanctions with three methods. In the first model, the resolution of cases involving children in conflict with the law is handled by the head of the family whose child is in conflict with the law with the family whose child is the victim. The most basic form of dispute resolution is recognized as a hereditary tradition still used by the community. In the second model, the victim child's parents report the perpetrator's evil actions against their children to the keuchiek (the head of the village). In this dispute resolution model, the active role of the keuchikas customary stakeholders and village leaders is more prominent. The third model in the sanction application against children in conflict with the law involves the Police. The Police actively supervise conflict resolution until a decision is reached at the gampong (village) level. However, in this resolution model, the Police are not actively involved in making decisions.

**Keywords:** *Sayam*, Sanction Model, Children, Conflict, Law, Aceh

## 1. Introduction

In Indonesia, social life is currently in turmoil due to various crimes, each with its characteristics. Adults are not the only ones who commit criminal acts; children, the nation's future generation, are also involved (Unayah, Unung and Muslim Sabarisman: 2016) (Siregar, Risdalina; 2017, 94). Efforts to combat child crime (children in conflict with the law) are currently being pursued through the implementation of criminal law (Muhammad Nur; 2018, 73). Either through the imposition of criminal sanctions or other action sanctions.

The application of sanctions to children must prioritize non-penal sanctions in addition to penal sanctions in the form of action and punishment. Article 71 of Law Number 12 of 2011 concerning the Juvenile Criminal Justice System states:

(1) The primary punishment for children consists of:
   a. Warning penalty;
   b. Penalty with the following conditions: 1) coaching outside the institution,
(2) community services, or
(3) under state supervision.
   a. work training;
   b. Juvenile Fostering institution; and
   c. Jail.

Protection of children's rights in conflict with this law is a form of implementing restorative justice, which is carried out through diversion efforts. The non-penal sanctions are applied to children aged twelve to fourteen years. Meanwhile, the penal sanction in the form of action is applied to children aged over twelve to fourteen years. ( Article 1 Number 7 of Law Number 12 of 2011)

According to Nashriana, the response to misbehaving children must be based on the principle of benefit to the child, taking into consideration whether the sanction benefits the child or has the potential to worsen the child's condition, such as inhibiting the child's physical, social, and primarily psychological development. (Nashriana;2010,33) As a result, sanctions against children who violate the law should be based on a criminal law policy for children that is explicitly directed to promote child welfare and protect children's rights, particularly those of delinquent children.

The philosophy of punishing children is to restore the mental state of children who have been shaken by the criminal acts they have committed. The philosophy of child punishment is to restore the mental state of children whose criminal acts have shaken. So it is not only about punishing guilty children but also about fostering and reviving children who have made mistakes or committed deviant acts. As a result, the actions of children who break the law should not be equated with adult crimes because they are distinct. Juvenile crimes must be handled differently than handling adult crimes (Muhammad Nur, et al.; 2022, 54).

Suppose children in conflict with the law are handed over to law enforcement agencies. In that case, the sentencing process requires the presence of children in the court or law enforcement agencies full of officers wearing official clothes. This condition can affect the psychology of children. Therefore we need a law enforcement system that does not bring harm to children and does not require the children to be openly present in the law enforcement institution. This resolution can be accomplished through a cultural approach called *sayam*thatdevelops in Acehnesesociety. Some Acehnese, particularly those living in rural areas far from the public (official) judiciary, settle almost every case and legal dispute between themselves and their community members through informal means.customary law services.

The cultural approach involving local wisdom and customary institutions is a strategic and practical step in resolving criminal acts because the community already has a living legal system known as customary law. The Acehnese people use the *sayam* sanction approach, an Acehnese cultural framework influenced by Islamic values for conflict resolution. Moreover, this traditional and cultural-based conflict resolution process that has long been rooted in Acehnese societyis compensation in the form of property given by the perpetrator of the crime to the victim or the victim's heirs, specifically related to damaged or malfunctioning limbs and bleeding. This tradition is a wise and democratic conflict resolution process that does not involve bloodshed or revenge between the two parties conflicting parties, both vertically and horizontally. The sanction currently being applied in Aceh has been strengthened by the Aceh *Qanun* Number 9 of 2008. Based on the background, this research aimed to investigate sayam as a model for sanctions against children in conflict with the law in Aceh.

## 2. Research Method

This descriptive study aimed to analyze *Sayam* Sanction Model Against Children in Conflict with the Law in Aceh and to accurately describe the characteristics of a particular individual, condition, symptom, or group, as well as to determine the spread of a phenomenon or to determine whether there is a relationship between

symptoms in society. The juridical review is used considering that the applicable legal rules can be influenced by various factors, including the society, the developing culture, and the law and society interactions. In contrast, the empirical review is intended to see the law from reality. (Muhammad Nur, et al.; 2022, 55)

The following are the sources of research data used in this study:

1. Primary data

   Primary data in this study was obtained through field research in the form of interviews with respondents. This data was obtained using interview techniques (interview guide). Interviews were conducted on respondents using interview guidelines prepared in advance. This interview was conducted using either directed or undirected and in-depth interviews. The respondents consist of:

   1. One investigator from the Protection of Women and Children unit at the Aceh Besar Police,
   2. One investigator from the Protection of Women and Children unit at the East Aceh Police,
   3. One investigator from the Protection of Women and Children unit at the North Aceh Police
   4. Three *Imam Mukim* (Religious leaders of sub-district)
   5. Three *Keuchiek Gampong* (Village leaders)
   6. Three customary stakeholders
   7. Parents of three victims
   8. Parents of three perpetrators

2. Secondary data

   The secondary data in this study was the primary material for normative legal research from the standpoint of its binding strength, divided into primary, secondary, and tertiary legal materials.

   1) Primary legal materials consist of the 1945 Constitution, Law Number 3 of 1997 and its amendments, Law Number 11 of 2012 on the Juvenile Criminal Justice System, and Aceh *Qanun* Number 9 of 2008 customary Institutions.
   2) Secondary legal materials include books on the problem under study.
   3) Tertiary legal materials, such as dictionaries and other documents.

Data analysis was carried out using qualitative methods, which entailed qualitatively interpreting respondents' opinions or responses and then explaining them completely and comprehensively on various aspects of the subject matter (Ronny Harjito Soemitro; 2005, 93).

## 3. Discussion

### *3.1. Children in conflict with the law*

Children are commonly defined in Indonesian law as people under age people who are not yet mature *(minderjaring)*, people who are underage/inferior (*minderjarighaid*) or children who are under the supervision of a guardian *(minderjarigeondervoordij)* (Maghfira, S; 2016,215). According to Law Number 4 of 1979 on Child Welfare, a child is defined as someone who has not reached the age of 21 and has never been married. Hence, the compilation of Islamic Law based on Presidential Instruction Number 1 of 1991 stated the age limit for children who can stand alone or as adults is 21 years, as long as the child is not physically or mentally disabled or has never been married.

According to Article 1 number 3 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, a Child in Conflict with the Law, hereinafter referred to as a Child, is a child who is 12 (twelve) years old but not yet 18 (eighteen) years old and suspected of committing a crime. Based on Law Number 35 of 2014, a child is defined as anyone under 18 (eighteen), including children still in the womb.

Children in conflict with the law need to be handled seriously, even though they are still in the form of child delinquency (Mumtahanah, N. 2015). Delinquency is based on actions or behaviour that violate applicable laws and violations of moral values.

*3.2. Settlement of Criminal Cases According to Aceh's Customary Law*

Customary and Islamic laws for the indigenous people of Aceh are like two sides of a coin. Acehnese people describe it as hukom ngoen adat *lagee zat ngoen sifeuet* (law and custom, such as the relationship between substance and its nature). A substance and its characteristics are distinct, distinguishable, but inseparable. According to Teuku Djuned, to solve crime problems. In Acehnese tradition, the philosophy '*uleubeu mate, rantengbekpatah*' (the snake must die and the branch must not be broken). The essence of this proverb is that there should be no more problems after the peace. According to Soepomo, quoting Soekanto, one of the elements forming the foundation of the customary law system is the substantial nature of togetherness that encompasses the entire field of customary law. (Ali Abubakar; 2011,17) Settlement of disputes or criminal acts committed by Aceh's indigenous peoples can be pursued in two ways under Aceh's customary law. First-level settlement is through the *gampong*(village) customary court. If the *gampong* customary court's decision is unacceptable, it can be submitted to the customary court at the *mukim* (subdistrict) level.

The criminal case resolution through customary law always prioritizes the nature of kinship and the principle of peace even though there are sanctions. AbidinNurdin emphasized that *sayam* is one of the patterns of conflict resolution found in the lives of the Acehnese. This pattern has been practised for a long time and even longer than in *'iet* or *suloh*. *Sayam*is a type of compensation in the form of assets given to the victim or the victim's heirs by the criminal, specifically related to damaged or malfunctioning limbs (Abidin Nurdin; 2013,17).

Where the *sayam* procession is held after the *keuchik* and *teungkumeunasah* (religion leaders) have contacted the disputing or conflicting parties. If both parties agree, the *sayam* procession will occur at the victim's home or the *meunasah* (worship place). According to Manfarisyah, *sayam* is one of the Acehnese people's disputes/conflict resolution patterns. *Sayam is explicitly* designed for disputes resulting in damaged or malfunctioning limbs due to the perpetrators' actions and also a form of restitution for blood loss caused by persecution. For a long time, the Acehnese people have followed this pattern. (Manfarisyah; 2016,175)

According to Nanda Amalia et al., two dispute resolution models are commonly used by the community in Aceh villages today: the first is a simple dispute resolution model with the involvement of *Keuchik*, who is very active in resolving disputes between communities, and the second is the involvement of community elements called *Tuha Peut Gampong*. *TuhaPeut Gampong*as a whole is used to settle disputes. The settlement pattern follows a model resembling a formal trial and refers to the customary court guidelines issued by the Aceh Customary Council. (Nanda Amalia, et al. 2018;178)

Several cases can be resolved through customary courts at the *gampong* customary court and customary courts at the *mukim* level, according to *Qanun* Number 9 of 2008 on Customs and Customary Development. The use of customary law to resolve community cases is always practiced in the lives of the Acehnese indigenous people. The process is quick and painless, does not create resentment between opposing parties, and can help restore balance in society as a whole. The use of customary law is the legal basis for resolving community cases because customary law does not contradict community will and will increase the number of brothers and their noble position in Islam. Islam promotes peace, which the Prophet Muhammad brought to humanity.

*3.3. Sayam's Sanction*

Local wisdom has long been used as norms and values in society and interacting with God, humans, and nature. Local wisdom can be defined as all life views or teachings, advice, proverbs, and traditional values that are lived, respected and practised by the community, both those with and without customary sanctions. (Nurdin, A; 2013,135) This tradition is believed to be a powerful means of fostering brotherhood and solidarity among citizens, and it has been institutionalized and crystallized in the social and cultural order.

A cultural approach involving local wisdom and customary institutions is a strategic and effective step in resolving criminal acts because the community already has a living legal system known as customary law. Rasjidi stated that the cultural approach to achieving this security and order is consistent with the flow of

sociological jurisprudence law, which states that good law is the law that is appropriate and lives in society (Marco Manarisip; 2012, 25). Cultural values that have taken root are typically profane and sacred in nature, allowing their implementation to be more quickly and easily accepted by the community. It is hoped that by applying this approach to local culture and customs, conflict resolution can be quickly realized and accepted by all groups, resulting in no hidden, latent conflict in society (Astri, H; 2011,151). *Sayam*, according to Abidin, is a form of recompense that aims to protect and respect God's creation in the form of the human body (Abidin Nurdin; 2013,147).

*3.4. Sayam as a Sanction Model Against Children in Conflict with the Law in Aceh*

In Aceh Province, particularly in the districts of Aceh Besar, North Aceh, and East Aceh, cases of children in conflict with the law are still resolved using sayam as a form of sanction. childor his family are willing to pay compensation, the sanction does not result in a prison sentence. This data is based on interviews, focused discussions, and observations of Acehnese dispute resolution practices through customary law. As a result, the author obtains three models or patterns for resolving children in conflict with the law.

The first model of resolving cases of children in conflict with the law is handled by the head of the family whose child conflicts with the head of the family whose child is the victim. This most basic form of dispute resolution is recognized as a hereditary tradition that is still used by the community. The completion of this model is carried out on conflicts that occur among residents of the same village, where the head of a family whose child is a victim goes directly to the head of the perpetrator's family in a familial way, or vice versa.

A family meeting was held to discuss their respective children's behaviour, particularly the good and bad behaviour, and implicitly acknowledge their children's shortcomings. With the child's mischievous behaviour, such as telling too many jokes and injuring the victim, the family who believes their child is guilty is responsible for their child's mistakes. Then, through deliberation between the two parties, find a solution for the victimized child.

This sayam will be given directly to the parents of children who are victims by the parents of children who conflict with the law. During the deliberations, efforts are made to provide children who have suffered from bleeding or injuries with minimal medical expenses as a form of charity. Because the case was resolved directly without involving the customary village stakeholders, it was completed with the handover of the *sayam* followed by a handshake of both parties. Their social lives returned to normal as before the dispute.

The second model, the child's parents as victims, report to the *keuchiek* the treatment received by their children due to evil actions by the perpetrator's children. In this model, *Keuchik*'s role as a customary stakeholder and village leader is more prominent in dispute resolution. *Keuchiek*tries to bridge the gap between these two families so that they can constructively resolve their children's disputes and avoid acting violently against children as perpetrators of crime. As a result, *Keuchiek* will visit each party's home to gather detailed information about the existing problems. The findings of the keuchiek visit to both parties' homes will be communicated to the village staff or customary stakeholders to find a solution to solve the case.

Based on the customary stakeholder's discussion, both parties were invited to compromise to resolve disputes between the perpetrator's and victim's children. The meeting is usually held at *Keuchiek*'s house, and both parties are served food and beverages. During deliberation, cases that can be resolved at the *keuchiek*'s house are usually resolved immediately, including what and how to compensate the victim. However, the *sayam* is based on the ability of the perpetrator's family to pay the compensation amount and the sayam implementation.

Suppose the perpetrator's parents can pay for the *sayam*. In that case, the *keuchiek* will invite the victim's parents to his house to receive a simple *sayam* and *peusijeuk* followed by a handshake between the families. The case is closed with a handshake, and the lives in society return to normal without any sense of revenge.

In this second settlement model, sometimes there is no agreement between the victim's and perpetrator's families because each party insists on their own opinion. Therefore, the settlement of this case will be brought to *Meunasah* for resolution. The settlement of disputes between families in *Meunasah* involved more parties, especially the customary stakeholders, such as*Keuchiek*, village secretary, *Tuha Peut, Imum Gampong*, *Dusun*head, and the parents of the perpetrator and the victim.

The settlement process, which includes customary stakeholders, still refers to efforts to settle cases peacefully with full kinship following the traditional life of the Aceh village community while still respecting both parties. This is where the customary stakeholders demonstrate their wisdom under the philosophy of resolving disputes through customary law, *uleuebeu mate, rantengbek patah* (the snake must die, and the branch must not be broken). With this precautionary principle, it is hoped that both parties will accept the Customary stakeholders' decision.

Suppose in this trial there is still no agreement between the parents. In that case, the customary stakeholders decide to impose sanctions on the perpetrators' parents in a particular form and amount. In making this decision, customary stakeholders rely on the advice of*indatu* (ancestral): "*yang rayek ta peuubit yang ubittapeugadoh*" (big problems are minimized, and minor problems are eliminated). Therefore, the customary court determines the sayam form and amount based on re-tightening the brotherhood between families and not incriminating the guilty party. The perpetrator's parents must obey this customary sanction imposed within a certain period.

The amount and form of *sayam* required of the perpetrator's parents are usually adjusted to the victim's condition. If the victim only suffers minor injuries, then the compensation is in the form of medical expenses. If the injuries are savere, the compensation is in the form of the slaughtered goat and payment of medical expenses as a form of responsibility for the bleeding from the victim's body. The sayam are delivered in Meunasah in a joint meal at a *kenduri* (banquet) of goat cuisine provided by the parents of children who conflict with the law. Before the feast, a *peusijuek* is performed on the victim, and then a handshake between the two parties is a sign that the dispute has been resolved and there should no longer be any grudge between the victim and the perpetrator. The last advice given to the disputing parties was, "*Nyoekasep oh no beknadendam le, nyoe beujeut keu jalinan silaturahmi, karenanyan ajaran agama geutanyoe"* (meaning: this problem has ended here and should not be extended anymore. This handshake is expected to be the beginning of friendship because this is the teaching of our religion)

The Police are involved in the third model of applying sanctions to cases of children in conflict with the law. This model is more difficult because neither party wants to give in, and the victim does not want the case to be resolved by the gampong leader or a customary stakeholder so that the victim reports the case to law enforcement, particularly the Police. As a result, the Police are actively involved in cases like this.

The Police are actively investigating this case until a decision is reached at the village level. However, the Police are not actively involved in decision-making. Cases were reported to the Police because the victim lacked confidence in the village apparatus stakeholders to resolve the case. The Police, on the other hand, provide opportunities for village stakeholders to resolve cases of children in conflict with the law harmoniously. So that the Police only provide input and encouragement to the disputing parties, the perpetrator's and victim's parents, to resolve the case at the gampong level considering that the child's case, even though it is brought to law enforcement, will also be resolved through diversion.

This settlement model involves customary stakeholders in the *gampong*. The settlement is carried out in Meunasah through a trial involving the *keuchiek, tuhapeut, imum gampong*, the village secretary and the head of the *Dusun*, and the parents of the perpetrator and the parents of the victim. While the Police stood by and did not participate in the trial. After the case was resolved, the Police requested a peace deed to prove it had been appropriately handled. Therefore, if any parties report the case to the Police again, the Police can show that the case has been completed and cannot be legally processed again.

The three models of resolving children in conflict with the law, which are still in use in Acehnese society, are a form of community responsibility in maintaining unity and brotherhood in Gampoeng community life. The principle of dispute resolution is *uleue beu mate, ranteng bek patah* (the snake must die, and the branch must not be broken). This proverb means that when solving social problems, great care is taken to ensure no party is harmed. Similarly, disputes must be settled through sacrifices to fellow communities within the framework of customary brotherhood so that no matter how big the problem that arises, it must be settled peacefully based on "*yang rayek ta peu ubit yang ubit tapeugadoh*" (big problems are minimized and minor problems are resolved).

Dispute resolution among the Acehnese people must also be based on sincerity; what the leader has decided must be accepted gracefully as a form of respect for the leader's wisdom in protecting the community, as taught by Islam. "Oh no, defender, Nyoe Kasep has a grudge, Mrs. Beujeut wants to have a relationship because of the Geutanyoe religion's teachings." (This problem has ended here and should not be extended further; this handshake is expected to be the start of a relationship because this is our religion's teaching). This is following Acehnese society's advice, *hukom ngoen adat lagee zat ngoen sifeuet* (law and custom such as the relationship between substances and their nature), law based on custom, custom based on the Book of Allah. Child or his family is willing to pay compensation, the sanction does not result in a prison sentence.

## 4. Conclusion

The resolution of cases of children in conflict with the law in Aceh is still conducted through the use of special sanctions called sayam with three models or patterns. The first model, which involves resolving cases involving children in conflict with the law, is handled by the head of the family whose child perpetrator is with the head of the family whose child is the victim. This is the most basic form of dispute resolution, and it is recognized as a hereditary tradition still used by the Aceh community. While in the second model, the victim child's parents report to the keuchiek the treatment their children have received as a result of the perpetrator's evil actions. *Keuchik'*s role as customary as customary holder and village leader is more prominent. In the third model, Police are involved in applying sanctions in cases of children in conflict with the law. The Police actively supervise this third form of settlement until a decision is made at the village level, but they are not actively involved in decision-making.

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# Coastal State Responsibility and Rights in Regard to Fisheries Resources in EEZ

Anindito Wiraputra[1,3], Sri Kuncoro Bawono[2,3], Koesmoyo Ponco Aji[1,3]

[1] Hukum Keimigrasian, Politeknik Imigrasi, Depok, Jawa Barat, Indonesia
[2] Administrasi Keimigrasian, Politeknik Imigrasi, Jawa Barat, Depok, Indonesia
[3] Australia National Centre for Ocean Resources & Security (ANCORS), University of Wollongong Australia, Wollongong, Australia

Correspondence: Anindito Wiraputra, Prodi D4 Hukum Keimigrasian, Politeknik Imigrasi, Depok, Jawa Barat, Indonesia, 16514. E-mail: anindito.wiraputra@poltekim.ac.id

**Abstract**
Decreasing number of fishery resources impacted by unsustainable fisheries management, climate issues, and the sovereignty system at sea have made fishery conflicts a growing security concern, such as the conflict between Indonesia and Vietnam over the Natura Sea. This dispute is exacerbated by China's militarization efforts, as the fishing industry recognizes its ability to influence the maritime sphere around it. Other Southeast Asian coastal states, such as the Malacca Strait and the Natuna Sea, border Indonesia's EEZ, making it vulnerable to disputes. And if there is a violation of laws and regulations in the territorial sea, the coastal state can apply its criminal law to the violators if the violation has a negative impact on the coastal state or interferes with security. This EEZ regime was established to regulate long-standing disputes over maritime territory and unilateral claims, such as the dispute between Indonesia and Malaysia over the Malacca Strait Sea, which was successfully resolved. As a result, the coastal state has jurisdictional rights to make arrests, as specified in Article 73 concerning the enforcement of the coastal state's laws and regulations.

**Keywords:** Maritime Security, Fisheries Law, EEZ, Law of the Sea, International Law

## 1. Introduction

The sea is the most valuable natural resource on Earth, accounting for roughly 71% of the planet's surface. The sea provides protein and omega-3 fatty acids, which are essential for human health. Each year, 200 billion pounds of fish and shellfish are caught for human consumption. Aside from food, the sea serves as a means of transportation and recreation for ships. Mining resources found in the sea include sand, salt, copper, nickel, iron, cobalt, and oil (Marine Bio, 2022). The sea has now become a major focus in environmental studies and conservation. Its role in regulating the Earth's climate is critical; after all, the sea is a source of oxygen and an absorber of blue carbon for the planet (Reef Resilience, n.d.). Because of this, the sea is vital to the continued existence of both humanity and the planet.

Fish is a marine resource that has been used for thousands of years. Fish is an important part of the global economy and human welfare; fisheries currently supply up to 20% of the world's total protein. As a result, fish resources are critical to both human food supply and the aquatic ecosystem itself. The fisheries sector, as the most traded food commodity, generates long-term employment and income opportunities. Particularly in two countries where fish is the primary source of protein, namely Japan and Iceland (FAO, n.d.). Over this, the sustainable management of marine resources has become an issue of serious concern.

Many countries are interested in managing the sea because of the wealth of resources it contains. As a result, the sea has a special place in policies, national and international laws governing its management. The purpose of this is to either prevent or resolve any conflicts that may arise. For instance, situations like illegal fishing, illegal transshipment, and even claims to ownership of specific waters are frequently encountered in the management of fisheries resources. If there are no clear rules for its management, the abundance of fishery resources can lead to conflict and even become a security risk.

Furthermore, the decreasing number of fishery resources impacted by unsustainable fisheries management, climate issues, and the sovereignty system at sea have made fishery conflicts a growing security concern, such as the conflict between Indonesia and Vietnam over the Natura Sea. The two fishing communities and their respective governments frequently argue over who has jurisdiction over the Natuna Sea's EEZ. In the period 2014-2019, 294 Vietnamese vessels illegally entered Indonesian jurisdiction, including an incident in which a Vietnamese Coast Guard ship collided with an Indonesian Navy ship to protect Vietnamese fishermen who had illegally entered Indonesian sea areas. The overlapping exclusive economic zones in the North Natuna Sea are a frequent source of conflict in the region (Aziz et al., 2020).

The importance of the coastal state in becoming a strategic fishery commodity exacerbates existing maritime disputes. One more illustration of this would be the conflict in the South China Sea. There are frequent disagreements between China, Vietnam, Malaysia, the Philippines, Malaysia, and Taiwan overfishing resources in the South China Sea. These countries have not yet resolved their claims to territorial divisions in the sea, so fishermen are frequently caught in the middle of these disagreements. This dispute is exacerbated by China's militarization efforts, as the fishing industry recognizes its ability to influence the maritime sphere around it. Especially with environmental issues such as climate change, countries that rely on fish protein for nutritional security face a threat. The decline in catches and stocks of fishery resources due to climate change can affect changes in fisheries systems, which has a negative impact on global fisheries management and is feared to trigger conflicts over fisheries resources (Spijkers, 2020).

The wealth of resources owned by the sea provides the countries that have a coast (coastal state) with their own power, also known as "sea power." The existence of sea power became more significant because of two events: (1) the collapse of the colonial empire after 1945, which resulted in the formation of many sovereign states. Because many of the new sovereign states are coastal states, their marine areas are managed and protected by the navy; and (2) the establishment of the 1982 UN Convention on the Law of the Sea (UNCLOS).

As a result of the establishment of the International Law of the Sea regime, which is responsible for determining the maritime territorial boundaries of countries or the Exclusive Economic Zone (EEZ), the coastal state now has the sovereign rights and jurisdictional rights, as outlined in UNCLOS III, necessary to manage, explore, and exploit the marine resources that are located within its territory (Borresen J, n.d.). Then, how does UNCLOS III control the management of fishery resources both within a country's Exclusive Economic Zone and even outside of that country's EEZ?

## 2. Method

The method that used in this study is normative research. This research conducted by examining the situation based on the statutory approach that related to the existing phenomenon. The data collection conducted through a literature review and existing legal material that correspondent to the topic such as United Nation Convention of

Law of the Sea. While the analytical technique conducted by constructing legal argument by argumentative technique.

## 3. Discussion

### *3.1 Exclusive Economic Zone*

The Exclusive Economic Zone, also known as the EEZ, is a convention on the international level that controls a zone that stretches from the baseline of a coastal state out to a distance of 200 nautical miles. According to the United Nations Convention on the Law of the Sea from 1982, all nations that have oceans with territorial waters, exclusive economic zones, and contiguous continental shelf are referred to as "coastal states." On the other hand, a coastal state can also be defined as a small or medium-sized nation that is located on the coast of the sea and has jurisdiction over the sea that is immediately adjacent to it (Borresen J, n.d.).

Within the boundaries of the regulated zone, each nation enjoys the privilege of unrestricted access to both biological and non-biological resources. Within the EEZ, the rights of the coastal state extend to all layers of the sea and those that are within it. The EEZ is a concept that aims to protect coastal states' rights to their marine resources, the seabed, and all of its layers and contents, including mineral richness (Borresen J, n.d.). The EEZ and the Continental Shelf Doctrine are conceptually comparable in many ways.

The word "Exclusive Economic Zone" (EEZ) refers to a zone that possesses economic value, and the coastal state possesses exclusive rights to anything that possesses economic value within its particular zone. This is in keeping with the name of the term "EEZ." This indicates that coastal states have the ability to extract and create energy resources within a radius of two hundred miles of the baseline. Strictly speaking, the EEZ states that the coastal state has two things: (1) exclusive jurisdiction over man-made structures, marine scientific research, and the protection and preservation of the marine environment; and (2) sovereign rights for the purpose of exploring and exploiting, conserving, and managing (all) the natural resources of the waters above the seabed and the seabed and subsoil. The exercise of the rights outlined above must, of course, take into account the rights held by people in other countries.

However, when the last sentence of article 56 eliminates the strata that the seabed and subsoil are part of the EEZ, the preceding statement becomes unclear. According to the article's final sentence, "rights relating to the seabed and its subsoil" must be exercised in accordance with Part VI of the continental shelf conventions. The continental shelf, according to Section IV, "does not include the deep seabed with its oceanic ridge or subsoil." The area is a significant portion of the EEZ in many coastal states, causing issues.

From a historical standpoint, the concept of establishing a "fishing zone," such as this EEZ, has been used since the twentieth century. Spain, for example, expanded its territorial sea to include the continental shelf in 1916 because the majority of edible fish species are found in the continental shelf zone. Similarly, on September 28, 1845, America issued two declarations. According to the first declaration, America has the right to explore natural resources on the adjacent continental shelf from its land territory. The second declaration calls for conservation zones and the protection of high-seas fishery resources (adjacent to the coast).

Aside from the two examples given above. More specifically, the EEZ concept was inspired by the 1945 Truman Declaration, which established the right to regulate fishing activities in waters outside the territorial sea of the coastal state. As a result, there has been an increase in unilateral declarations claiming sovereignty over the expanded sea area. Following the Truman Declaration, Latin American countries claimed 200 nautical miles of jurisdiction overfishing activities, foreshadowing the EEZ regime. Kenya then introduced the EEZ concept to the Asian-African Legal Constitutive Committee in 1971, and to the UN Seabed Committee in 1972. Latin American countries are constructing the Patrimonial Sea concept in other parts of the world. The EEZ concept was introduced at the conference in 1974 to replace the freedom to fish outside the territory and open access to high seas fisheries up to 200 AD (Bernard, n.d.).

France, the United States of America, Australia, Russia, the United Kingdom, and Indonesia have the largest and widest EEZ areas. France has the largest and widest EEZ, with an area of 11,691,000 square kilometers, and Indonesia has an EEZ of up to 6,159.031 square kilometers (Bagoes, n.d.). Other Southeast Asian coastal states, such as the Malacca Strait and the Natuna Sea, border Indonesia's EEZ, making it vulnerable to disputes. The EEZ is essentially an effort to strengthen sovereign rights in order to protect marine resources. Aside from all existing disputes, the UNCLOS EEZ concept seeks to protect coastal state marine resources from theft by foreign ships, such as fishing. Many coastal states, including Indonesia, have ratified the EEZ. Indonesia has ratified international law into domestic law through the passage of Law No. 5 of 1983 governing the Indonesian Exclusive Economic Zone (Winarwati, n.d.).

With the granting of jurisdictional rights and exclusive rights as stated in Article 2 of UNCLOS 1982 concerning the legal status of the territorial sea, the airspace above the territorial sea, and the seabed and subsoil as follows:

1. A coastal State's sovereignty includes, in addition to its land area and internal waters, and in the case of an archipelagic State, its archipelagic waters, a sea lane bordering it known as the territorial sea.
2. This sovereignty extends to the airspace above the sea, as well as the seabed and subsoil.
3. Sovereignty over territory is exercised in accordance with this Convention and other international legal principles.

As a result, if there is a violation of laws and regulations in the territorial sea, the coastal state can apply its criminal law to the violators if the violation has a negative impact on the coastal state or interferes with security. Criminal jurisdiction on board foreign ships is governed by UNCLOS Article 27 paragraph 1: The coastal State's criminal jurisdiction cannot be exercised on board foreign ships crossing the territorial sea to arrest anyone or conduct investigations into any crime committed in the territorial sea. except in the following cases: on board during such passage (United Nations, 1982):

1. If the crime's consequences are felt in the coastal state;
2. If the crime disturbs the peace of the state or involves the territorial sea;
3. If the captain of the ship has requested assistance from local authorities through the diplomatic representative or consular official of the flag State; or
4. If such action is required to combat illicit narcotics or psychotropic substance trafficking.

*3.2 International Law about Fisheries in EEZ*

Article 73 UNCLOS discusses the enforcement of the coastal State's laws and regulations regarding the exploration and exploitation of fishery resources, so that if a foreign ship violates the laws and regulations concerning the conservation of fishery resources, the coastal state can capture the foreign ship. However, by meeting the requirements of Article 73, which states:

1. In exercising its sovereign right to explore, exploit, conserve, and manage living resources in the exclusive economic zone, the coastal State may take such measures as necessary, including boarding, inspecting, arresting, and conducting judicial proceedings, to ensure compliance with applicable laws and regulations.
2. Arrested ships and crews must be released immediately after an appropriate deposit or other form of security is provided.
3. In the absence of an otherwise agreed-upon agreement between the States concerned, penalties imposed by the coastal State for violations of fisheries laws and regulations in the exclusive economic zone may not include confinement or any other form of corporal punishment.
4. If a foreign vessel is arrested or detained, the coastal State must promptly notify the flag State, via appropriate channels, of the action taken and any penalties imposed.

According to the explanation above, the captured ship and crew must be released immediately with a reasonable bond given to the coastal state, and the punishment does not take the form of imprisonment, because the coastal state in the EEZ concept only has "sovereign rights," not sovereignty.

In particular, international law of the sea discusses the management of fisheries resources in section 5 of UNCLOS III, which contains 15 articles. Furthermore, UNCLOS III regulates the granting of access to foreign parties in the coastal state's EEZ, as stated in article 62 (Kurnia, n.d.):

1. Without prejudice to the provisions of Article 61, the coastal State must promote the goal of optimal utilization of living resources in the exclusive economic zone.
2. The coastal state must assess its ability to exploit the exclusive economic zone's biological resources. If the coastal State is unable to utilize the entire allowable catch, the coastal State, through treaties or other arrangements and in accordance with the provisions, requirements, laws, and regulations in paragraph 4, allows other States to exploit the catch that can be exploited. is permitted by paying particular attention to the provisions of articles 69 and 70, particularly those relating to developing countries mentioned therein.
3. In giving other countries the opportunity to enter their exclusive economic zone under this Article, the coastal State must consider all relevant factors, including, inter alia, the importance of the living resources in its area for the coastal State's economy and other national interests, the provisions of Articles 69 and 70, the need for developing countries in the sub-region to take advantage of a portion of the surplus, and the need to protect the coastal State's interests.

UNCLOS III regulates not only resource management within the Exclusive Economic Zone, but also the Additional Zone and the high seas, as discussed in article 24 paragraph 1. The Additional Zone is a sea area that extends beyond the baseline (12 miles) but does not exceed 24 miles. Unlike the EEZ, the state's power in the Additional Zone is limited to preventing customs, tax, and immigration violations in its territorial sea. According to Article 24 paragraph 1, the high seas zone connected to the territorial sea of the coastal state has the authority to carry out the following supervision:

1. Preventing violations of customs, taxation, immigration, and health-care laws and regulations;
2. The authority to punish violations or regulations relating to the aforementioned legislation.
   Three United Nations conferences were held to discuss the development of the International Law of the Sea (UNCLOS).

According to UNCLOS III, coastal states should have exclusive jurisdiction over fisheries in extended economic zones. The grant of fisheries management rights to coastal states is motivated by three factors: (1) It is possible to establish a functional fisheries management regime by enforcing coastal state jurisdictions. The 200-mile distance was established because most fisheries are within 200 miles of shore. (2) Fisheries will be easier to control, resulting in less overfishing and overcapitalization of fishing fleets; and (3) Coastal states will be able to enforce EEZ rules for everything. As a result, the fisheries management theory applicable in the EEZ is deemed sufficient to regulate fisheries under the established jurisdiction's control (Christie, 2006).

*3.3 Fisheries Resources Conflict in EEZ*

The Exclusive Economic Zone is a feature for managing and conserving marine resources. This regime will control unilateral water claims by establishing a 200 nautical mile zone that extends from the baseline. Furthermore, by granting the coastal state exclusive rights in the form of sovereign rights and jurisdictional rights to manage, explore, exploit, and conserve various types of marine resources, both above, within, and on the seabed of their territory (JMOL, n.d.).

Several disputes have been successfully resolved under the EEZ regime over unilateral claims made by the coastal state, such as the dispute between Indonesia and Malaysia over the Malacca Strait Sea border. The dispute arose as a result of a lack of clarity in international law governing the territorial boundaries of coastal states; problems like this became the impetus for the establishment of UNCLOS III in 1982. Because both countries had ratified the 1982 United Nations Convention on the Law of the Sea, the dispute between the two countries was settled using the EEZ concept. Indonesia ratified UNCLOS III through Law Number 17 of 1985, and Malaysia ratified it in 1996.

The Malacca Strait Sea area is less than 400 miles wide, and the two countries are facing each other, which is at the heart of the dispute. Indonesia feels disadvantaged in terms of defense, security, politics, and the economy in this situation. Because both countries have ratified the International Law of the Sea, UNCLOS III is the reference for resolving this dispute.

Because not all regions have the same area and the determination of each country's Exclusive Economic Zone cannot be the same, UNCLOS has arranged this one-of-a-kind case. This is stated in Article 15 concerning the determination of territorial sea boundaries between coastal states facing each other, namely: "In the event that the coasts of two States are opposite or adjacent to each other, neither of them has the right, unless there is an agreement to the contrary between them, to determine its territorial sea limits exceed the median line, the points of which are equidistant from the nearest points on the baselines from which they are equidistant from the median line, the points of which are.

The above provisions, however, do not apply if there are reasons for historical rights or other special circumstances that necessitate determining the territorial sea boundaries between the two countries in a manner other than the above provisions. Finally, the dispute between the two countries can be settled through litigation or non-litigation, as specified in article 280 regarding dispute resolution by a peaceful means chosen by the parties. Both countries have fulfilled their obligations as ratifying countries under the UN Convention on the Law of the Sea, specifically Article 279 regarding the obligation to settle disputes peacefully in accordance with Article 2 paragraph 3 of the United Nations Charter and Article 33 paragraph 1(Yuseini et al., n.d.).

Article 187 specifically mentions the dispute resolution referred to in Article 279 above, namely the selection of producers. Each country that ratifies the UN Convention on the Law of the Sea is free to choose how to resolve disputes, including (JMOL, n.d.):

1. International Criminal Court;
2. The International Court of Justice for the Law of the Sea;
3. The special arbitral tribunal established under Annex VIII;
4. The special arbitration tribunal is established in accordance with Annex VIII for one type of dispute.

The dispute between Indonesia and Malaysia has been referred to the International Court of Law of the Sea for resolution (Christie, 2006). In accordance with Article 56 concerning the rights, jurisdiction, and obligations of the coastal State in the Exclusive Economic Zone, both countries have the same rights over the EEZ area in the Malacca Strait Sea. The coastal state has sovereign rights to explore, exploit, conserve, and manage natural resources (biological and non-biological) in the economic zone, according to paragraph 1 of the article. Then, in paragraph 2, it is explained that in exercising the aforementioned rights, the coastal state must consider the rights and obligations of other states.

This EEZ regime was established to regulate long-standing disputes over maritime territory and unilateral claims, such as the dispute between Indonesia and Malaysia over the Malacca Strait Sea, which was successfully resolved. However, several disputes remain unresolved, such as maritime territorial disputes in the South China Sea. Disputes in the South China Sea over maritime territorial claims can be divided into two categories: history and law.

China claims that traditional fishermen have been exploring the Spratly and Paracel Islands since 200 BC. The territorial waters of Indonesia, Malaysia, the Philippines, and Vietnam surround the two islands. As a result, resolving this dispute becomes more difficult. The following is a table of demands for the nine dasher-lined lines established by China in 1947 during Chiang Kai-Sek's National Government : (Junef, n.d.).

1. On the basis of historical records dating back to the Han Dynasty, China filed a claim in the South China Sea in 1887.
2. Vietnam sued the Spratly Islands in 1802 based on Emperor Gea Ling's history.
3. The Philippines claimed in 1946 at the United Nations General Assembly that Japan had ceded the Spratly Islands to the Philippines.
4. Malaysia published a map of the Malaysian Continental Shelf in 1979, indicating that a portion of the

Spratly Islands belonged to Malaysia.

5. Brunei protested the Malaysian Continental Shelf map in 1979 and filed a claim for ownership of Louisa Reef, which is located within the Brunei Exclusive Economic Zone.

However, UNCLOS does not recognize historical claims to marine areas in this case. One principle is known as *"uti possidetis juris*," which states that the territory or state boundary follows the territory of the colonizer or his predecessor. Because previous rulers had clearly defined state boundaries in an agreement, new countries only continued what they had inherited, this concept is thought to be more capable of creating border stability. However, in this case, China, the Philippines, and Vietnam all claim the Spratly Islands on historical grounds.

Legally, the coastal countries directly adjacent to the South China Sea issued legislation claiming and regulating the area but ignored their rights and obligations under the International Law of the Sea Convention (UNCLOS III), despite the fact that the disputing countries ratified the convention. For example, the Philippines claimed the Spratly Islands through a Presidential Regulation issued in 1978, and China through PRC Rule Number 55 of 1992 (Junef, n.d.).

More countries, particularly ASEAN members such as Indonesia, now have an indirect interest in determining the area of the South China Sea. This complicates the resolution of the dispute. According to Annex V, section 2, disputes concerning the delimitation of seas, historical bays, or historical rights are resolved through conciliation, according to UNCLOS III, article 289.

*3.4 Coastal States' Rights in EEZ*

In general, each coastal state is granted two equal rights in its exclusive economic zone. In article 56 of UNCLOS III, which explains the rights, jurisdiction, and obligations of coastal states in the exclusive economic zone, the rights obtained by the coastal state are clearly defined. First, the coastal state has sovereign rights over all layers of the sea for the purposes of exploration, exploitation, conservation, and management of natural resources (biological and non-biological). With these rights, the coastal state can take advantage of its territory's abundance of marine resources, such as energy production from water, currents, and wind. Second, in addition to exploration and exploitation rights, the coastal state has jurisdictional rights, such as the creation and use of artificial islands, installations, and buildings; marine scientific research; and the protection and preservation of the marine environment.

The two rights have actually explained that the management of various resources in the EEZ area, including fishery resources, is a matter of the coastal state. UNCLOS regulates fisheries resource management within the EEZ, which is more closely related to the conservation and management of fishery resources on the high seas. The high seas are sea areas with no sovereignty, which means that no one owns the territory, and anyone can use it.

UNCLOS III, in particular, has regulated coastal states' rights in managing fishery resources in Section 2 concerning Conservation and Management of Biological Resources on the High Seas. Article 116, which discusses the right to fish on the high seas, states that all countries have the right to allow their citizens to fish on the high seas, subject to international treaty obligations; coastal states' rights and obligations are defined in articles 63 to 67.

Furthermore, Article 117 explains the state's obligation to take action in relation to its citizens for the conservation of living resources on the high seas. UNCLOS has mandated that all countries take action or collaborate with other countries to conserve living resources on the high seas. Article 118 describes country cooperation in the conservation and management of biological resources. The article encourages the state to work with other countries to conserve and manage living resources on the high seas.

The conservation of biological resources is specifically mentioned in Article 119 paragraph 1 in determining the number of allowable catches and matters concerning the conservation of liver resources on the high seas. States

should take planned actions based on the best scientific evidence to maintain and restore populations of caught fish species. States should also produce scientific information, catch statistics, and data on fishing effort.

UNCLOS III specifically regulates fishing on the open seas because the rules governing fisheries management in the Exclusive Economic Zone are clearly regulated in the coastal State's sovereign rights and jurisdiction. The open seas are sea areas where the state's sovereignty, sovereign rights, and jurisdiction do not apply. The open seas are the seas that are free and open to all countries, such as:

1. Freedom of sailing;
2. Freedom of flight;
3. Freedom to lay submarine cables and pipelines, subject to Chapter VI;
4. Freedom to build artificial islands and other installations permitted under international law, subject to Chapter VI;
5. Freedom to fish, subject to the conditions set out in section 2;
6. Freedom of scientific research, subject to Chapters VI and XIII.

Various freedoms granted to all countries on the high seas must continue to pay attention to the rights stipulated in UNCLOS III (Pinem, n.d.).

Essentially, all countries that ratify the International Law of the Sea UNCLOS III implement all policies or regulations contained in the conventions that have been agreed upon, signed, and ratified. Indonesia, for example, in the Law of the Republic of Indonesia No. 45 of 2009 concerning Amendments to Law No. 31 of 2004 Concerning Fisheries. The first section of the law states that the waters under Indonesian sovereignty and the Indonesian Exclusive Economic Zone, as well as the high seas containing potential fish resources and as fish farming land, are mandated to be used as much as possible by Indonesia, taking into account existing carrying capacity and sustainability. for the sake of the Indonesian people's well-being and prosperity.

*3.5 Conclusion*

According to history, regulations concerning marine waters are closely related to the management of "fishing zones," such as when Spain expanded its territorial sea in 1916, because the majority of the species of fish eaten are found in the continental shelf zone. Fisheries are a valuable economic resource, and many countries are fighting for the right to manage, explore, and exploit their fishery resources. As a result, clear rules for regulating the use of fishery resources are required to avoid conflict and the decline of fish populations, as regulated in UNCLOS III Part 2 concerning Conservation and Management of Biological Resources on the High Seas.

The Exclusive Economic Zone is essentially a concept that seeks to secure marine resources in all of their layers, both in the sea and on the seabed, by strengthening the coastal state's sovereign rights to protect its waters, such as the practice of illegal fishing by ships. foreign. As a result, the coastal state has jurisdictional rights to make arrests, as specified in Article 73 concerning the enforcement of the coastal state's laws and regulations.

Because most fisheries are within 200 miles of the coast, it is hoped that the establishment of the EEZ regime will result in the establishment of a functional fisheries management regime. The fisheries sector will be easier to manage, resulting in less overfishing and overcapitalization of fishing fleets. Thus, the fisheries management applicable in the EEZ is deemed sufficient to regulate fisheries under the control of the coastal state's sovereignty and jurisdictional rights, as stated in UNCLOS III articles 2; 27; 62; and 73.

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# Development of the Concept of Cyber Notary in Common Law and Civil Law Systems

Ikhsan Lubis[1], Tarsisius Murwadji[2], Sunarmi[3], Detania Sukarja[4], T. Keizerina Devi Azwar[5], Faradillah Sitepu[6]

[1] Student at Doctoral Program in Law, Faculty of Law, Universitas Sumatera Utara, Jl. Universitas No.4, Kampus USU, Padang Bulan, Kec. Medan Baru, Kota Medan, Sumatera Utara 20155.
Email: ikhsanlubis@students.usu.ac.id
[2] Professor at Faculty of Law, Universitas Padjadjaran, Jl. Dipati Ukur No.35, Lebakgede, Kecamatan Coblong, Kota Bandung, Jawa Barat 40132. Email: t.murwadji@unpad.ac.id
[3] Professor at Faculty of Law, Universitas Sumatera Utara, Jl. Universitas No.4, Kampus USU, Padang Bulan, Kec. Medan Baru, Kota Medan, Sumatera Utara 20155. Email: sunarmi@usu.ac.id
[4] Lecturer at Doctoral Department of Law, Faculty of Law, Universitas Sumatera Utara, Jl. Universitas No.4, Kampus USU, Padang Bulan, Kec. Medan Baru, Kota Medan, Sumatera Utara 20155.
Email: detasukarja@usu.ac.id
[5] Lecturer at Doctoral Department of Law, Faculty of Law, Universitas Sumatera Utara, Jl. Universitas No.4, Kampus USU, Padang Bulan, Kec. Medan Baru, Kota Medan, Sumatera Utara 20155.
Email: Keizerina@usu.ac.id
[6] Lecturer at Doctoral Department of Law, Faculty of Law, Universitas Sumatera Utara, Jl. Universitas No.4, Kampus USU, Padang Bulan, Kec. Medan Baru, Kota Medan, Sumatera Utara 20155.
Email: faradillah@usu.ac.id

**Abstract**
This paper aims to identify the development of the cyber notary concept in the common law and civil law legal systems. This study uses a normative juridical approach. The type of data used in this paper is secondary data. This secondary data was acquired through document studies that were carried out by exploring libraries and the internet to find different library items, including textbooks, thesis/dissertation journal articles, and other library materials. Additionally, the notion of a cyber notary, which emerged from the Common Law System's legacy, has been extensively used in reality. Indonesia, a contemporary nation that belongs to this tradition of nations that follow the Civil Law System, is no exception. The rule of law and developments beyond the law are inextricably linked.

**Keywords:** Cyber, Notary, Law

## 1. Introduction

Technological developments occur very quickly and affect human life in various aspects. Many of these advances are present as disruptive innovations, namely innovations that tend to disrupt existing markets and will eventually replace those markets (Peter C. Verhoef et al., 2021). The influence of technology in the form of electronization in notary activities disrupts the existing balance, modern notaries will make changes and use technology assistance,

while those who are not familiar with the technology will choose to stick with the procedures that have been carried out so far (Mark Ishman and Quincy Maquet, 1999).

In Indonesia itself the concept is often put forward using the term cyber notary. This concept raises various opinions, some support and some reject. The main problem that arises is the debate regarding the validity of the deed made in the cyber notary work system. There are also those who argue that cyber notary is contrary to the principle that has been held so far, namely the principle of the table lionic officium fideliter exercebo, which means that a notary must work traditionally.

The State of the Republic of Indonesia as a country of law guarantees certainty, order and legal protection for every citizen. To ensure order and legal protection, authentic written evidence of legal acts, agreements, determinations and events is needed that are made before or by authorized officials (M. Luthfan Hadi Darus, 2017)

Before discussing further regarding the validity of a deed in cyber notary practice, it is necessary to explore the roots of the emergence of this concept. Through this concept a notary in America has the authority to perform various authentications for documents made in electronic business communications (John C Anderson and Michael L Closen, 1999).

In practice, this concept has been applied in Florida and Alabama, but there are often denials by other state jurisdictions regarding the validity of the deed. The thing to remember is that notaries in America as a country that adheres to the common law system have differences with notaries in Indonesia who come from the civil law system. Notaries in America who are known as public notaries are not responsible for the accuracy or legality of the documents that are stamped by them, the implication of this lies in the difference in the strength of proof of the deed made. An authentic deed made by a notary in a civil law country has perfect proof power, while a deed made by a public notary does not (Ikhsan Lubis and Duma Indah Sari Lubis, 2021).

Furthermore, such a robust evidentiary power arises from the actual fact that notaries in civil law countries have a proper obligation that arises from the implementation of the table lionic officium fideliter exercebo principle (Ikhsan Lubis et al., 2021).

The duty is within the sort of an obligation that the notary public himself should come, see and listen to in each deed creating and be signed by the notary himself and also their individual appearers directly at the place wherever the deed is scan by the notary. The inscribed signature must be the initial signature of the notary public and the appearers don't seem to be electronic signatures which will be inscribed on the deed (Felicia et al., 2020).

This formal obligation, within the author's opinion, contains a terribly deep that means and benefit, particularly in making certain that the party getting in the agreement is admittedly the party whose name is expressed in the comparison, that he's not beneath coercion, deception or oversight, conjointly the} agreement in accordance with the needs of the parties. This obligation makes the notary public accountable not just for his signature as a public notary however also for the contents of the authentic deed created by him (Luh Anastasia Trisna Dewi, 2021).

This opinion is in line with the arrangement of an authentic deed supported Article 1867 of the Civil Code that could be a good proof if it meets the necessities within the sort of having to create it before or by a public official.

Expanding the definition of the associate authentic deed as well as a deed in electronic kind as a result of the follow of cyber notary public can really produce new contradictions that may scale back the evidentiary power of the authentic deed. Concerning the provisions of Article five paragraph (4) of the ITE Law, electronic deeds don't have good proof power like authentic deeds. till now, electronic deeds are solely thought-about as non-public deeds that are equated with documents, letters, and electronic certificates (David López Jiménez, Eduardo Carlos Dittmar, and Jenny Patricia Vargas Portillo, 2021).

Thus, the author is of the opinion that the concept of a cyber notary that comes solely from America should not be applied immediately considering the differences in the functions and authorities of a notary and a public notary (Ika Yuli Agustin and Ghansham Anand, 2021).

In addition, changes to the provisions, both understanding and conditions related to authentic deeds, must be studied in more depth to the philosophical reasons that created these understandings and conditions which, although they look old-fashioned and seem to force a notary to continue to work traditionally, have better legal considerations and provide stronger protection so as to maintain the integrity of the evidentiary power of the authentic deed, which is related to three things, the power of formal proof, the strength of material evidence, and the power of outward proof.

As a solution, Indonesia as a civil law country can provide its own understanding of cyber notary and apply restrictions on the use of technology in order to maintain the validity of an authentic deed so that it remains in line with the main spirit of the notary profession as a public official (Miftahurrahman Kurniawan Djumardin, 2021).

For example, as applied in Georgia, a country in Eastern Europe, where electronization there does not negate the party's obligation to appear before a notary, as a solution the notary understanding is expanded that both parties do not have to be present at the same notary, but each of them is present before a notary in his domicile area and then the notaries act as the party facilitating the dissolution of the agreement via video conference (Fani Martiawan Kumara Putra, 2021).

This example provides confirmation that cyber notaries in practice in civil law countries do not eliminate the obligation of a notary to continue to uphold his traditions in order to maintain the integrity of the power of proof of the deed he made.

Based on historical literature, the term Cyber Notary and Electronic Notary was born from two different concepts, namely the term "e-notary" which was popularized by legal experts from countries that inherited Continental European traditions, while the term "CyberNotary" was popularized by legal experts from common law (Choky Ramadhan, 2018). Therefore, this study aims to analyze the Development of the Concept of Cyber Notary in Common Law and Civil Law Systems and its influence on Indonesia.

**2. The Existence and Legislation of Cyber Notary in Civil Law Countries (Belgium and France)**

The rapid advancement of technology today has made various actions that we do cannot be the term authentic deed in English, is called authentic deed, while in Dutch, it is called authentieke deed van, which has been regulated in Article 1868 of the Civil Code (hereinafter referred to as the Civil Code) and various other laws and regulations (H.S. Salim, 2015).

Economic development in Indonesia is currently growing, in fact there are many legal subjects who carry out legal activities, one of which is a limited liability company expressly recognized by law as a legal entity and as a legal subject who is capable of carrying out legal actions or entering into legal relations with various parties like humans (Azizah, Hukum, 2015).

separated from various kinds of electronic equipment. These actions include both ordinary actions that do not cause legal consequences and actions that cause legal consequences. Acts carried out with the intention of causing legal consequences are known as legal acts. In the context of legal actions carried out using electronic devices, in accordance with the provisions of the Law on Information and Electronic Transactions (UU ITE), they are called Electronic Transactions. The intended public official is generally known as a notary (Luthvi Febryka Nola, 2011). Thus, it can be understood that in general the person authorized to make an authentic deed is a notary, but in the context of the auction implementation of an authentic deed in the form of auction minutes, the auction official at the KPKNL can also make an authentic deed. In the construction of such an understanding, it can be seen that in making the minutes of the auction, the auction officer at the KPKNL essentially exercises the authority possessed by a notary. Explicitly, Article 15 paragraph (2) letter "j" UUJN also gives authority to a notary to make a deed of

auction minutes. As the main issue in this paper, in the context of implementing notary authority, the concept of cyber notary is also known.

Civil law is a legal system that has binding power, because it is realized in the form of laws and regulations that are systematically arranged in a codification. Countries in the world that adhere to the civil law system include Indonesia, Belgium, and France. In terms of implementing a cyber notary, this research involves a comparative study with Belgium and France which have modified their laws to accommodate authentication or what is often called electronic system authentication (David Tan, 2019).

The two countries have changed the articles in their Civil Code, in particular regarding the article on authentic deeds that provide an opportunity for electronic signatures to be implemented.

In addition to the Netherlands, the United States has also passed an e-signature law that stipulates that electronic signatures are as valid as signatures on paper (Niniek Suparni, 2009).

The existence of the article indirectly emphasizes that any technology, as long as it can meet several main requirements, namely identification, content integrity, and content approval, can be accepted in court as evidence (H Marshall Jarrett and Michael W Bailie, 2002).

Article 1322 of the Belgian Civil Code states that “data in electronic form which can be attributed to a determined person and which maintains the integrity of the content of the instrument comply with the legal requirement of a signature”, which means that any data in electronic form, if related with a party that has been determined to maintain the integrity of the contents of the instrument, it is said to meet the legal requirements of a valid signature.

Power of attorney can be granted and received in a general deed, in a handwritten, even in a letter or orally. Acceptance of a power can also occur tacitly and be inferred from the exercise of that power by the power. From these provisions it can be seen that the grant of power is free from a certain form of formality with other words being a consensual agreement meaning that it is binding on the second that an agreement is reached between the giver and the beneficiary of the power of attorney (R. Subekti, 2014).

The binding agreement for the sale and purchase of land rights is made by the parties before a notary, because the parties have not been able to meet the requirements or documents to make a deed of sale and purchase of land rights (AJB) before the Land Deed Making Officer (PPAT) (Suhendro, 2014).

Likewise, the Belgian Notary Act 16 March 1803 or hereinafter referred to as the Belgian State UUJN, has considered its amendments related to the decision to improve the conditions for making cyber notary laws under the control of the Belgian National Council of State Notaries. In connection with this, the Belgian Law Potpourri V dated 6 July 2017 or Potpourri V Law dated 6 July 2017 which discusses cyber notary, specifically emphasizes specifically that it is very possible to carry out a notary deed to be made remotely or via video conference. Similar but not the same, currently more than 70% of actions received by Notaries in France are carried out in paperless form. The first authentic act signed in electronic media was carried out in 2008. Notaries involve video conferencing on a computer network to facilitate remote deed making with an appearance.

Article 1317 of the French Civil Code states "Authentic instruments are instruments received by public officials who are authorized to compile the instrument at the place where the instrument was written and with the required formalities. It can be created on electronic media created and stored under specified conditions.” Basically, the French state assumes that a notarial deed can be made on electronic media provided that there is preservation of the deed and the conditions for obtaining an electronic signature must be fulfilled (Antoine Meissonnier and Françoise Banat-Berger, 2015).

In this condition, the act may retain all its elements or qualities, such as legal date, strength of evidence, and enforcement. This has been reinforced in Article 1316 of the French Civil Code which states that “A document in electronic form can be accepted as evidence in the same way as a paper-based document, provided that the person

who gave it can be properly identified and produced and stored in conditions calculated to secure its integrity" (Sabine Marcellin and Pauline Ascoli, 2010).

The laws and regulations of the Belgian and French countries have clearly regulated the legality of implementing an electronic-based authentic deed, even in real life, notaries in both countries have implemented paperless authentic deed making and involved video conferencing with their appearers. Seeing the existence of a clear legal umbrella related to cyber notary in Belgium and France, the implementation of cyber notary and its regulations in Indonesia must reflect on the two countries. Indonesia needs amend many laws, including the Law on Notary Positions, Article 1868 of the Civil Code, and Article 5 paragraph (4) letter b of the Law on Information and Electronic Transactions, in order to provide a solid legal foundation for cyber notaries. It is envisaged that the implementation of a cyber notary in Indonesia would be able to ensure and prioritize the principles of certainty, benefit, and law order as well as have a clear legislative framework connected to cyber notaries with the adjustments made to certain of these rules (Devi Alincia and Tundjung Herning Sitabuana, 2021) (Mutiaratu Astari Rafli, 2022).

The provisions of Article 15 paragraph (3) in the body of the UUJN regulates the existence of other powers possessed by a notary other than those stipulated in the UUJN itself. In the Elucidation of the Article, it is then explained that these other authorities are "the authority to certify transactions made electronically (cyber notary), make *waqf* pledge deeds, and aircraft mortgages." The sound of the explanation is considered as the entry point for the implementation of the cyber notary concept in the Indonesian legal system. However, no further regulation has been found regarding this matter and how the procedures for implementing the cyber notary's authority are at the implementation level.

The lack of clarity has resulted in the absence of an understanding in interpreting the concept of cyber notary in Indonesia. If you read the explanation of the article, the question may arise, "which is done electronically"? Is it the "transaction certification" or the "transaction"? Answering this question, there is an opinion which states that what is done electronically is the transaction, not the authority. This opinion is based on a grammatical interpretation, which is related to the presence of conjunctions in the form of the word "yang", so that the conjunction is an integral part of "transactions conducted electronically".

In addition to the method of grammatical interpretation, according to the author, if the interpretation is carried out systematically, then the UUJN actually has the spirit of requiring that what is done electronically is the transaction. So it can be understood that the certification process is not electronic, but the certification is carried out on a transaction that is carried out electronically (Toryanto & Yunanto, 2022).

This is based on the arrangement in Article 16 paragraph (1) letter "c" of the UUJN which stipulates that the appearers are required to attach letters and fingerprint documents to the minutes of the deed, meaning that the arrangement requires the physical presence of the appearers directly before a notary. This certainly cannot be done if the process is carried out electronically. The arrangement in the UUJN can be a reflection of the spirit of the law, and in accordance with the principle of harmony in the material content of the legislation, the assumption must be raised that between Article 16 paragraph (1) letter "c" of the UUJN and the Elucidation of Article 15 paragraph (3) UUJN does not conflict, but because the Elucidation does not contain a binding norm, the provisions of Article 16 paragraph (1) letter "c" have more binding power to become the basis of the argument.

In addition, if what is meant by being done electronically is the certification process, then the product is an electronic document which according to the ITE Law is referred to as an electronic certificate. Meanwhile, according to article 1 number 10 of the ITE Law, the provider of electronic certification must be a legal entity. Referring to these provisions, the notary clearly cannot perform electronic certification because the notary is not a legal entity.

**3. The Existence and Legislation of Cyber Notary in Common Law Countries**

The concept of cyber notary is a concept that adopts the use of computers by notaries in carrying out their duties and authorities. This concept is widely used in common law countries. This is because the notarial legal system in common law countries allows for the wider application of the cyber notary concept. Notaries in common law countries are known as public notaries and are not appointed by authorized officials and there is no requirement that the form of the deed must be regulated by law as in the civil law system (Junyu, 2020). The task of a public notary is more to carry out administrative processes, namely to give a stamp or seal to an agreement. The value of the stamp or seal is the same as the signature of the parties which is not accepted by the common law court as evidence of the facts written in the document, that fact must be proven by the usual way. As a result, everyone can compose a legal writing and the value given to the writing is not related to the qualifications or title of the author.

At the beginning of the notary's presence in Indonesia, around 1620 with limited authority and only to serve certain groups of residents or serve those who transacted with the *Vereenigde Oost Ind. Compagnie* (VOC) and during the reign of the Dutch East Indies, Notaries were once given the authority to make deeds of transfer for plots of land that were subject to the provisions of the BW, for lands registered and for the transfer of rights must be carried out and registered with officials called Officials Of The Name *Reversal (Overschrijving-ambtenaren)* (Habib Adjie, 2009).

*Instructie voor de Notarissen Residente in Nederlands Indie* was published on 17 March 1822 (Stb. No. 11). The notary is legally obliged to give power and support to the investigator by setting a date, confirming it, retaining the original or minutes, issuing grosse, and providing a true and accurate copy as stated in Article 1 of the investigation (Habib Adjie, 2014).

So basically, anyone can make a deed and the position of the deed as evidence is also not really considered before the court. Therefore, the application of the concept of cyber notary in the common law system will not affect the strength of the deed. Meanwhile, notaries in Indonesia use a civil law system which views that the deed made by and before a notary is an authentic deed (Khairul et al., 2019). A notarial deed can become an authentic deed if it meets the requirements of the legislation, especially Article 1868 of the Civil Code. Various requirements that must be met in making an authentic deed make the application of the concept of cyber notary in Indonesia more difficult than if it is applied in common law countries.

In the notary context, the 1961 Hague Convention gave rise to 2 (two) concepts of the role of a Notary in the embodiment of the effectiveness of electronic transactions, namely Cyber Notary and Electronic Notary.(Wijaya, 2018) Cyber Notary was originally the idea of the American Bar Association Information Security Committee in 1994. This concept is widely implemented in Common Law countries such as the UK, the United States, Canada and Australia, where a Notary is known as a Public Notary who is not appointed by an authorized official. So that it is not bound by the necessity of certain forms/formats of deeds regulated by law.

In the context of Cyber Notary, the task of a public notary is more to carry out administrative processes combined with security technology as part of the implementation of the CIAANA Principle of Secured Transaction 21 by stamping a document/agreement as a form of administration or registration of letters and documents.

**4. Cyber Notary Concept: Indonesian Context**

Ethics is a collection of principles or values related to the norms that live in society that are generally recognized as a moral method as a guide in behavior, so that ethics in a particular society or certain organization will always be different that will adapt to the conditions and culture of the community or organization. Ethics is etymologically defined as moral in the form of values and norms that are the handle of a human being or group in regulating his behavior (Frans Hendra Winata, 2003).

Cyber notary ethics is also needed as a guideline and standardization to comply with the Notary code of ethics.

The regulations of the Notary code of ethics resulting from the Extraordinary Congress of the Indonesian Notary Association in 2005 are adjusted to the thoughts of Abdulkadir Muhammad, then in the Notary code of ethics in the form of obligations and prohibitions for the Notary profession can be held as follows:

1. Notary personality ethics
    1. Have good morals, morals and personality, respect and uphold the dignity and dignity of the notary position;
    2. Respect and uphold the dignity and dignity of the notary office;
    3. Obey the law based on the Law on the position of Notary, oath of office and AD ART of the Indonesian Notary Association;
    4. Have professional behavior
    5. Improving the knowledge that has been possessed is not limited to science and notarization.
6. Ethics of performing the duties of the office
    1. Act honestly, independently, impartially, and full of a sense of responsibility;
    2. Using one office in the place of domicile and the office is the only office of the Notary byang concerned in carrying out his office on a daily basis;
    3. Installing a nameplate in front of his office according to the applicable size;
    1. Carrying out the position of Notary, especially in deeds, readings and signing of deeds carried out in the office except for valid reasons;
    2. Do not promote through print or electronic media;
    3. It is forbidden to cooperate with existing service agencies / people / legal entities as intermediaries in finding clients.
1. Ethics of service to clients
    1. Prioritizing service to the interests of the community and the State;
    2. Treat any client who comes well without discriminating against his economic status and or his social status;
    3. Providing deed-making services and other notarial services for people who are unable to collect honorariums;
    4. It is forbidden to sign a deed whose minuta manufacturing process has been prepared by others;
    5. It is forbidden to send minuta to the client for signature;
    6. It is forbidden to attempt for a person to transfer from another Notary to him;
    7. It is forbidden to coerce the client withhold the file that has been submitted with the intention that the client will continue to make a deed to him.

Ethics of relationships with notaries: (Abdul kadir Muhammad, 2001)

1. Active in Notary organizations;
2. Mutual help, mutual respect for fellow Notary colleagues in a family atmosphere;
3. Must take care of each other's honor and defend the honor and good name of the Notary corps;
4. Not conducting competition that harms fellow Notaries, both morally and internally;
5. Does not demonize or blame the notary's associates or the deeds made by him. In the event that a Notary confronts and/or finds a deed made by another Notary partner and encounters serious misunderstanding or endangering his client, then the notary must notify in a non-patronizing manner, in order to prevent unwanted things from arising to the client concerned or the colleague;
6. It is forbidden to form groups of fellow colleagues that are exclusive in nature with the aim of serving the interests of an agency, let alone closing the possibility for other Notaries to participate;

Two legal systems, notably the common law and civil law systems, are where the idea of a cyber notary first emerged. Based on this separation, it is understood that "Electronic Notary" (E-Notary) and "Cyber Notary" are two legal words that are frequently used synonymously. At a legal workshop session sponsored by the European Union in 1989 in Brussels, Belgium, the French delegation initially suggested the first term. A notary is essentially defined under the E-Notary concept as a person who offers an independent record of an electronic transaction that the parties have engaged in.

The American Bar Association (ABA) first used the phrase "virtual notary public" in 1994. This notion suggests that a person who engages in cyber notarial activities is a person with expertise in both law and computers.

Additionally, it is implied in this notion that it operates similarly to a Latin notary in enabling a worldwide transaction, may electronically authenticate papers, and is predicted to confirm legal capabilities and financial responsibilities. Based on this justification, it can be said that the ABA's proposal on cybernotary reflects the common law system or Anglo-American perspectives, but the notion of E-Notary put out by France represents the civil law legal system or Continental Europe. Therefore, Indonesia, a nation that in theory upholds a civil law system, is more appropriate to adopt the concept of E-Notary, but in actuality, the term "cyber notary" is explicitly included in the explanation of Article 15 paragraph (3) of the Notary Position Act (*Undang-Undang Jabatan Notaris*, UUJN).(Ramadan et al., 2022)(Paripurno et al., 2022) Based on these facts, there is an opinion which states that Indonesia should not adopt the concept of a cyber notary as it is, and suggest to conceptualize what is meant by a cyber notary in the Indonesian context. Notaries in Indonesia, which are based on the civil law legal system, certainly have principal differences with public notaries who come from the common law legal system.

In Anglo Saxon countries, a notary public (Notary) only becomes a legislator from the signatures of those who make the agreement, while the agreement itself is made by the Lawyer (Chen, 1986). Notaries at that time needed in-depth knowledge of the law because they were not only obliged to ratify the signature but also compose words and provide input if needed before the deed was made. In this regard, notaries can make important contributions to the development of notarial institutions and national law. The position of a notary isn't a profession however a grip of a notary enclosed within the variety of implementation of a noble position as supposed by Kansil and Christine, namely: associate degree implementation of a position that is actually a service to humans or society. Folks that do these noble positions additionally earn a living from their work, but that's not the most motivation. The most motivation is that the disposition of the person involved to serve others.

Notaries in common law countries are independent professionals while in civil law systems notaries are appointed by authorized officials so that they are an extension of the government's authority so that civil law notaries are authorized to carry out property, will and inheritance transactions and store them as archives. The concept of cyber notary is a concept that adapts the use of computers in cyber/online by notaries in carrying out their duties and authorities (Humaira & Latumeten, 2022). The application of this cyber notary concept differs from one country to another. Broadly speaking, the difference in the application of the cyber notary concept appears between countries that adhere to the common law system and the civil law system (Smith, 2006). The concept of Cyber Notary is widely used by common law countries.

The legal rules related to the position of a notary used by Indonesia to date are legal products that are not based entirely on modern national law. This is emphasized in the Elucidation of the General Part I UUJN which states that most of the regulations regulated in the UUJN are still based on laws and regulations from the colonial era of the Dutch East Indies, which during the colonial era did not recognize digital transformation and technological developments that made people literate towards technology. The readiness of supporting facilities is unquestionably related to information technology so that it can be applied in notary services. Regarding the legality of an electronic deed, it can still have legal force even before the court, such as digital signatures, digitally ensured documents, and video conferencing in making a deed between a notary and an appearer.

The essence of legislation regarding Notaries in Indonesia needs to be seen and compared with laws and regulations in other civil law countries, because other countries have gone far more advanced than Indonesia in implementing technology-based Notary transactions.(Felicia et al., 2020) Among them are Belgium and France which have amended their Civil Code to legalize the making of electronic-based authentic deeds. But unfortunately, Indonesia has not followed the development of the revolution in the field of electronic-based notary, and also the government does not heed this.

## 5. Conclusion

Both the concept of cyber notary and e-notary require comprehensive legal components for their implementation. Based on the theory of the legal system, Lawrence M. Friedman suggests that the success of law enforcement depends on 3 (three) elements of the legal system, namely substance, structure and legal culture. The most important question that needs to be answered regarding the integration of electronic technology with the position

of a notary is whether Indonesia will take a cyber notary approach as stated in Article 15 paragraph (3) of the UUJN which states that a cyber notary is interpreted as another authority of a notary to certify transactions conducted electronically, or will use the Continental European approach through the concept of E-Notary and whether the concept will be placed as an additional/complementary provision of the existing provisions. Such as the provisions of the cyber notary which is positioned as another authority of the Notary or is it a change to the provisions related to the position of a notary in the sense of a shift towards Electronic Notary (E-Notary) in the sense of digitizing notary services and their products. Regarding the integration of electronic technology with the position of a notary in Indonesia. First, Indonesia must decide which approach to take, whether a cyber notary approach as stated in Article 15 paragraph (3) of the UUJN which states that a cyber notary is interpreted as another authority of a Notary to certify transactions conducted electronically. Or will it use the Continental European approach through the next E-Notary concept, whether the concept will be placed as an additional/complementary provision of the existing provisions, such as the cyber notary provision which is positioned as another authority of the Notary. Or is it a change to the provisions related to the position of a notary in the sense of a shift towards Electronic Notary (E-Notary) in the sense of digitizing notary services and their products.

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# The Impact of the Covid-19 Pandemic on the Legal Concept of Visas in Indonesia

Koesmoyo Ponco Aji[1], Anindito Rizki Wiraputra[1], Sri Kuncoro Bawono[2]

[1] Immigration Law Study Program, Immigration Polytechnic, Depok, Indonesia
[2] Immigration Administration Study Program, Immigration Polytechnic, Depok, Indonesia

Correspondence: Koesmoyo Ponco Aji, Jl. Seruling Raya No.43, Mekar Jaya, Sukmajaya, Depok, Indonesia, 16411. E-mail: ponco@poltekim.ac.id / phone+6282113190744

**Abstract**
The Covid-19 pandemic that has been going on globally since March 2020 has led to the universal closure of national borders. The exponential spread of the Covid-19 virus has resulted in a new phenomenon in the immigration field: stranded foreigners. To avoid the continued access of these stranded foreigners, Indonesian immigration issued a series of visa regulations. This study aims to analyse the impact of the Covid-19 pandemic on the concept of visa law applicable in Indonesia by existing formal law. This research uses a normative method with a conceptual approach, namely by identifying existing principles or doctrinal views and then generating new ideas. The concepts and theories used in this research are the rules of law concept with an analytical knife in the form of a hierarchy of laws and regulations theory and the theory of sovereignty. The results show that there is a shift in the concept of visa law in Indonesia as a result of the Covid-19 pandemic. In the theoretical study, it is known that this shift in the idea of visa law has ruled out the visa doctrine that has been regulated in Indonesian immigration law. However, the principle of relative sovereignty that respects the principles of international law is the justification for changing the concept of visa law in Indonesia during the Covid-19 pandemic.

**Keywords:** Covid-19 Pandemic, Immigration, Minister of Law and Human Rights Regulation, Visa

## 1. Introduction

Since it was declared a pandemic, Covid-19 has factually infected almost all countries (Ciotti et al., 2020). The world in terms of immigration, the Covid-19 pandemic has caused many countries to close their borders, including Indonesia. In a short period, Southeast Asia agreed to close their borders to international travellers and other countries in other parts of the world. (Yazid & Lie, 2020) Some things excluded from the restrictions on global human movement are only humanitarian assistance, diplomatic missions, supply chain-related cargo and particular matters due to force majeure. Tourists, cross-country foreign workers, and foreigners holding permanent resident permits, temporarily cannot leave the country they were in to return to their home country. (Directorate General of Immigration of the Republic of Indonesia, 2022)

Restrictions on the movement of people across countries and the closure of state borders caused a domino effect in multi-faceted state administration. Even the closing of the gates of one country is enough to give a chain effect

to the rest of the country. The closure of the Australian state borders causes foreigners residing in the country to be unable to leave Australian land and vice versa, causing no Australian citizens outside their homeland to return to the country. Likewise, in Indonesia, the closure of the country's gates for international crossings caused the absence of people entering and leaving Indonesian territory during the Covid-19 pandemic. The chain effect of closing the gate from one country to another is a form of mutually influencing relations over a country's policies. (Yazid & Lie, 2020)

In the country's economic calculations, the closure of the country's borders due to the Covid-19 pandemic has caused Indonesia's economic growth to be minus 2.97% in the first half of 2020. (Pati, 2020) This shows that immigration policy in closing state borders influences the national economy. Similarly, the fundamental values of Indonesia's immigration function as stated in the Law of the Republic of Indonesia Number 6 of 2011 concerning Immigration in Article 1 number 3, which states that the four functions of Indonesian immigration, namely the fourth function as a facilitator of economic welfare development, are accurate. (Act Number 6 the Year 2011 Concerning Immigration, 2011) From an immigration perspective, the Covid-19 pandemic has noticeably influenced managing gateways at state borders and monitoring the presence and activities of foreigners residing in the country's territory. Briefly, the challenges faced by immigration in Indonesia in particular and in the region in general during the Covid-19 pandemic include: (Aji et al., 2021)

1) handling of human crossings at the gates of the country;
2) the potential for transmission of the virus to frontline officers;
3) handling of foreigners stranded on the territory of the country;
4) adaptive regulation of immigration regulations with rapid changes;
5) coordination and collaboration between government agencies both domestically and across countries.

Referring to the above problems, handling stranded foreigners requires the right approach. Stranded foreigners are not only travellers who have lost resources to be able to return to their home countries, but also, in this case, those who have sufficient resources but international regulations do not allow them to return to their home countries. For this reason, it is necessary to internalise the policies of state officials into a particular law. This ultimately forces the Indonesian government, through the Directorate General of Immigration, to be able to issue regulations that are adaptive to force majeure that no one has ever predicted. Changes in immigration regulations certainly do not target the Immigration Law itself as the basic norm of immigration regulation in Indonesia. Adaptive regulation is manifested in several operational provisions that can be directly applied in the field. The main concentration in solving the problem of foreigners stranded in Indonesia during the Covid-19 pandemic is the operative provisions regarding visas and residence permits. (Maulana & Arifin, 2021)

Of the nineteen immigration operational regulations issued during the Covid-19 pandemic, one-third are operational rules governing visas and residence permits. In the arrangements regarding visas and residence permits, there is an extraordinary discretion exercised by ministerial-level state administrative officials and the Director General of Immigration. Considering the limited access to international crossings, the Indonesian government issued a new concept in issuing visas to foreigners called onshore visas. (*Regulation of the Minister of Law and Human Rights Concerning Visas and Residence Permits in the Adaptation Period to New Habits*, 2020) The idea of this onshore visa is a legal breakthrough in the level of operational regulations. It is stated that foreigners who are located and detained/stranded in Indonesia can apply for a new visa within the territory of Indonesia to avoid potential violations of immigration law. This legal breakthrough shows the flexibility of regulations in Indonesia in dealing with the force majeure of the Covid-19 pandemic. Still, on the other hand, it has broken the formal doctrine that applies in Indonesia and the universal understanding of the visa itself. (Herlina, 2021)

Referring to the background conveyed above, the author sees that there has been a shift in the visa doctrine that has been known and embraced by the Indonesian government by applicable immigration law. For this reason, to make light of the problem, the author raised the issue of "The Impact of the Covid-19 Pandemic on the Legal Concept of Visas in Indonesia".

## 2. Method

The research method used in this study is the normative method. Normative legal research methods can be interpreted as legal research at the level of norms, rules, principles, theories, philosophies, and legal practices to find solutions or answers to problems either in the form of legal vacuums, conflicts of norms, or blurring of norms. This research method uses secondary data from sources such as laws and regulations, books related to the object of research, and research results in the form of reports, theses, and dissertations. The data that has been obtained is then used as supporting data in analysing the shift in the concept of visa law in Indonesia as a result of the Covid-19 pandemic (Nurhayati et al., 2021).

### *2.1. Subsection* Identification

The specific approach used in this study is the conceptual approach. The conceptual process is carried out by understanding and reviewing the studied topic's principles, principles, doctrines, legal theories and philosophies. In this case, the principles, ideologies, and theories are adjusted to the problems raised. (Hart, 2018)

### *2.2. Sampling* Procedure

This study takes secondary data because this study is normative. The following are three legal materials used in secondary data sources, namely primary, secondary and tertiary legal materials:

#### 2.2.1. Primary Legal Material

Primary legal material is the main legal material, an authoritative legal material, that is, legal material with authority. Primary legal materials include laws and regulations and all official documents containing legal provisions. Primary legal material is the main legal material that supports this research, namely:(I Ketut Suardita, 2017)

1. Laws of the Republic of Indonesia, including the Immigration Law and the Law on the Establishment of Laws and Regulations;
2. Government Regulations of the Republic of Indonesia, especially those related to the implementation of Immigration Law;
3. Presidential Regulation of the Republic of Indonesia, regarding Visas and handling the Corona-19 pandemic;
4. Regulation of the Minister of Law and Human Rights, especially those governing visas and residence permits.

#### 2.2.2. Secondary Legal Materials

Secondary legal materials are documents or legal materials that explain primary legal materials such as books, articles, journals, research results, papers, and so on that are relevant to the problem to be discussed.

#### 2.2.3. Tertiary Law Materials

Tertiary legal materials as legal materials that provide guidance and explanations for primary and secondary legal materials, such as dictionaries or encyclopedias.

## 3. Results

### *3.1. Immigration*

Immigration derived from the subject matter of immigration is a unique terminology regulated in Indonesian immigration law. The term migration itself comes from the Latin "migratio," which means the movement of

residents from one regional entity to enter another regional entity. Meanwhile, the definition of immigration according to some of the leading tertiary legal materials includes:

1. Black's Law Dictionary: The coming into a country of foreigners for purposes of permanent residence. The correlative term "emigration" denotes the act of such persons in leaving their former country. (Black, 1968)
2. Oxford Dictionary of Law: The act of entering a country other than one's native country with the intention of living there permanently. (Black, 2002)
3. Glossary on Migration: A process by which non-nationals move into a country for the purpose of settlement. (International Organization for Migration, 2011)

Several definitions of immigration are based on the international dictionary; it explains that what is meant by migration is in the form of movement or movement of people from one country to another with specific purposes that are temporary or sedentary in nature.

The definitions of Immigration in Indonesia and other countries are not too different. The elaboration of the term Immigration in Indonesia was first stated in the legal product of the first Immigration Law, namely Law Number 9 of 1992, that Immigration is a matter of traffic of people entering or leaving the territory of the Republic of Indonesia and the supervision of foreigners in the territory of the Republic of Indonesia. Which was later revised in 2011 to become a matter of traffic of people entering or leaving the territory of the Republic of Indonesia and its supervision to maintain the upholding of state sovereignty. (Act Number 6 the Year 2011 Concerning Immigration, 2011)

From the immigration terminology regulated in the positive immigration law, it can be seen that immigration, according to the law, has a broader perspective. Immigration, according to legal terminology, is not only about cross-border human movement but is much more complex because it also includes all matters related to cross-human beings, such as border arrangements and management, travel documents, permits for existence to supervision from passers-by and foreigners residing in Indonesian territory.

*3.2. Visa*

In terminology, the term Visa comes from the French word 'Vise', which was previously adopted from Latin in the form of 'Visus', which means 'has been seen, to see. When translated into Indonesian, that meaning reads 'to have been seen, to see.' In the Big Dictionary of Indonesian Visa is a permit to enter and stay in a country outside its land in the form of a stamp and paraphrase stated by the relevant official on the applicant's passport. (Kemendikbud, n.d.)

Since the birth of the concept of territorial in an entity of a nation-state, visas have been used to control the entry of foreigners into state territory. (Ouellette & Livermore, 1993) Efforts to regulate the inflow of non-citizens are carried out by limiting or facilitating the intention of such foreigners' arrival into the state's territory. Of course, the arrangements in the form of granting visas are strongly influenced by the diplomatic and geopolitical relations of the region of the country. (Stringer, 2004) The presence of the concept of a nation-state gives the state the right and authority to decide whether a person may enter and live in the country. Visa policy can be seen as an instrument of restriction and control of the mobility of movement across borders. The philosophical basis on which a country requires visas for foreigners, not its citizens, before the person enters and carries out activities in the territory of the country is a form of control in the governance of the mobility of people so that the state can carry out prevention from possible threats and in the context of controlling the welfare of the state. (Mau et al., 2015)

3.2.1. Visa terminology in Indonesian immigration law doctrine

As stipulated in the Immigration Law or the hierarchical regulations under it, a visa is defined as a written statement given by an authorised official at the Representative of the Republic of Indonesia or elsewhere designated by the Government of the Republic of Indonesia containing approval for a Foreign National to travel

to Indonesian Territory and being the basis for granting a Stay Permit. From this definition, it can be concluded that visas in the Indonesian immigration law doctrine must meet the following elements:

1. In the form of written information;
2. Granted by authorised officials, both Immigration Officers and Foreign Service Officers, as specified in Article 40;
3. Given at the Representative of the Republic of Indonesia outside the territory of the Republic of Indonesia or in another place determined by the Government of the Republic of Indonesia, which is then regulated in Article 41, it is stated that the other place is the Immigration Checkpoint that the Minister has determined;
4. Contains consent for a Foreign National to travel to Indonesian Territory; and
5. It is the basis for granting a Stay Permit to such a foreigner.

3.2.2. Onshore visa terminology

Onshore comes from The English language, a combination of the syllables on and shore so that it can be interpreted on the beach or land. Onshore is a description of the place where an activity is carried out on the beach or land. The opposite of Onshore is offshore, meaning the opposite, namely outside the coast or open ocean. So when interpreted etymologically, Visa Onshore means Visa obtained while on the mainland. (cambridge.org, n.a.)

By formal law, the doctrine of onshore visas cannot be found in immigration legislation as the philosophical foundation of positive immigration law in Indonesia. The term onshore visa is not clearly stated regarding operational provisions in the product of immigration law. Although legal terminology is not mentioned, in disseminating information to the public, the Directorate General of Immigration gives information from this rule under the terms Visa *Onshore* and Visa *offshore* on various social media platforms. This is then more widely known in the community, so it seems to create a new doctrine in visa law in Indonesia. (Directorate General of Immigration, 2021)

3.2.3. e-Visa terminology

When the Minister of Law and Human Rights Regulation Number 26 of 2020 concerning Visas and Stay Permits in the New Customs Adaptation Period was issued on September 29, 2020, a new concept regarding existing visas was introduced, namely the electronic visa or e-Visa. This concept was introduced as a response to the emergence of the phenomenon of foreigners being stranded in Indonesian territory. In this e-visa concept, foreigners no longer need to apply for a Visa by coming to the Representative office of the Republic of Indonesia. Applications are made online through the Online Visa Approval website. This applies to foreigners who are within the territory of Indonesia and outside the territory of Indonesia.

In the clause of general provisions of Article 1 number 2, it is stated that an Electronic Visa (e-Visa) is a visa granted electronically by an authorised official that contains approval for a Foreign National to travel to the Indonesian Territory is the basis for granting a Stay Permit. In this terminology, no such phrase is given in the Representative of the Republic of Indonesia outside the territory of the state of Indonesia or in other themes stipulated by the Government of the Republic of Indonesia as expressed in Law Number 6 of 2011 concerning Immigration. Even if it is not clearly stated in the regulations, in practice, e-Visa applications can be made within the territory of Indonesia, and their issuance can also be practically given in the territory of Indonesia outside the Immigration Checkpoint.

*3.3. Hierarchy of Laws and Regulations*

In legislation, there is a hierarchy theory. Hierarchy theory states that the legal system is arranged in stages and levels like steps. The relationship between the norms that govern the actions of other norms is referred to as a super and subordination relationship in a spatial context. (Kelsen, 2005) The norms that determine the actions of

other norms are superior, while the norms that carry out the actions are called inferior norms. Therefore, the actions carried out by higher norms (superior) are the reason for the validity of the entire legal system that forms a single unit. (Suprapto, 1998)

Hans Kelsen suggests that the hierarchy of legislation in a legal system is known as the hierarchy of norms (stufenbau theory). For this reason, this theory is known as the Lex superior derogat legi inferior principle, which implies that the higher law overrides the lower law. In Indonesia, this chain of legal norms is actualised into a hierarchy of laws and regulations stipulated in Law Number 12 of 2011 concerning the Establishment of Laws and Regulations (Aditya & Winata, 2018). Lower-level legislation must not conflict with higher legislation. Based on Law Number 12 of 2011 concerning the Establishment of Laws and Regulations, Indonesia recognises seven types and levels of laws and regulations consisting of: (Act Number 12 the Year 2011 Concerning the Establishment of Legislation, 2011)

1) Constitution of the Republic of Indonesia of 1945;
2) Decrees of the People's Consultative Assembly;
3) Government Acts/Regulations in Lieu of Laws;
4) Government Regulations;
5) Presidential Regulation;
6) Provincial Bylaws;
7) District/City Regulations.

In addition to the hierarchy of the position of the statutory regulations, the hierarchy of material content contained in each level of the regulation shall not conflict with the regulations above it. The legal strength of laws and regulations is by the levels in the hierarchy of laws and regulations. This is then expressly regulated in Article 7 Paragraph (2) of Law No. 12 of 2011, which determines that the legal force of laws and regulations is by the hierarchy as in Article 7 Paragraph (1). The provisions of article 7 clearly state that the 1945 Constitution of the Republic of Indonesia is used as a fundamental norm according to Kelsen or the basic rule of the state (Staatsgrundgesetz), as Nawiaky views. Similarly, the Law regulates the technical provisions of a state affair, as in this case, it is the Immigration Law. Therefore, the consequences are: firstly, the Immigration Act overrides all immigration regulations of an operational nature with a lower hierarchy (the principle of lex superiori derogat legi inferiori applies), and secondly, the content material of the Immigration Act becomes the source in the formation of all operational regulations under it, so that it must not conflict with the Immigration Act itself. (Huda, 2016)

*3.4. Sovereignty*

The word 'sovereignty' comes from the Latin word 'superanus', meaning 'the top'. The state is said to be sovereign or sovereign because sovereignty is a trait or essential feature of the state. (Santoso, 2018) When it is said that a country is sovereign, it is intended that it has the highest power. In the context of its implementation, this supreme power also has its limits. This space for the applicability of the highest power is limited by the country's territorial boundaries, meaning that a country has only the highest power within its territorial boundaries. Thus, the notion of sovereignty as the supreme power contains two necessary restrictions in itself, namely: (Kusumaatmadja & Agoes, 2003)

1. Power is limited to the territorial boundaries of the country that has that power, and
2. That power ends when the rule of another country begins.

In general, there are 2 (two) popular types of sovereignty theory, namely:(Akani, 2019)

1) Absolute Sovereignty

   This doctrine emphasises that sovereignty is not only the highest authority but also knows no other authorities, and sovereignty has more or less unlimited power. The holder of total authority in establishing the national interest. Such a situation allows for the coercion of the will in carrying out various decisions taken by the owner of the power.

2) Relative Sovereignty

The idea of relative sovereignty is that sovereignty can be subordinated to international law. However, the sovereignty of one country cannot be subordinated to another because, in principle, all states are equal. The doctrine of relative sovereignty emphasises that the sovereignty of a state must be free from the other party's form of power authority. The state is sovereign within the scope of its jurisdiction and has the right to be free from any intervention. However, the state cannot be free from the norms of international law. Because international law also regulates various other sovereign states, and each state has the same obligations in international relations based on agreed international conventions and treaties.

## 4. Discussion

The Covid-19 pandemic has markedly changed the system of human life. From the beginning, humans were free to chat face-to-face, then with a snap, the habit was limited by health protocols regulated by each state government. As a result, virtual face-to-face has become commonplace and a new practice for human beings. In more important terms, the Covid-19 pandemic has also changed human interaction and mobility, especially in terms of mobility between countries. When the WHO first declared a pandemic on March 11, 2020, most countries imposed closures on the country borders regarding the traffic of people entering and leaving their countries. However, no one government has implemented the closure of state borders. In Indonesia, the closure of the country's borders due to the Covid-19 pandemic does not apply. In 2020 and 2021, the Indonesian government has always issued regulations that are adaptive to the actual situation and conditions regarding international human traffic restrictions.

In regulating human traffic between countries, the Indonesian government, through the Ministry of Law and Human Rights, the Directorate General of Immigration and the National Task Force for Covid-19 Mitigation, have issued nineteen regulations related to immigration as follows. (Directorate General of Immigration of the Republic of Indonesia, 2022)

Table 1: Immigration Regulations during the Covid-19 Pandemic

| No | Publish Date | Regulatory Name |
|---|---|---|
| 1 | February 05, 2020 | Regulation of the Minister of Law and Human Rights Number 3 of 2020 concerning Temporary Suspension of Free Visit Visas, Visas, and Granting of Forced Stay Permits for Chinese Citizens |
| 2 | February 28, 2020 | Regulation of the Minister of Law and Human Rights Number 7 of 2020 concerning the Granting of Visas and Residence Permits to Prevent the Entry of the Corona Virus |
| 3 | March 18, 2020 | Regulation of the Minister of Law and Human Rights Number 8 concerning Temporary Suspension of Visa Free Visits and Visit Visas Upon Arrival and Granting of Stay Permits in Forced Conditions |
| 4 | April 02, 2020 | Regulation of the Minister of Law and Human Rights Number 11 of 2020 concerning the Temporary Prohibition of Foreigners from Entering the Territory of the Republic of Indonesia |
| 5 | October 01, 2020 | Regulation Of Minister Of Law And Human Rights Number 26 Of 2020 On Visa And Stay Permit In The New Normal |
| 6 | October 15, 2020 | Decree of the Minister of Law and Human Rights Number M.HH-01.03.01 of 2020 concerning Certain TPIs for Entry in the Adaptation Period of New Habits |
| 7 | January 14, 2021 | Circular Letter of the Director General of Immigration 2021 concerning Temporary Restrictions on Foreigners Entering Indonesian Territory |

| | | |
|---|---|---|
| 8 | January 26, 2021 | Circular Letter of Extension of Validity Period of the Director General of Immigration Number IMI-0103. GR.01.01 of 2021 |
| 9 | July 06 2021 | Circular Letter Of Minister Of Law And Human Rights On Visas, Entry Signs, And Stay Permits During the Restrictions on Community Activities |
| 10 | July 21, 2021 | Regulation Of Minister of Law and Human Rights Number 27 of 2021 concerning Restrictions on Foreigners Entering Indonesian Territory During the Enforcement of Restrictions on Emergency Community Activities |
| 11 | September 15, 2021 | Regulation Of The Minister Of Law And Human Rights Number 34 Of 2021 On The Granting Of Visa And Immigration Stay Permits During The Mitigation Of The Spread Of Coronavirus Disease 2019 And National Economic Recovery |
| 12 | September 17, 2021 | Decree of the Minister of Law and Ham Number M.HH-02. GR.02.02 of 2021 concerning Certain Immigration Checkpoints as Entry Points in the Period of Handling the Spread of Corona Virus Disease 2019 and National Economic Recovery |
| 13 | October 13, 2021 | Circular Letter Number 20 of 2021 concerning International Travel Health Protocols During the 2019 Corona Virus Disease (Covid-19) Pandemic |
| 14 | October 13, 2021 | Decree of the Chairperson of the Covid-19 Handling Task Force Number 14 of 2021 concerning Entry Points, Quarantine Places, and Rt-Pcr Obligations for Indonesian Citizens International Travel Actors Head of the Covid-19 Handling Task Force |
| 15 | October 15, 2021 | Decree of the Head of the Covid-19 Task Force Number 15 of 2021 concerning 19 Foreign Countries whose citizens are allowed to come to Indonesia |
| 16 | November 02, 2021 | Addendum to Circular Number 20 of 2021 concerning International Travel Health Protocols During the Corona Virus Disease 2019 (Covid-19) Pandemic |
| 17 | November 27, 2021 | Circular Letter Number IMI-0269. GR.01.01 of 2021 concerning Temporary Restrictions on Foreigners Who Have Lived and/or Visited the Territory of Certain Countries to Enter Indonesian Territory to Prevent the Spread of the New Variant of Covid-19 B.1.1.529 |
| 18 | November 29, 2021 | Covid Task Force Circular Number 23 of 2021 concerning International Travel Health Protocols During the Corona Virus Disease 2019 (Covid-19) Pandemic |
| 19 | December 02, 2021 | Addendum to Circular Number 23 of 2021 concerning International Travel Health Protocols During the Corona Virus Disease 2019 (Covid-19) Pandemic |

*Source: Directorate General of Immigration page (Directorate General of Immigration of the Republic of Indonesia, 2022)*

As shown in the table above, of the nineteen immigration regulations issued, six regulations specifically regulate visas and residence permits. Then, of the six operational rules regarding visas and residence permits, three regulations specifically regulate visas in the circumstances of the Covid-19 pandemic, namely:

1. Regulation of the Minister of Law and Human Rights Number 26 of 2020 concerning Visas and Stay Permits in the Adaptation Period of New Habits;
2. Regulation of the Minister of Law and Human Rights Number 27 of 2021 concerning Restrictions on Foreigners Entering Indonesian Territory during the Implementation of Restrictions on Emergency Community Activities;
3. Regulation of the Minister of Law and Human Rights Number 34 of 2021 concerning the Granting of Immigration Visas and Stay Permits in the Period of Handling Corona Virus Disease 2019 and National Economic Recovery.

In its implementation, the Minister of Law and Human Rights Regulation Number 34 of 2021 revokes and replaces the Regulation of the Minister of Law and Human Rights Number 27 of 2021. And the Regulation of

the Minister of Law and Human Rights Number 27 of 2021 is an operational regulation that revokes and replaces the Regulation of the Minister of Law and Human Rights Number 26 In 2020. Revocation and replacement of an operational regulation in a short time during the Covid-19 pandemic is not a problem. This is understandable considering society's rapid changes and conditions at that time and to create national stability, especially in immigration.

*4.1. The Legal Concept of Visa in a Conceptual Approach*

One exciting thing about the three operational regulations mentioned earlier is the birth of a new legal concept related to visas. The legal concept of visas, referring to Law Number 6 of 2011 concerning Immigration, has changed. From the original, "in the form of a written statement given by an authorised official at the Representative of the Republic of Indonesia or elsewhere determined by the Government of the Republic of Indonesia containing approval for a Foreign National to travel to Indonesian Territory and become the basis for granting a Stay Permit" to "is granted electronically by an authorised official containing approval for a Foreign National to travel to Indonesian Territory and becomes the basis for granting a Stay Permit" based on the Regulation of the Minister of Law and Human Rights Number 26 of 2020.

Conceptually, the doctrine of immigration has been well outlined through Law Number 6 of 2011 concerning Immigration which is a positive law of Indonesian immigration. In the immigration law, in detail, the concept of visa is spelled out in several clauses, namely: (Act Number 6 the Year 2011 Concerning Immigration, 2011)

1. General Provisions, Article 1 number 18, which states the Visa of the Republic of Indonesia, from now on referred to as a Visa, is a written statement given by an authorised official at the Representative of the Republic of Indonesia or elsewhere determined by the Government of the Republic of Indonesia which contains approval for a Foreign National to travel to Indonesian Territory and is the basis for granting a Stay Permit.
2. In Chapter III regarding Entry and Exit of Indonesian Territory, Article 8 Paragraph (2) states that Every Foreign National entering the Indonesian Territory must have a valid Visa unless otherwise specified under this Law and international treaties.
3. In Article 13, Paragraph (1) letter d, it is then stated that the Immigration Officer refuses a Foreign National to enter Indonesian Territory if the foreigner does not have a Visa, except for those who are exempt from the obligation to have a Visa;
4. Furthermore, in Chapter V regarding Visas, Entry Stamps, and Residence Permits, Article 40 states that:
    - Visit visas and limited stay visas are the authority of the Minister.
    - Such visit visas and limited stay visas are granted and signed by the Immigration Officer at the Representative of the Republic of Indonesia abroad.
    - In the realm of the Representative of the Republic of Indonesia, there is no Immigration Officer yet. Foreign service officials carry out the granting of visit visas and limited stay visas.
    - Foreign service officials are authorised to grant Visas after obtaining a Ministerial Decree.
5. Furthermore, Article 41 states that a visit Visa may also be granted to a Foreign National upon arrival at the Immigration Checkpoint. The granting of a visit Visa upon arrival at the Immigration Checkpoint is carried out by the Immigration Officer.

From the concept written in the immigration law, there is a common thread that can be drawn, namely the Republic of Indonesia visa issued at the Representative of the Republic of Indonesia outside the territory of the Republic of Indonesia or in another place determined by the Government of the Republic of Indonesia, namely the Immigration Checkpoint.

Then if we refer to the operational regulations issued during the Covid-19 pandemic through three rules at the level of Ministerial Regulations, it can be seen that the common thread previously clearly written in immigration law has changed. This can be seen as follows: (Directorate General of Immigration of the Republic of Indonesia, 2022)

1. In accordance with the Regulation of the Minister of Law and Human Rights Number 26 of 2020, article

9 states that "Foreigners holding a Stay Permit residing in Indonesia can be granted a new Stay Permit after obtaining Visa Approval";

2. Article 14 then states that "In certain circumstances, the Minister under his authority may issue other policies relating to immigration facilities insofar as it provides general expediency and recovery of the national economy";
3. Meanwhile, in Article 3 of the Regulation of the Minister of Law and Human Rights Number 27 of 2021, the legal concept of visas mentioned in Article 9 of the Regulation of the Minister of Law and Human Rights Number 26 of 2020 has not changed, namely "Foreigners holding a Stay Permit residing in Indonesian territory can be granted a new Stay Permit after obtaining a Visa";
4. Only then, in the Regulation of the Minister of Law and Human Rights Number 34 of 2021, the legal concept of visas is refined through Article 1 number 4; it is emphasised that "The Visa of the Republic of Indonesia, hereinafter referred to as Visa, is a written statement, both manually and electronically given by an authorised official to travel to Indonesian Territory and is the basis for granting a Stay Permit" then in Article 6 it is stated that "Foreigners holding a Stay Permit who are in Indonesian territory and unable to return to their home country may be granted a new Stay Permit after obtaining a Visa."

Indeed, the legal concept of visas carried out in the Regulation of the Minister of Law and Human Rights Number 26 of 2020 to the regulation of its amendments through the Regulation of the Minister of Law and Human Rights Number 34 of 2021 is still acceptable in the concept of the operational level. It's just that, when in the stipulation of article by article of the ministerial regulation where it is stated that "Foreigners residing in the territory of Indonesia can apply for an extension of a Stay Permit through Visa approval by applying electronically," then, in fact, the legal concept of visas according to the doctrine outlined in the Immigration Law has changed.

*4.2. Visa Legal Concepts in the Hierarchy of Laws and Regulations*

Regulation of the Minister of Law and Human Rights Number 26 of 2020 is the first legal basis governing the birth of an electronic Visa or e-Visa. In Article 7, Article 8, and Article 9, it is stated that a Foreign National residing in Indonesia can apply for an extension of a Stay Permit through Visa approval using an electronic application. The same regulation in Article 11 states that a visit visa's approval also applies to a Visit Stay Permit. An electronic visa is a product of the Minister of Law and Human Rights Regulation 26 of 2020. As a result, anything related to an electronic Visa must not conflict with the higher rules of law or above.

By the hierarchy of laws and regulations, the position of the Ministerial Regulation is under the Presidential Regulation and above the Regional Regulation. This is implied as stated in the Elucidation of the Law of the Republic of Indonesia Number 12 of 2011 concerning the Establishment of Legislation, in the Elucidation of Article 8 paragraph (1) it is stated that "What is meant by "Ministerial Regulation" is a regulation stipulated by the minister based on content material in the context of administering certain affairs in the government", while in the body of Article 8 Paragraph (1) itself it is written "Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the Council of People's Representatives, Regional Representatives Council, Supreme Court, Constitutional Court, Supreme Audit Agency, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by law or by the Government by order of Law, House of Representatives Provincial Region, Governor, Regency Regional People's Representative Council /City, Regent/Mayor, Village Head or equivalent". (Act Number 12 the Year 2011 Concerning the Establishment of Legislation, 2011)

From the explanation of article 8, Paragraph (1), it can be concluded that a Ministerial Regulation can only be recognised if it is regulated or ordered to exist in the legislation above. Referring to the legal basis (considering) the three Ministerial Regulations, it can be seen that the three of them include Law Number 6 of 2011 concerning Immigration as a Law used as the legal basis. In addition, the three Ministerial Regulations also refer to Government Regulation Number 31 of 2013 concerning Regulations on the Implementation of Law Number 6 of 2011 concerning Immigration as the following legal basis. Then referring to Law Number 6 of 2011 itself, there is a clause that is delegative to be regulated in the regulations below, such as:

1. In Article 47, it is stated that "Further provisions regarding the requirements and procedures for application, types of activities, and the period of Visa, as well as procedures for granting Entry Stamps, are regulated by a Government Regulation";
2. Article 40 states that "The granting of visit visas and limited stay visas is the authority of the Minister";
3. Article 41 states, “A Foreign National who may be granted a visit Visa upon arrival is a citizen of a particular country established under a Ministerial Regulation."

Referring to these sources of law, the existence of a Ministerial Regulation regulating Visas and Electronic Visas during the Covid-19 pandemic is by the theory of the hierarchy of legislation. Even though the problem in this hierarchical perspective is that there are differences in the definition of Visa between those contained in Law Number 6 of 2011 and the Regulation of the Minister of Law and Human Rights, both regulated in Ministerial Regulation Number 26 of 2020, Ministerial Regulation Number 27 of 2021 and in Ministerial Regulation Number 34 of 2021.

Law 6 of 2011 does not recognise granting Visas for Foreign Nationals residing within the Indonesian Territory. So that the things that are deviations in the derivative regulations of this immigration law are:

1. Visas can indeed be granted elsewhere, but there is no specific explanation of which another place is referred to other than the Immigration Checkpoint.
2. Electronic visas are granted within the territory of Indonesia. They are not by the mandate of the Visa as in the Immigration Law Visas are granted abroad or in other places designated by the Minister in the form of Immigration Checkpoints.
3. Then, in the Immigration Law, the Visa is also not valid as a Stay Permit, but the Visa is only valid as the basis for granting a Stay Permit.
4. The electronic visa itself is valid as a Stay Permit for Foreigners in Indonesia.

Thus, it can be concluded that the concept of an electronic Visa carried out by operational regulations at the level of Ministerial Regulations is not in line with the visa concept in the immigration law as stipulated in the immigration law. Referring to these things, then in terms of the legal concept, the hierarchy theory of laws and regulations is not implemented correctly.

### *4.3. Visa Legal Concept in Sovereignty Concept*

There are 2 (two) popular types of sovereignty theory, namely absolute sovereignty and relative sovereignty. Absolute sovereignty believes that the holder of power is fully authorised to enforce the will to make decisions. Meanwhile, relative sovereignty places a position in international law and obeys the principles of international law.

Sovereignty means that the state has the right to full power to exercise its territorial rights within the boundaries of the territory of the country concerned. The principle of sovereignty in the United Nations Charter is one of the most important and respected basic principles, especially in the equal position of rights between countries in the world, and this is one of the principles or doctrines called "jus cogens" or "peremptory norms," namely "A norm that is accepted as a basic norm of international law and recognised by the international community as a whole as a norm that should not be violated." (Santoso, 2018) In implementing active free politics, the state must pay attention to the principle of state sovereignty. Sovereign states have exclusive rights in the form of power, namely: (Santoso, 2007)

1. The power to control domestic matters;
2. The power to accept and expel strangers;
3. Privileges to open its diplomatic representatives in other countries;
4. Full jurisdiction over crimes committed within its territory.

Thus, it can be interpreted that within a sovereignty, there is an inherent territory of authority /jurisdiction and cannot be separated from the sovereignty itself. The presence of an electronic Visa is undoubtedly not a form of coercion from the Indonesian government towards foreigners stranded in Indonesia but rather an exclusive right of the state to control its domestic problems. The government considers the interests of other countries whose

citizens are in Indonesia. The Government of Indonesia conducts various communications and coordination through the Ministry of Foreign Affairs and the Directorate General of Immigration to assist in the repatriation of foreign nationals stranded in Indonesia. Thus the theory of relative sovereignty can be more in line with the rules of electronic Visa. In the perspective of sovereignty theory, the electronic Visa is an embodiment of the principle of relative sovereignty or sovereignty that respects the principles of international law.

*4.4. Changes in the Legal Concept of Visa in Indonesia as a result of the Covid-19 Pandemic*

When the Minister of Law and Human Rights Regulation Number 27 of 2021 was issued to replace the Minister of Law and Human Rights Regulation Number 26 of 2020, the clauses in this latest regulation did not change the concept, especially in terms of the concept of an electronic visa. Then, through the Minister of Law and Human Rights Regulation Number 34 of 2021, which replaced the Minister of Law and Human Rights Regulation Number 27 of 2021, the legal concept of an electronic Visa became increasingly apparent. However, later, the Covid-19 pandemic situation, which forced people to be restricted in their movements, caused the socialisation of these operational regulations not to be carried out optimally. So to make it easier for the general public, a journalistic narrative was made by the Directorate General of Immigration regarding this electronic Visa. Through its social media pages, the Directorate General of Immigration introduces this electronic Visa as an Onshore Visa. Initially, the translation of the electronic visa into an onshore visa was only a term that explained that the visa was obtained on land or within the territory of Indonesia. However, this translation makes it clear that the existing concept of visa law in Indonesia has shifted from the immigration doctrine stated in the basic norms of immigration law itself. The essence of the Onshore Visa itself is very different from the essence of the Visa in Law Number 6 of 2011 concerning Immigration, where the Visa is a selection stage for someone who wants to travel to a country and is valid as an entry permit when someone is still outside the country whose destination, to lose the concept of security itself.

Law Number 6 of 2011 concerning Immigration has a separate meaning regarding Visas and Stay Permits. It can be seen as follows:

1. A visa is a written statement given to a Foreigner to travel to the Indonesian Territory and as a consideration for issuing a Stay Permit. A visa is considered a permit to travel to the territory of Indonesia and ideally is given at the Indonesian Representative office or other designated place. Meanwhile, the electronic Visa, later introduced as an Onshore Visa, is not valid as a travel permit because an Onshore Visa applicant has already been in Indonesian territory.
2. Stay Permit is a permit issued to Foreign Citizens by an authorised official to stay in Indonesia. But the fact is that the Onshore Visa also applies as a Stay Permit as long as the Foreigner is in Indonesia. So, the essence of an Onshore Visa is a Visa that is valid as a Stay Permit in Indonesia.

This change in concept was then strengthened by the broadcast of the Directorate General of Immigration through its social media accounts. In the Instagram account of the Directorate General of Immigration, the electronic visa terminology mentioned in the ministerial regulation is presented with improper journalistic language, that is, being an onshore visa.

## 5. Conclusion

The electronic visa, which is then published as an onshore visa, is a legal product in a force majeure situation. The Covid-19 pandemic forced the government to immediately provide space for foreigners stranded in Indonesia. Even though the operational law product is present in a global emergency, the regulation in the form of a Ministerial-level Regulation is still by the rules of the hierarchical theory of laws and regulations. Even so, the issuance of these three ministerial regulations is a manifestation of the sovereignty of the government of the Republic of Indonesia in regulating its domestic affairs. What needs to be done by the Directorate General of Immigration as an extension of the power of state administration is to ensure the validity period of these three operational regulations. Determination of the useful life of the Ministerial Regulation related to electronic Visa/Onshore Visa becomes important when the concept of visa law in Indonesia is not in line between

operational regulations and the initial doctrine regulated in the basic norms of immigration law through Law Number 6 of 2011 concerning Immigration.

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# Comparison of Legal Cultures for Settlement of Industrial Relations Disputes Through Arbitration Between Singapore (Common Law System) and Indonesia (Civil Law System)

Darmawan Yusuf[1], Agusmidah, Agusmidah[2], Aloysius Uwiyono[3], & Ningrum Natasya Sirait[2]

[1] Doctor Program Faculty of Law, Universitas Sumatera Utara, Medan, Indonesia
[2] Universitas Sumatera Utara, Medan, Indonesia.
[3] Universitas Indonesia, Depok, Jawa Barat, Indonesia.

Correspondence: Darmawan Yusuf. Email: darmawan.yusuf@students.usu.ac.id

**Abstract**
In the common law legal system, the main sources of law are habits that live in society as a legal culture, as well as agreements that have been agreed upon by the parties. Meanwhile, in the civil law legal system, the regulations set by the government are the main source of law. There are two kinds of sources of labor law, namely: autonomous and heteronomous legal methods. Singapore is a country that has adopted an export-oriented industry, so the Singapore economy is colored by the role of the government. The state of industrial relations in Singapore is seen as the most stable and most functioning industrial relations system. In addition to tripartite relations, as well as a strong collaboration between the government, workers, and employers is the hallmark of industrial relations in Singapore. Singapore (Common Law) has the employment law The Employment Act 1968 which is a refinement of various ordinances made by the colonial rulers (Britain), including The Labor Ordonance 1957, The Shop Assistants Employment Ordinance 1957, and The Clerck's Employment Ordinance 1957. Laws and regulations in the field of labor apply in Indonesia, namely: Law no. 13 of 2003 and Law no. 02 of 2004 concerning the Settlement of Industrial Relations Disputes. Normative legal research with a comparative approach to legal culture. The legal issue is that if the two legal traditions are related to both types of labor law sources, then in countries that adhere to the Common Law legal tradition, the main source of labor law is generally the autonomous method. Meanwhile, countries with civil law traditions are generally heteronomous. Labor law is not a neutral and independent type of law, so government involvement is needed as an effort to protect workers who are weak in position.

**Keywords:** Comparison, Industrial Relations, Singapore, Indonesia

## 1. Introduction

There are two kinds of legal traditions, namely: the Anglo-Saxon legal culture (*Common Law System*) and Continental European law (*Civil Law System*). In the Common Law Country tradition, the main source of law is the habits that live in the community and the agreements that have been agreed upon by the parties. Meanwhile,

in the Civil Law Country tradition, the laws and regulations set by the Government are the main sources of law (Nuhardianto, F., 2015). There are no less than 42 legal systems in the world (de Cruz, P., 2013).

The common law tradition began in medieval England and was practiced in British colonies across the continent. Civil law traditions developed simultaneously on the European continent and were applied in the colonies of European empires such as Spain and Portugal. In the 19th century and 20th centuries, civil law was also adopted by countries that previously had different legal traditions, such as Russia and Japan. These countries sought to reform their legal systems to gain economic and political power over Western European countries. To Americans familiar with English common law terminology and legal procedures, the civil law tradition feels foreign and confusing. England had deep cultural ties with all European countries during the Middle Ages, but the legal traditions that developed there were different from others for several historical reasons. One of the most fundamental differences is that court judgments are used as the basis for the common law legal tradition and statutory judgments are used as the basis for the civil law legal tradition (Legrand, P., 1999).

Common law is generally not codified. This means that there is no comprehensive compilation of legal regulations. Common law relies on some laws that are the result of legislative decisions, but most are based on precedent, i.e. legal decisions previously made in similar cases. This precedent has been maintained over time through the court's historical record, documented in collections of cases known as almanacs and reports. This precedent applies to decisions in each new case designated by the presiding judge. As a result, judges have played an important role in shaping the law in America and England. Civil law is codified law. A country with a comprehensive civil law system has a constantly updated legal codification, including the rules of court proceedings, applicable procedures, and appropriate penalties for each offense (de Cruz, P., 2013).

Such codes distinguish between different kinds of laws. There are substantive laws that can be criminally or civilly prosecuted, procedural laws that determine how to determine whether a particular act is a crime, and criminal laws that determine appropriate penalties. The role of the judge in the civil law system is to establish facts and apply the provisions of applicable law. Judges often conduct formal prosecutions, investigate matters, and decide cases, all within the framework provided by a comprehensive set of laws. Therefore, the decisions of these judges are less important in shaping civil law than those of the legislators and legal scholars who interpret the law (Uwiyono, A., *in* Widigda, RS., and Sharifa, A., 2019).

Based on the description of the background of the problem, the legal issues in this study can be formulated as follows: How is the legal culture compared in the settlement of industrial relations disputes through arbitration between Singapore which adheres to the common law system and Indonesia which adheres to the civil law system.

## 2. Research Method

The research method used is prescriptive legal research with a comparative approach. This study aims to analyze the comparative legal cultures of Singapore and Indonesia regarding the resolution of industrial relations disputes through arbitration. The survey is based on Labor Force Act No. 13 of 2003, Labor Relations Dispute Settlement Act No. 2 of 2000 concerning Unions as positive law in Indonesia compared to the Employment Act 1968 as positive law in Singapore, secondary legal material in the form of quotations from the books listed in the bibliography, and tertiary legal materials such as dictionaries and periodicals magazines. Legal materials are qualitatively analyzed and the results of the research are presented in the form of explanations.

## 3. Results and Discussion

### *3.1. Common Law System and Civil Law System sources of law*

For centuries, there has been a heated debate about which is the best between Civil Law and Common Law. Jeremy Bentham who was later supported by John Austin is a supporter of civil law, and considers that the common law system contains uncertainty and calls it the "*law of the dog*" (Colls, R., 2002). On the other hand, one of the proponents of the common law system, F.V. Hayek said that the common law system is better than the civil law

system because it guarantees individual freedom and limits government power (Arrunada, B., and Andonovo, V., 2008). The best way to overcome these differences is to approach from a historical aspect as Benjamin N. Cardozo argues "*history in illuminating the past illuminates the present so that in illuminating the present it illuminates the future*" (Nasution, B., URL, May 20th 2022).

The tradition of the common law system was born in 1066, an event that occurred that year when the Normans defeated and conquered the natives (Anglo-Saxons) in England. Meanwhile, the civil law system was born first when the Corpus Juris Civilis of Justinian was published in Constantinople in 533 AD which was heavily influenced by Roman law. The root of the substantial difference between the two legal systems lies in the source of law used by the Court in deciding a case (Rahardjo, S., 1991). The civil law system uses codification as a source of law, while the common law system uses the decisions of previous judges as a source of law or better known as the doctrine of stare decisis. Another prominent difference concerns the role of the courts. In a civil law system, judges are part of the government (Qamar, N., 2010).

This is inseparable from the history that underlies the creation of these differences. Before the revolution, the French judges became enemies of society rather than defenders of the public interest because they favored the interests of the King. This condition then triggered the French revolution led by Napoleon. This pre-revolutionary experience served as inspiration for Napoleon in placing judges under the control of the government to prevent "*rule by judges*" as had happened before the revolution. This makes government power in civil law system countries very dominant (McCullough, R.L., URL, May 20th 2022).

This difference is maintained in the civil law system in the continental area which inherits the tradition of Roman law. In France, for example, courts distinguish between cases relating to the government and apply a different law to the law governing private-sector relations. This position makes the ordinary courts in France procedurally not have the authority to review government policies. On the other hand, countries that adhere to a common law system derived from the British tradition have an independent judiciary. Therefore, the power to determine the law rests with the Supreme Court as the highest court (Suprayogi, A., 2016).

### *3.2. Comparison of Common Law System and Civil Law System*

#### 3.2.1. Based on History and Source of Birth

Civil law is the oldest and most influential legal system in the world. This legal system derives from the Roman-Germanic tradition. Around 50 BC. The Roman Empire created the first written rules called the "*Roman Twelve Tables*". This Roman legal system spread to different parts of the world with the expansion of the Roman Empire. This legal system was later codified by Emperor Justin in the 6th century. The Corpus Juris Civilis was completed in 53 AD. When Europe first began to have governments, Roman law was used as the basis for each country's domestic law. Napoleon Bonaparte in France enacted the Napoleonic Code in 1804 and in Germany enacted the Civil Code in 1896 (Marzuki, P.M., 2011). Common law is based on tradition and evolves from precedent used by judges to resolve legal issues (Ramadhan, C.R., 2018).

#### 3.2.2. By Source

Common Law: Based on a judge/court decision. Judicial rulings create legal certainty even if they recognize legislative rules. On the other hand, civil law: is based on statutory law (written law) and the maximum norms in the rule of law. A source of law is the law formed by the body responsible for legislation and customs (*volksgeist*) (Aulia, M.Z., 2020) of society, as long as it does not contradict existing regulations.

#### 3.2.3. Based on General Principles

It is binding law because its source is embodied in ordinances in the form of statutes and systematically placed in specific codes or collections. This main principle is adhered to, considering that the main value which is the purpose of the law is legal certainty. Therefore, based on the legal system adopted, judges generally cannot enact

binding laws. A judge's decision in a case is binding only on the litigants (*a priori reasoning*). Giving priority to jurisprudence and adopting Montesquieu's theory of separation of powers, the function of the legislature is to make laws, and the courts apply them (Munaf, Y., 2015).

Customary Law: Sources of law are not systematically arranged into specific hierarchies as in the legal system of Continental Europe. The Anglo-Saxon legal system had a "role" assigned to judges who were not only responsible for establishing and interpreting laws and regulations, but also played a very large role in shaping the whole order of people's lives. I have. Judges have a very broad power to interpret existing law and to create new legal principles to guide other judges in deciding similar cases (*inductive reasoning*). This system respects the principle of judicial precedent, which is the essence of law and gives top priority to the execution of justice (Simanjuntak, E., 2019).

3.2.4. Based on the Classification

Civil Law under classification: Divided into public and private law areas. Public law includes legal provisions that regulate the power and authority of a ruler/state and the relationship between society and the state. Public law includes constitutional law, state administrative law, and criminal law. Private law includes legal regulations that regulate relationships between people to meet their needs. Private law includes civil law, which includes civil law and commercial law.

Common Law: Also recognizes a distinction between public and private law. The importance given to public law is about the same as that given by the legal order of continental Europe. Private law is intended to be the legal norms relating to property rights (*property law*), but personal law, contract law, and tort law are scattered throughout the country. Written Regulations, Judgments, and Laws (Handoyo, H.C., 2009).

3.4.5. Based on Scope

Civil Code: This system applies to many European countries and their colonies, including Angola, Argentina, Armenia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Germany, Greece, Haiti, Honduras, Italy, the Netherlands, and Indonesia. will be Common Law: This system applies to the United Kingdom and most of its colonies, as well as Commonwealth countries such as the Bahamas, Barbados, Canada, Dominica, Fiji, Gibraltar, Jamaica, New Zealand, and Togo (de Cruz, P., 2013).

*3.3. Labor Law*

In the field of labor law, there are two sources of law: autonomous law and heteronomy law. The first is the legal provisions established between the parties involved in the employment relationship, i.e. the employee or trade union, and the employer or employers' association. Examples: Employment contracts, company rules, and collective bargaining agreements. The second is a statutory provision established by a third party other than the party bound by the employment relationship. For example, all labor laws and regulations enacted or ratified by governments include Law No. 13 of 2003, Law no. 02 of 2004, and Law no. 21 of 2000 and their implementing regulations.

If the two legal traditions mentioned above are associated with both types of labor law sources, then in countries that adhere to the Common Law legal tradition, the main sources of labor law are generally autonomous methods, such as Collective Labor Agreements. In countries that adhere to the legal tradition of the Civil Law System, generally heteronomous methods, namely: Legislation established by the Government is the most dominant source of labor law (McCullough, R.L., URL, May 20$^{th}$ 2022).

The term employment or labor is all things related to labor, namely people who can do work to produce goods and/or services both to meet their own needs and for the community, before, during, and after the work period. People who can do the work and then work by receiving wages or other forms of remuneration are called workers/laborers. Work is a productive activity at the behest of another person, in the case of an Employment Relationship, the other person is an entrepreneur. The wages received by the worker/laborer are a reward from the

entrepreneur for the work that has been done. The understanding has been carried out not only that the work order must have been completed by the worker/laborer but can also be agreed to be paid before the work is carried out.

Law is a political product, where in the process of legislation, both its formulation and interpretation do not take place in a value-free or neutral context from the influences of morals, religion, and political interests (Sinaga, M., 2006). This means that there is a political and ideological background behind every product of legislation issued. Labor Law is not a neutral and independent type of law, so the government's involvement is needed as an effort to protect workers/laborers whose positions are weak (Tjandra, S., and Suyomenggolo, J., 2006).

Employment law ideally serves as a balance between the interests of workers/laborers and employers. This is based on the socio-economic condition of the worker/laborer under (subordination) to the entrepreneur. Thus, it can be understood that Employment Relations do not only enter the realm of private law but have become a public law that aims to provide fair protection to workers/laborers (Damanik, S., 2005).

According to Soepomo, I., Labor Law is a set of regulations, both written and unwritten, relating to events where a person works for another person by receiving wages. Juridically, the position of workers/laborers and entrepreneurs is the same, but sociologically they are different, meaning that workers/laborers only have the power, although sometimes some have the knowledge and skills, to work for entrepreneurs, thus bringing consequences for the entrepreneur who determines the requirements. work in the work agreement that gives rise to the Employment Relationship that occurs (Supomo, I., 2003).

Three main laws regulate employment in Indonesia, including Law no. 13 of 2003 concerning Manpower, Law no. 2 of 2004 concerning Settlement of Industrial Relations Disputes, and Law no. 21 of 2000 concerning Trade Unions/Labour Unions. In addition, there is Law no. 11 of 2020 concerning Job Creation (Yusuf, D., *et.al*., 2022).

In the Employment Relations between employers and workers/laborers, there are rules as an elaboration of the three laws above (heteronoom rules) which include working conditions, rights, and obligations of parties (employers, Trade Unions/Labor Unions) in the form of Company Regulations. Company Regulation or Collective Labor Agreement is usually referred to as the autonomy rule. The contents of the Company Regulations or Collective Labor Agreement must not conflict with the law above, meaning that the quality and quantity of its contents cannot be lower than the law governing a matter.

*3.4. Settlement of Industrial Relations Disputes*

In the case of industrial relations disputes, whether disputes relating to rights, benefits, dismissal, or disputes between unions, Law No. 2 of 2004 concerning Settlement of Industrial Relations Disputes, on the resolution of industrial relations disputes, from bilateral negotiations, mediation/conciliation/conciliation to arbitration to the Industrial Relations Court, including Supreme Court renunciation levels and even judicial review. The types of labor-related disputes under Article 2 of Law no. 2 of 2004 concerning Settlement of Industrial Relations Disputes, are as follows: 1) provisions of laws, collective bargaining agreements, company regulations or collective bargaining agreements; 2) Conflicts of interest, i.e. disputes arising in employment relationships as a result of disagreements regarding the creation and/or modification of working conditions specified in employment contracts, company rules or collective bargaining agreements. 3) Termination of Employment Disputes, i.e. disputes arising from disagreements regarding termination of employment made by one of the parties; 4) Disputes between trade unions, i.e. disputes between trade unions and other trade unions, exist only within one enterprise due to the absence of agreements on union membership, the exercise of rights and obligations (Article 2 Law No. 2 of 2004).

In the event of a labor dispute, the parties must first participate in bilateral negotiations between labor unions/trade unions with workers/employees or employers to resolve labor disputes through consultation and reach an agreement. Any dispute resolution between the two parties must be resolved within thirty (30) business days of the commencement of negotiations. If bilateral negotiations prove unsuccessful, the parties may settle legal disputes, conflicts of interest, dismissal disputes, and union disputes with one company only through the advice of

one or more neutral mediators. / Conciliation efforts can be made to resolve union disputes. The conciliator shall perform its duties within thirty (30) working days of her receipt of the dispute resolution mandate (Kesuma, I.N.J., *et.al*., 2018).

In addition to mediation, parties may resolve interest disputes, termination of employment disputes, or union/international disputes in a single company only through consultation by conduction by one or more neutral arbitrators. The parties may also choose to use arbitration efforts. The parties will submit a written settlement request to an arbitrator appointed and agreed upon by the parties. The arbitrator shall perform its duties within her thirty (30) business days of receipt of the dispute resolution request (Article 4 Law No. 2 of 2004).

A party may also elect to arbitrate. That is, to submit to an arbitrator the settlement of interest disputes of one company only and disputes between labor unions, written agreements, and dispute settlements by the disputing parties. binding and final on both parties. The resolution of labor disputes by arbitrators is based on the agreement of the disputing parties. The arbitrator is obliged to settle the labor dispute within 30 working days after he signs the agreement on the appointment of the arbitrator (Article 40 Law No. 2 of 2004).

If mediation or mediation attempts other than mediation attempts are unsuccessful, the parties may petition the Labor Relations Court for settlement. a) at the first level of legal disputes; b) First and last level of conflict of interest. c) the first stage of disputes over the termination of employment; d) the Initial and final stages of inter-union disputes within the company (Article 56 Law No. 2 of 2004).

The Judiciary Commission is obliged to decide on the settlement of the labor dispute within 50 working days of the initial hearing. Decisions of the Labor Court of the District Court on disputes and termination of employment disputes shall have permanent legal effect if an application for renunciation is not filed with the Supreme Court within 14 working days: a) Reading out decisions at main judicial hearings; and b) for parties who are not present, starting from the date of receiving notification of the decision (Article 110 Law No. 2 of 2004).

Based on Article 30 of Law no. 5 of 2004 concerning Amendments to Law No. 14 of 1985 concerning the Supreme Court jo. Law No. 3 of 2009 concerning the Second Amendment to Law no. 14 of 1985 concerning the Supreme Court, at the Cassation level, the Supreme Court may annul court decisions from all judicial circles for the following reasons: a) not having authority or exceeding the limits of authority; b) misapply or violate any applicable law, and c) for parties not present, from the date of service of the decision (Article 30 Law No. 5 of 2004).

Disputes in the Supreme Court or settlement of dismissal disputes will be made within thirty (30) business days of receipt of the waiver application (Article 115 Law No. 2 of 2004). Since the law of procedure applicable to the Industrial Relations Court is the law of civil procedure applicable to the courts within the general courts, parties dissatisfied with the outcome of the renunciation shall, except as expressly provided for in this law, can apply for judicial review. For the following reasons: a) if the decision is based on a lie or trickery by the other party known after the decision of the case or on evidence later declared false by a criminal judge; b) After the judgment of the case, conclusive evidence is found that could not be found during the hearing of the case. c) is granted anything that is not required or is more than required; d) if part of the claim was not decided without reason; f) the same party to the same case, on the same grounds, by the same court or at the same level, makes mutually contradictory decisions; g) If there is a judging error or genuine error in the decision (Article 67 Law No. 5 of 2004).

### *3.5. Termination of Employment in Singapore*

Examples of countries adhering to the Singapore common law system. Singapore also has laws regulating employment. Employment Act 1968. The Employment Act 1968 is one of the laws aimed at creating an attractive environment for investors to invest in Singapore companies. The Act improved and consolidated various colonial (British) ordinances, including the Labor Ordinance 1957, the Clerk Employment Ordinance 1957 and the Clark Employment Ordinance 1957 (Sudjudiman, H.N., *et.al*., 2020).

Through this law, the Singapore Government seeks to standardize working conditions. Among other things, it regulates the standard working days in one week (ie: a maximum of 44 hours a week), the amount of overtime pay, and the time limit for overtime that is allowed to be carried out by workers/laborers. In addition, it also regulates the number of benefits received by sick workers/laborers, as well as provisions regarding the period of leave for them in one year. Through these various regulations, it is hoped that high hidden costs will be prevented from overtime carried out by workers/laborers so that through the inhibition of these high costs, foreign investors are expected to be attracted to invest in Singapore. Through this law, the Singapore government also hopes to accelerate industrial growth in the country (Walter, W., 2000).

In 1975, The Employment Act 1968 was amended, namely by freezing the obligation to provide bonuses or other payments to workers/laborers to a certain level or amount. The amendment means that the government provides guarantees for investors to get cheaper labor costs. On the other hand, the government limits or reduces rights in the form of bonuses or other payments for workers/laborers to a certain level or amount (Sudjudiman, H.N., *et.al*., 2020).

In 1984, The Employment Act 1968 was again amended to increase productivity. This second amendment permits companies/entrepreneurs to set working hours more flexibly, namely by allowing non-shift workers for twelve hours a day if the worker concerned gives written approval to the company. In addition, the second amendment also prohibits companies from employing children under the age of twelve. However, companies may apply for a permit to employ children under the age of twelve for non-industrial occupations after obtaining certification from a health worker (Sudjudiman, H.N., *et.al*., 2020).

An employer or employee wishing to terminate the employment relationship may do so by terminating the employment contract. Termination of employment carries certain legal obligations for both the employer and the employee. Dismissal must comply with the conditions specified in the employment contract. Before either party decides to terminate employment, it is important to consider the following: 1) the conditions under which work can be terminated including who can terminate the employment, when the termination of employment will begin, what types of layoffs require compensation and notification of layoffs, and others; 2) the rights, duties and responsibilities of the employer and the employee terminating the employment; 3) Things that are allowed and prohibited layoffs in Singapore (Suprayogi, A., 2016).

### *3.6. Comparison of Legal Culture for Settlement of Industrial Relations Disputes through Arbitration Between Singapore (Common Law System) and Indonesia (Civil Law System)*

Given that the two legal traditions mentioned above are related to the two sources of labor law mentioned above, in countries belonging to the legal tradition of the customary system, the main source of labor law is generally autonomous labor law, such as collective bargaining agreements. That's the way. Customary law based on court decisions. Judicial rulings create legal certainty even if they recognize legislative rules. Civil law is based on written law and incorporates as many norms as possible into the rule of law. The source of law is the law formed by legislators and community customs, so long as it does not contradict existing rules. In countries that adhere to the legal tradition of civil law systems, the dominant source of labor law is generally polynomial, i.e. laws and regulations enacted by the government.

Concerning the settlement of disputes over the Termination of Employment, Indonesia prioritizes settlement by deliberation between employers and workers. If it does not work out of court, then the dismissal will be valid if it has obtained a decision from the Industrial Relations Court. Dissatisfied parties can even appeal to the Supreme Court. In contrast to Singapore, in Indonesia the Industrial Relations Arbitration institution is not authorized to settle disputes over layoffs, while in Singapore, the International Arbitration Court (IAC) is authorized to do so.

According to Article 1 point 1 of Law no. 30 of 1999, arbitration is "*a method of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties*." From a doctrinal perspective, several experts have also given their opinion on the definition of arbitration. Priyatna Abdurrasyid explained that arbitration is another form of the private adjudication process. Settlement through arbitration is

generally chosen for contractual disputes, both simple and complex. Furthermore, Priyatna Abdurrasyid also states that such arbitrations can be categorized as follows: a) Quality arbitrations, which involve contractual issues (*question of fact*) which naturally require arbitrators with high technical qualifications; b) technical arbitrations that do not involve matters of substance, such as problems in the preparation of documents or the application of contract provisions, and c) Mixed arbitration, namely for disputes both on factual and legal issues (*question of facts and laws*) (Abdurrasyid, P., 1995).

Abdurrasyid, P., also explained arbitration by comparing it with several existing mechanisms within the scope of Alternative Dispute Resolution. The following table briefly explains the differences between conciliation, negotiation, mediation, and arbitration. In the context of the history of international law, arbitration has been used since Greek times. In the Christian era, disputes between kings and rulers were submitted to Papal Arbitration. Vitoria, Suarez, and Grotius have resorted to dispute resolution through arbitration. Based on history, it can also be understood that arbitration turned out to be the first way of resolving disputes and which inspired the establishment of permanent international judicial institutions (Wahyuningsih, 2012).

Arbitration is a method of settlement carried out by submitting to a third party. According to the Advisory Opinion of the Permanent Court of Justice on the Interpretation of the Treaty of Lausanne Case (1925) PCIJ Ser. B No. 12, arbitration in international law has a more specific meaning, namely: First, arbitration is a procedure for resolving legal disputes. In other words, arbitration concerns the rights and obligations of the disputing parties under the provisions of an international treaty, and settlement will be sought by applying the agreement to the facts of the case. Second, arbitration awards are legally binding on the disputing parties. Once, a country or legal subject as a party agrees to use arbitration, the state or legal subject is bound by a legal obligation to carry it out. Third, in arbitration proceedings, the disputing parties may choose their arbitrator. This is not the case in court, the parties to the dispute through arbitration have the authority regarding the composition of the arbitral tribunal and its procedures. In its dynamics, to answer the needs of the activities of international legal subjects, such as countries, international organizations, and business entities such as large-scale companies, which are increasingly complex, arbitration institutions also experience development (Gunadi, A., 2013).

The legal basis of Article 1 point 1 of Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, arbitration is defined as a way of settling civil disputes outside the general courts based on an arbitration agreement made in writing by the disputing parties (Kansil, C.S.T., *et.al*., 2006). Settlement through arbitration can be done by individuals or institutions. Currently, arbitration is increasingly being used in resolving national and international trade disputes. In terms of the timing of the settlement selection, arbitration is divided into 2 (two), namely: the arbitration clause and submission agreement. The former is arbitration that has been included in the contract of the parties, while the latter is an action taken by the parties to submit dispute resolution to arbitration (Redfern, A., 2004).

The Employment Relations Act is the primary law governing the termination of employment in Singapore. All employment contracts must contain a termination clause that explains the rights, obligations, obligations and responsibilities of employers and employees in the event of termination of employment. The law aims to restructure industrial relations in Singapore and establish a system of tripartite cooperation between the government and the state on labor issues. According to the Industrial Relations Act and its 1968 amendments, resolution of labor disputes should be prevented and resolved out of court, ie through collective bargaining, mediation and arbitration. The collective bargaining process states that if negotiation does not resolve the dispute between the company and the worker/laborer, the next step must be the arbitration process. This arbitration is conducted by the Labor Commission operating under the auspices of the Ministry of Labor. If the arbitration attempt is still unsuccessful, the next step is to resolve the dispute through an arbitration tribunal, the Industrial Arbitration Court (IAC). The Chair and Vice-Chair of this arbitration body are directly appointed by the President on the advice of the Prime Minister. From this position, the IAC appears to have enormous power and be in a very strong position to settle disputes between companies and workers.

Based on this description, the two legal systems, both the Common Law System and the Civil Law System, generally involve the Government in labor law. The settlement of layoff disputes in Indonesia should be resolved

more simply and quickly if it is resolved out of court as the settlement of layoffs in force in Singapore. Recommended, Law no. 2 of 2004 concerning the Settlement of Labor Disputes needs to be amended immediately to give the Industrial Relations Arbitration the authority to resolve layoff disputes, adjusted to the needs of the community which requires a faster and cheaper process.

## 4. Conclusion

Dispute resolution for layoffs in Indonesia prioritizes settlement through consultation between employers and workers, and if no agreement is reached, it can be resolved out of court, especially through mediation or conciliation in industrial relations. If this is not possible out of court, the dismissal is valid upon obtaining a decision from the Labor Court. Dissatisfied parties can even appeal to the Supreme Court. Unlike Singapore, industrial relations arbitration bodies in Indonesia do not have the power to settle disputes over layoffs. The Employment Relations Act is the primary law governing termination of employment in Singapore. All employment contracts must contain a termination clause that explains the rights, obligations, obligations and responsibilities of employers and employees in the event of termination of employment. The law aims to restructure industrial relations in Singapore and establish a system of tripartite cooperation between the government and the state on labor issues. The law, like its 1968 amendments, aims to prevent the resolution of labor disputes and to resolve them out of court through collective bargaining (collective bargaining), mediation and arbitration. The collective bargaining process states that if negotiation does not resolve the dispute between the company and the worker/laborer, the next step must be the arbitration process. This arbitration is conducted by the Labor Commission operating under the auspices of the Ministry of Labor. If mediation efforts remain unsuccessful, the next step is to resolve the dispute through an arbitration tribunal, the Industrial Arbitrator (IAC). The Chair and Vice-Chair of this arbitration body are directly appointed by the President on the advice of the Prime Minister. From this position, the IAC appears to have enormous power and be in a very strong position to settle disputes between companies and workers.

Resolving labor disputes in Indonesia should be easier and faster out of court than in Singapore. The Recommendation, Law no. 2 of 2004 on Settlement of Labor Disputes, shall be amended without delay, including by authorizing Labor Relations Arbitration Courts to settle labor disputes procedure.

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# The Principle of Common Heritage of Mankind in the Law of Outer Space

Chi Eric Nnadozie[1], Ibrahim Sule[2]

[1] PhD (Research Fellow) University of Calabar, Nigeria, Notary Public, Chartered Arbitrator and a Lecturer at the Nigerian Law School, Yenagoa Campus, Bayelsa, Nigeria
[2] PhD (Research Fellow) University of Utara, Malaysia, Fellow of IBA and teaches at Nigerian Law School, Kano Campus, Nigeria

**Abstract**
Nomadic primitive men were in constant quest for food and water. With sparse population, they rarely encountered other humans. Chance meetings were greeted with confrontations over food and water, the basic essentials for survival. With the passage of time, life became easier when humans transited from hunting to farming. No longer in perpetual pursuit of food and water, civilization and property ownership commenced. Prior to the advent of international law, conquering land seemed simple: the fittest survived and won the land. The victor's flag flapped majestically in the air above the conquered territory as a symbol of acquisition. No rules existed to ensure fairness. Superior armies seized land or those skilled in the exploration declared new unoccupied areas for their kingdoms. For a millennium, homo sapiens followed this savagery and barbaric "first in time, first in right" rule of property ownership. Haven conquered the earth, the inordinate expansionist tendencies of man have shifted his attention to the outer space, an area devoid of the obnoxious "first in time, first in right rule". Rather, the order of the day in this sphere is the doctrine of "common heritage and province of mankind". What is it all about? What is the genesis of the doctrine? Is it absolute and sacrosanct? Or is it a case of all animals are equal, but some are more equal than others". All these will be unraveled as we explore the topic in this exercise.

**Keywords:** Law of Outer Space, International Law, Property Rights, Common Heritage and Province of Mankind

## 1. Introduction

In the beginning, soul that came to this world had to take on the embodiment of flesh in order to survive the coarse vibrations of the physical universe. He was a leaf eater and lived in terror of the killer beasts that stalked and trapped him. Soul had no place to live for he was prey to the brutality of the flesh eaters. He was not a creature with fangs, claws, and muscular strength. What strength he had was not enough to protect him from the prowling beasts. He could not venture into the waters for there the beasts awaited ready to tear him apart. In the jungles were the huge serpents and deadly insects; on the prairies were the wolves. There was no spot on earth for him to safely lay his head. He had only one place to live and that was in the trees.

So, it was in the high treetops of the jungle that he built his home to be safe from the prowling animals that killed him for food. He developed an amazing dexterity to swing through the higher branches. For ages, he was a treetop tenant, rarely venturing to the ground. He drank water from the foliage, and made his bed in a tree crotch.

He scorned the endless spectacle of slaughter which went on beneath him. But the day came when he descended to the soil of earth.

At first, he walked on four feet, and then learned to stand upright, and what was a creature now became a man because he could think, and by thinking he could protect himself. Thereupon, he found a persistent pattern of behaviour that set him free. Never again could his supremacy be threatened nor his foe be more than his slave, for they were the beasts of the forest, the birds of the air, and the creatures of the sea.

Human consciousness came into being, and man became the supreme creature upon the earth. He developed thought and the ability to use it for protection against the flesh killers and the environment. He found shelter in the caves and fashioned weapons out of sticks and stones. The female reproduced his species, and he lived in family groups. A headman or chief was selected to supervise the family and the tribe which gathered around him. Thus, civilization formed in a primitive manner.

Homo sapiens began canvassing the earth, spending their days as nomads, in constant quest for food and water. Due to sparse population at the time, over a vast land, humans rarely encountered other human groups. Chance meetings were greeted with confrontations over food and water, the basic essentials for survival. Nomads gave no heed to land as they hunted. Uppermost in their minds was survival.

Life became much easier when humans shifted from hunting to farming; they were no longer in perpetual pursuit of food; thus, began civilization. With the dawn of civilization came the idea of property ownership, and man became territorial. Communities drew together in war to defend their land from aggressors, and strike to conquer more land. With such expansionist tendencies, property ownership blossomed into a symbol of power and wealth, the age of empire mentality transpired.

Long before the advent of international law, conquering land seemed simple: the strongest army won the land, and the victor's hoisted flag flapped majestically in the breeze above the conquered territory as a symbol of acquisition. No rules existed to ensure fairness. Superior armies seized land, or those skilled in the exploration declared new unsettled grounds for their kingdoms. For thousands of years, *homo sapiens* followed this seemingly savage and barbaric "first in time, first in right" rule of property.

Man, in the ordinary state of nature is selfish, squabbling with his fellow beings over anything he wants to control, not unlike children fighting over toys. By the mid-twentieth century, however, the war-scarred comity of nations realized that an advisory council or forum needed to address international property issues before more conflicts erupted in the advanced global age. Laws needed to act as a moral baby-sitter to ensure that nations played the property game fairly and that no nation denied another's due right to areas not yet conquered or occupied. In the post modern era, even if prompted by apprehension and distrust, the international community exuded an ideal of equity. Unfortunately, nothing in this world seems fair.

From time immemorial, civilizations intelligent or fortunate to make use of resources within their reach excelled and dominated. Intuitively, man exploits natural resources and develops technology to better his existence. Human nature demonstrated this trait from the beginning – represented by innovations such as wheel, tools, and weapons, medicine, and the domestication of animals. Along the line, however, the cradle of civilization lost its foothold. Many civilizations, though globally dominant in centuries past, lag behind in the modern world of technological advancement; and some others never even got a fighting chance due to factors such as famine, disease, natural disaster, or lack of natural resources.

The international community in 1960s decided that the atrocious property principle of "first in time, first in right" should not be applied to the deep seabed, Antarctica, or the outer space, the only regions not controlled by any one sovereign (Jiru, 2000). This theory stemmed from the fact that the exploitation of valuable resources in these regions presented developing nations with an opportunity to share in the world's resources rather than remain economically marginalized, and because each of these areas presented a dilemma regarding habitation and defense (Brilmayer & Klein 2001). No nation occupied these territories and no nation desired a race to own

without a guarantee of who would emerge victorious. Because these areas harbor coveted natural resources, every nation craved a piece of the action without the hurry-scurry state of mind regardless of economic or technological stance. This exercise examines the effectiveness of the international community's novel approach to property law *vis-à-vis* the ambiguous language in outer space treaties.

With this brief introduction, we shall now proceed to examine the topic under the following rubrics:

a) the common heritage of mankind principle applicable in outer space;

b) analysis of the relevant space laws applicable to acquisition of natural resources in space, property rights in outer space and appropriation of satellite orbit slots; and

c) concludes with the recognition that due to man's inherent nature, space operators will resort to the age-long primitive "first in time, first in right" rule of property that the international community attempted to eschew.

**2. The Common Heritage and Province of Mankind Principle**

The United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) provides that the outer space shall be the common province of mankind.

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. Outer space including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies. There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation (Outer Space Treaty 1967)

The Treaty further provides that the "outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

On its part, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement), provides that; The Moon and its natural resources are the common heritage of mankind. The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means. Neither the surface nor the subsurface of the Moon, nor any part thereof, or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on, or below the surface of the Moon, including structures connected with its surface, shall not create a right of ownership over the surface or subsurface of the Moon or any areas thereof (Moon Treaty, 1979)

The combined effect of the foregoing provisions clearly shows that the outer space including the Moon and other celestial bodies shall be a virtual place for research in science and technology for mankind and not subject to appropriation and ownership by any sovereign.

The comprehension of the extension of property laws to outer space and other celestial bodies requires proper understanding of the underlying common heritage ideal, the essence of man's attempt to civilize outer space. Under the common heritage of mankind principle, nations manage, rather than own, certain designated international zones (Rana, 1994). There is no national sovereignty over these spaces, what exists is the supremacy of international law. The principle of common heritage of mankind deals with international management of resources within the territory, rather than the territory itself (Joyner, 1999).

The principle renders the claim of title to designated international common heritage areas worthless and unrecognized, as such; the issue for countries becomes access (Rana, 1994). The common heritage principle therefore seems unconcerned with ownership of designated areas, but rather focuses on the uses of them for the

benefit of mankind, to serve the common interest of people everywhere. The distinction between access and ownership may however, appear difficult. In tandem with most international principles, a divergence between less-developed nations and developed nations over the interpretation of the common heritage emerged.

Less developed nations believe that international areas designated for the common heritage of mankind do not belong to any one sovereign, but instead to all nations (Schwind, 1986). Therefore, any resource or benefit derived from those resources, or the use of them, should serve all of mankind. Referring to it as a "common property" approach, less developed countries assert that there should be common management of such areas, with a singular group possessing exclusive rights to exploit natural resources and distribute those resources equitably to all nations, regardless of which nations actually funded the effort (either economically or by developing the technology, or both) (Mau, 1984).

Under this interpretation, a nation that did not contribute financially, nor had any involvement in developing the necessary technology, would reap the benefits of the exploitative activity. Not only does this seem inherently unfair, but also, this hardly provides an incentive for technologically advanced nations to conduct expeditions. Furthermore, this interpretation does not provide incentive for less-developed countries to develop technology or fund exploration. After all, why fund the research and development when the reward will be the same?

To the developed nations, the principle means that anyone can exploit these natural resources so long as no single nation claims exclusive jurisdiction over the area from which they are recovered. In a nutshell, every nation enjoys access and each nation must make the most of that access. The heritage lies in the access to the resources, not the technology or funding to exploit them. Developed nations may be prudent to interpret the principle in this manner because they possess the economic means and the technology to exploit natural resources (Mau, 1984). Developed nations contend that because they spend their time and money developing the technology that enables them to harvest resources, and they fund the expeditions that collect the resources, forcing them to share those benefits with countries that have contributed little or nothing to the effort would be unjust. Developed nations do not like the principle included in treaties, stating that severely reducing the economic incentives discourages the development of technology to exploit natural resources (Raclin, 1986) a viewpoint all too clear for capitalist societies.

### *3.1. The Common Heritage of Mankind Principle Applicable to Areas in Outer Space*

The unhealthy power rivalry between the United States and Russia together with the paranoia and suspicion emanating from the Cold War exacerbated the avoidance of a race to own any part of outer space. The then Soviet Union blazed the trail as the pioneer when it launched the first satellite (Sputnik) into orbit in 1957 (NASA 2021) and landed the Luna IX on the moon in 1966 (NASA, 2021) sending waves of alarm through the United States, which feared that the Soviets would stake a property claim in the moon. This prompted the United States to initiate treaties limiting activities in the outer space to peaceful purposes and preventing any state from exercising ownership (Lowder, 1999). Hence, the 1967 Outer space Treaty and the 1979 Moon Treaty emerged.

#### 3.1.1. The 1967 Outer Space Treaty

The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty) is the bedrock of International Space Law (Twibell, 1997 and the first treaty drafted by the United Nations' Committee on Peaceful Uses of Outer Space (UNCOPUOS). Like the Antarctic Treaty, the Outer Space Treaty promotes freedom of access for research and scientific investigation. The treaty denies land ownership rights to any one sovereign, and instead, states that exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of economic or scientific development (Outer Space Treaty, 1967).

The treaty does not use the term "common heritage of mankind," rather, uses the term "province of mankind," stating that the, "exploration and use of outer space, including the moon and other celestial bodies shall be carried out for the benefit and in the interests of all countries …and shall be the province of all mankind." The

word, 'province' seemingly, is associated with the idea of territory or the responsibility over a territory, thereby giving the notion of control rather than 'property and possible wealth.'

By its very nature, the common control of humanity over outer space and other celestial bodies does not deal with appropriation and property. It only means that the rules over outer space and other celestial bodies can only be made by humanity as a whole. No State therefore, rules on exploration and use of outer space, and other celestial bodies, or can exercise any territorial jurisdiction over it without the agreement of humanity (Kerrest, 2021).

Interestingly, the idea of heritage is directly linked with property and ownership. The Law of the Sea Convention declares that, the sea floor and its resources are the common heritage of mankind. Similarly, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement), provides that the Moon and its natural resources are the common heritage of mankind. The clear and unambiguous language of the provisions is that the property of these resources is recognized to belong to a legal person, and that personality is humanity. Unfortunately, the word 'humanity' seems vague. Who is humanity? Or who is entitled to speak for humanity? In a country with one man, one vote system, the majority usually consists of the less-developed nations due to their numerical strength. More often than not, the majority does not include space-faring nations.

3.1.2. The Moon Treaty 1979

The Agreement Governing the Activities of States on the Moon and Other celestial Bodies (the Moon Agreement or Treaty) was concluded on 18 December 1979, in New York, the United States of America. It came into force on 11 July 1984, after satisfying the condition requiring five ratifying States. As at 15 May 2020, only eighteen States are parties to the treaty, seven of which ratified the agreement, and the rest acceded (UN Treaty Collections 2020). A perusal of the Moon Treaty shows that it rehashes the Outer Space Treaty with some new provisions. As a result of the new provisions, many countries declined to sign the treaty contending that both the developed and less-developed nations disagreed on the issues relating to ownership and appropriation of resources derived from the Moon. The common heritage of mankind ideal materializes in the Outer Space Treaty, coated at times in the "province of mankind" language. The first appearance of which is in Article 4, which states, that the "exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit … of all countries." It has been noted, and rightly too, that the province of all mankind "is not the moon and celestial bodies, but the exploration and use." This interpretation is in tandem with the contention of the developed nations: the heritage lies in the access.

Article 11 of the Moon Treaty, states that the "moon and its natural resources are the common heritage of mankind …" and States may explore and use the moon without discrimination. The Article continues by requiring the future establishment of international regime to "govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible," reminiscent of the regime established to regulate the exploitation of the seabed. To date, no such regime exits: the Moon Treaty only provides that one shall exist in the future (Keefe, 1995)

The United States and some other nations declined to sign the treaty due to the common heritage of mankind ideal (US Congress, 2015) The action of the United States is reminiscent of its behavior with the International Seabed Authority and clearly indicates its future actions that it would enact its own laws governing the exploitation of celestial bodies. In 2015, the United States enacted its own law governing the exploitation of celestial bodies: the Space Resource Exploration and Utilization Act of 2015. The Act provides *inter alia* that "any asteroid resources obtained in outer space are the property of the entity that obtained such resources, which shall be entitled to all property rights thereto, consistent with applicable provisions of Federal law and existing international obligations." (US Congress 2015)

In April and May 2020, the United States signaled its determination to press ahead with two major space policy objectives: establishing a permanent U.S. presence on the moon and authorizing private companies to mine the

moon. An April mandate to authorize and encourage private lunar resources extraction, including through pursuing international agreements, was followed by a U.S. draft framework for bilateral moon exploration and mining agreements known as the "Artemis Accords." (The Guardian 2020). (The framework is apparently named the "Artemis Accords" for its relationship to the U. S. "Artemis Program" for lunar exploration). In May, the National Aeronautics and Space Administration (NASA) released draft principles intended to underpin the Artemis Accords (the NASA Principles). Potential partners for the envisaged agreements include Canada, Japan, the United Arab Emirates and members of the European Union. Nonetheless, the actions of the Trump administration indicated that it will take steps for the U. S. to return to the moon in 2024 with or without international cooperation or agreement.

The moon's surface contains a significant volume of hydrogen and oxygen used for rocket propellant which could facilitate onward travel to deeper space. This would, in turn, assist access to asteroids and other space objects that contain enormous amounts of minerals like nickel, iron, platinum and cobalt (Pandey & Baggs 2020). Proponents of the moon mining claim that these metals could be mined and extracted without many of the regulatory, environmental and human rights issues associated with terrestrial mining (Wong, 2018).

Both public and private actors are exhibiting increasing interest in space mining. So far, only Luxembourg and the U. S. have passed laws authorizing private ownership of space resources (Foust, 2017). but private companies in the United Kingdom (Carbonaro 2020) and Canada (Fatima & Morello, 2016), among others, are developing asteroid mining technologies. In 2019, Russia invited Luxembourg to collaborate on space mining (Soldatkin, 2019). On its part China has long expressed its intention to mine the moon. Recently, China launched a next generation spacecraft to increase its deep space exploration capacity (Berger, 2020).

On 6 April 2020, President Trump issued an "Executive Order on Encouraging International Support for the Recovery and Use of Space Resources." The Executive Order reaffirms the long- held U.S. position that the 1979 Moon Agreement, which the U.S. neither signed nor ratified, and which has eighteen member countries (UN Treaty Collections 2020) does not represent customary international law (Executive Order, 2020 The Moon Treaty provides that the moon and its resources are the "common heritage of mankind" and prohibits claims of ownership to those resources. By contrast, the Executive Order rejects the concept that outer space is a "global commons" akin to international waters and other shared resources. It further states that the United States shall "encourage international support for the public and private recovery and use of resources in outer space" and directs the State Department to pursue a strategy of bilateral and multilateral agreements (Executive Order, 2020). This statement goes further than the U.S. Commercial Space Launch Competitiveness Act, signed in 2015 (US Commercial Space Launch, 2015) which provided for private ownership of "any asteroid or space resource" but did not expressly contradict the Moon Agreement.

The Executive Order clarifies the U.S. position that it can lawfully support private extraction and use of resources on the moon, a position reaffirmed in the NASA Principles. The NASA Principles indicate that NASA will require foreign space agencies to execute bilateral Artemis Accord Agreements "grounded in the Outer Space Treaty of 1967", a treaty to which the U.S. has ratified to participate in the U.S. led Artemis Program for lunar exploration. The NASA Principles make it clear that exploitation of space resources "can and will be conducted under the auspices of the Outer Space Treaty. One of the core principles is that the extraction and use of Luna resources "will be critical to support safe and sustainable space exploration and development."

Despite these representations, the U.S. position may be in conflict not only with the Moon Agreement, but also with the Outer Space Treaty. The Outer Space Treaty prohibits "national appropriation" of the Moon and other celestial bodies" by "claim of sovereignty." (Outer Space Treaty, 1967). Scholars are not *consensus ad idem* on whether private ownership, use or sale of space resources would require a "claim of sovereignty." (Lintner, 2015). The NASA Principles reference to provisions of the Outer Space Treaty suggest that the U.S. may not view lunar mining as "national appropriation", and that all future mining by the private sector will have to be authorized and supervised by countries, who will ultimately bear any legal liability under international law.

Notably, statements by the U.S. do not assert sovereignty over moon resources. The NASA Principles further suggest a U.S. strategy for lunar exploration based on cooperation with like –minded countries rather than unilateral action. The NASA Principles call for full transparency between signatories, inter-operability of technology and full public disclosure of scientific data. The NASA Principles further propose creating exclusive "safety zones" around moon bases to safely spread out mining operations and the protection of common "heritage sites" for historically important areas, which could include the Apollo landing site. While this appears to be an effort to avoid allegations that the U.S. is claiming sovereignty over resources or historic lunar sites, privatization of moon resources will itself be contentious. For instance, Russia condemned attempts to privatize space resources and characterized U.S. lunar mining plans as an "invasion." (Bennetts, 2020). Recently, seven Canadian space law experts advised their government to treat space resources as a "global commons" rather than the U.S. approach (Chase, 2020).

The U.S. is poised to take several steps to advance its lunar exploration. On 30 April 2020, when announcing the award of Artemis Program Spacecraft contracts to three American companies, NASA administrator Jim Bridenstine stated that initial U.S. missions to the moon may not involve the previously multilateral "lunar gateway" project for establishing an international presence in lunar orbit (Chang 2020). On 6 May 2020, Bridenstine, said that the U.S. may premise participation in the Artemis Program on other countries adopting: certain "norms of behaviour" in space (Foust, 2020). Indeed, the recently released NASA Principles appear to be a U.S. led effort to codify these norms. NASA will hope that the public/private collaboration that resulted in SpaceX's Crew Dragon carrying NASA astronauts to the International Space Station at the end of May 2020 could also meet the U.S. lunar ambitions, and it has already contracted with SpaceX, Blue Origin and Dynetics to produce lunar Landers.

As the U.S. takes forward these initiatives, it may develop, test, and strain elements of the existing international legal regime. The U.S. position creates potential opportunities and risks for private entities. If it pushes ahead without international consensus on the relevant international legal framework, other countries may refuse to recognize some of the rights it grants to private entities. Without collaboration, different countries may award the same permission or rights to entities within their own jurisdiction. At the same time, the determination of the U.S. and other countries to push the multilateral discussion forward will not only speed up the potential for private involvement in space activities, but may also increase certainty by creating multilateral consensus on some of the more contentious issues and gaps in the current legal framework in a manner that is fit for purpose.

Thus, unbound by the Moon Treaty, and certain to develop the necessary technology sooner than other nations, the U.S. will continue to follow the archaic and barbaric "first in time, first in right" theory of property abhorred by less developed nations.

**4. Property Ownership and Appropriation in Outer Space**

In the age of private and commercial wealth, asserting ownership in outer space seems no longer unimaginable, but it may be against international law (Reinstein, 1999) stated previously, the Cold War between the U.S. and the former U.S.S.R. and the simultaneous race to space prompted paranoia that one country would gain "irreversible advantage by militarizing outer space." Referring to the "first in, first in right" property principle that dominated the earth for thousands of years, Arthur Goldberg, the U.S. Representative to the United Nations General Assembly stated, "as we stand on the threshold of the space age, our first responsibility as governments is clear: we must make sure that man's earthly conflicts will not be carried into outer space." Though this intention seems noble, reversing human behaviour spanning several thousand years may prove impossibility. Man intuitively, exploits resources within his reach to better himself, not necessarily his neighbour.

Adverting to the big picture, one can easily discern that space resources proximate to the earth are the easiest to exploit and appear limited. The universe may seem infinite in all directions. Without drastic technological advances man seems tethered to earth, incapable of travelling great distances in space. For unmanned missions, the issue becomes expense: exploitation activities proximate to earth are less expensive than distant expeditions. Therefore celestial bodies like the moon and near-earth asteroids exist as limited resources, not because of their

rarity, but because of their proximity to earth. Conversely, satellite orbit slots could become a finite resource, as an orbit slot can only accommodate a fixed number of satellites. Satellite resources become a finite resource due to the limitation on capacity. If the user utilizes the resource properly, the orbit slot remains infinitely renewable. Therefore, international law should govern the exploitation and use of such resources, as well as the appropriation of celestial territories. The resources include minerals mined from the moon or other celestial bodies, and territory appropriation encompasses not only celestial surfaces, but also satellite orbit slots as well.

*4.1 Property Rights in Natural Resources in Outer Space*

Article 6 of the Moon Treaty promotes "freedom of scientific investigation by allowing states to collect on and remove from the moon samples of its mineral and other substances", and Article 8 allows for the exploitation "on or bellow the moon's surface." The treaty also provides that "such samples shall remain at the disposal of those States Parties which caused them to be collected and may be used by them for scientific purposes." Collection of samples of minerals for research may be construed as effective exhibition of ownership over those samples. The "province of mankind" language weaved throughout the treaty is conspicuously absent here. Ideally, it would seem to accord with good reason to mandate that samples be shared, either equitably or equally, with all of mankind, or at best to interested parties.

Sample collection completely contradicts the language in Article 11 of the Moon Treaty which states that "neither the surface nor the subsurface of the moon, *nor any part thereof or natural resources in place,* shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person." A logical interpretation would require that "part of its natural resources" includes mineral samples from the moon. With such incompatible language within the body of the Moon Treaty, no mystery exists as to why developed nations' interpretation is at variance with that of the less-developed nations. Furthermore, with the absence of an international regime, as called for in Article 11, reconciliation of the conflicting provisions seems a mirage.

*4.2 Property Rights on the Surface of the Moon*

Article 8 of the Moon Treaty permits States to: (a) land their space objects on the Moon and launch them from the Moon; and (b) place their personnel, space vehicles, equipment, facilities, stations and installations anywhere on or below the surface of the Moon. Further, the personnel, space vehicles, equipment, facilities, stations and installations may move or be moved freely over or below the surface of the Moon, and such activities shall not interfere with the activities of other State Parties on the Moon. Article 9 of the Moon Treaty further clarifies this by declaring that States may establish manned and unmanned stations on the moon, but requiring that a station shall use only that area which is required for the needs of the station, and shall not impede the free access of other States.

Again, the phraseology of the treaty seems ambiguous. A party could place a semi-permanent station on the moon which both occupies the surface and, by its nature, blocks access to that specific area. Continued occupation means taking possession of that which at the moment is a no man's property, with a view of acquiring the property in it for oneself. Therefore, planting an unmanned space station on the surface of the moon, well within the allowances of the Moon Treaty, constitutes effective ownership but without the possessory label. States may engage in activities equivalent to ownership, provided no one calls it ownership. What will happen when two nations seek to plant unmanned stations in the same area? It can be surmised that nations will resort to the primitive "first in time, first in right" theory of property law. An irony exists in the probable occurrence of this happening, as the international community enacted the Moon Treaty specifically to avoid this behaviour.

*4.3 Appropriation of Satellite Orbit Slots.*

The Outer Space Treaty, which governs outer space, prevents national sovereignty claims, but does not expressly prohibit private appropriation of the moon and other celestial bodies (Copiz, 2002). In the past three decades, the

private-sector investment in telecommunications satellites has become a multi-billion-dollar industry, and the geo-stationary orbit, the orbital space above the Equator, likely exists as the most valuable of all space resources to date. Satellites in geo-stationary orbit travel at the same speed as the earth, making the satellites appear stationary over a fixed point on earth and casting large footprints over highly populated areas. In fact a satellite in geo-stationary orbit encompasses a field of view of 42% of the earth's land surface. Similar to that governing the use of seabed, the international community established an international regime to regulate and coordinate spectrum use.

The International Telegraph Union (ITU), supplemented by the International Telecommunications Convention (ITC), became the technical body that regulates international telecommunications (Cahill, 2001). The ITU utilizes two methods of orbit slot allocation: the *posteriori* system and the *a priori* system. Under the *posteriori* system, the ancient "first in time, first in right" property theory, the ITU assigns orbit slots as the need arises. Obviously, developed nations, who possess the necessary technology to exploit the space, favour this system. The *a priori* system, however allots a number of slots to each nation, regardless of whether use of the slots will ever occur. Because, less-developed nations fear that they will lose access to orbital slots due to their insufficient technology, they prefer the *a priori* system.

Entities can take advantage of the *a priori* system. A case in point is the small pacific island nation of Tonga registered for sixteen geo-stationary orbit allotments with the ITU. Tonga made the filings on behalf of Friendly Islands Communications from 1988 to 1990, when the ITU system allowed a country to register a position for up to nine years before a satellite was launched. Because Tonga lacked a genuine need for so many orbital allotments in the Pacific Rim portion of the Geosynchronous Orbit (GSO), the international community made its anger known. The outrage of the international community persuaded Tonga to withdraw its request for ten of the sixteen allotments. Tonga, however, leased one of the remaining allotments and auctioned off the other five allotments for $2 million per year for each orbit. This rental and auctioning of slots seems to support the perception in some quarters that property rights do exist with respect to individual orbits.

Sequel to the Tonga incident, the ITU now requires that the majority of the slots applied for must be used directly by the countries requesting the slots. Thus, the ITU wants to discourage the leasing and sale of geo-stationary orbits slots. However, an issue still exists with respect to the Outer Space Treaty and orbit slot regulation.
The ITU distributes orbit slots to those who provide the most efficient use of the resource, reasoning that distributing slots to those not capable of utilizing them would waste a finite resource. Therefore, by following an *a priori* system, the ITU would grant constructive national appropriation when allocating orbital slots to nations- an express prohibition under the Outer Space Treaty. Regardless of the prohibition, some nations attempted to claim the geo-stationary orbit.

In 1976, several less-developed nations located at the equator claimed territorial sovereignty over the geo-stationary orbit with the Bogota Declaration. The nations contended that the natural resources of each state necessarily include the geo-stationary orbit above that territory. Though the Declaration directly conflicted with the Outer Space Treaty which prohibits national appropriation of space, it became effective as a political device that brought attention to developing countries concerns over being prohibited access to the geo-stationary orbit by developed countries that already possessed the technological skills and resources necessary to utilize the resource. This resulted in the implementation of Article 33 of the ITU's Radio Regulations, which requires that the ITU consider the special needs of developing countries and the geographical situation of the particular countries.

The entire system conflicts directly with the Outer Space Treaty, if the ITU grants slots to nations because the Outer Space Treaty expressly prohibits national appropriation. The ITU seems to focus on the idea of access rather than ownership However, despite the label, when a satellite fills an orbit slot, the party occupies that space and effectively asserts sovereignty. This concept seems to be no different than an unmanned station on the moon; the space being used becomes inaccessible to others.

## 5. Conclusion

Despite the good intentions of the international community, full acceptance and implementation of the common heritage principle will come at a snail speed, if at all. Though evolution shapes life, such progression requires time to materialize. Life on earth shows that physical evolution results when the need arises. However, man's broad acceptance of the common heritage principle approach to land and its resources demands a psychological evolution rather than a physical flux mandated by his environment. Man seems incapable of such change; consequently, psychological evolution will require intense and enduring global effort.

It will be difficult for the international community to reverse millennia behaviour in one generation. Ancient nomadic man fought over land resources when permanent occupation of a definite area proved impossible due to the essential pursuit of food. Later, farming and agriculture replaced nomadic existence, man fought over the land as well as its resources. With technological advances, this pattern will continue into space and other previously unthinkable areas on earth.

Acceptance of the common heritage of mankind ideal (psychological evolution) will better only the existence of nations currently unable to fully exploit the resources. History illustrates that man evolves only to survive or better his existence. For instance, man became bipedal only when the grasslands gradually replaced the forests, thereby compelling man to stand upright to see the game over the grass. Similarly, skin pigmentation of native peoples, offering crucial protection against the sun's ultraviolet rays, varies depending on the proximity to the equator. Unfortunately, no such physical need exists here.

Technologically advanced nations do not feel compelled to harmonize their mindset with the common heritage principle. They will continue to exploit space resources, leaving the less-developed nations in their wake. Most likely, less-developed nations will also disregard the common heritage principle as they develop the necessary technology and rediscover the sheer advantage of the "first in time, first in right" theory of property. Only nations without hope of exploitation of the outer space urge equal distribution of the resources. Those who exploit space resources desire to keep the fruits of their labour to themselves. Throughout history, the more powerful man has innately and strangely kept his foot on the neck of the week. The quest for property in space will prove no different, and the inconsistency of international space law confirms man's lack of control over his true substance.

Man mirrors the cyclical nature of the universe, where everything follows a pattern. Each generation of mankind carries on as the one before it, resolving nothing, because the rhythmical essence of life remains unchanged (Hemmingway, 1926). Sometimes, only the name or the process changes, but the underlying theme remains eternal. Man like the universe follows a pattern, one of acquisitive need and selfish procurement. The ancient "first in time, first in right" property theory will come full circle. Ancient man first fought over earth's resources, and then the land itself when occupation became feasible. To the dismay of the less-developed nations, this cycle will continue in space, as man exploits celestial resources and later develops the ability to occupy celestial bodies.

The panacea: the international community could reach a *consensus ad idem* to abstain from exploitation for a period of time as was the case in the Antarctic Treaty (Naval Treaty, 2021) Such a moratorium obviously will leave the issue for the next generation to resolve; perhaps a subsequent one would embrace more fully the common heritage approach. At the moment, man simply seems unprepared for such a concept.

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# Constitutionality of Provisions Related to Suit Against an Indigent Person in India: Legal Discourse

Vaibhav Kartikeya Agrawal[1]

[1] B.A.LL.B. Guru Ghasidas Vishwavidyalaya, LL.M. Hidayatullah National Law University, Advocate

**Abstract:**
The Code of Civil Procedure (CPC) is the parent law that provides for matters related to procedure for filing of suit in civil cases, i.e. filing of plaint, written statement, the contents of pleadings, the submission of evidence, etc. This paper endeavors to contemplate rule 11 of Order XXXIII of CPC which authorizes revocation of the permission granted to sue as an indigent plaintiff due to non-delivery of summons or non-appearance of the plaintiff when the suit is called on for hearing. It further endeavors to analyze rule 11-A of Order XXXIII of CPC which mandates the Court to order for recovery of Court fees and other litigation expenses from the estate of the deceased plaintiff. The paper concludes that such a review of the provisions related to suit by an indigent person would make the procedure in consonance with the principles of equity and the legal jurisprudence. The paper uses doctrinal method.

**Keywords:** Indigent person, Court-Fee, Code of Civil Procedure, Welfare State, Special Rules

## 1. Introduction:

The Code of Civil Procedure (hereinafter 'CPC') is the parent law that provides for matters related to procedure for filing of suit in civil cases, i.e. filing of plaint, written statement, the contents of pleadings, the submission of evidence, etc. It provides for law related to exemption of Court fees and other litigation expenses for an indigent person. This is for the reason that India is a socialist democratic republic wherein State owns, controls and distributes the resources for the welfare of its citizens and in discharge of its negative obligation to protect the fundamental rights of its citizens. Further, the right to constitutional remedies is a fundamental right of every citizen. This paper endeavors to contemplate rule 11 of Order XXXIII of CPC which authorizes revocation of the permission granted to sue as an indigent plaintiff due to non-delivery of summons or non-appearance of the plaintiff when the suit is called on for hearing. It further endeavors to analyze rule 11-A of Order XXXIII of CPC that mandates the Court to order for recovery of Court fees and other litigation expenses from the estate of the deceased plaintiff. The paper affirms that such a review of the provisions related to suit by an indigent person would make the procedure in consonance with the principles of equity and the legal jurisprudence.

## 2. Who is an Indigent Person?

Order XXXIII of the CPC provides provisions on 'Suits by indigent persons'. Rule 1 to Order XXXIII of CPC states the cases when the suit could be instituted by an indigent person. It states:

**'Suits may be instituted by indigent person-**

Subject to the following provisions, any suit may be instituted by an indigent person.

Explanation I-
A person is an indigent person,-

(a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.
Explanation II -
Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.
Explanation III -
Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity.'

Rule 1-A to Order XXXIII of CPC further empowers the Court trying the suit to make an inquiry into the whereabouts of the person applied to sue or being sued as an indigent person. This provision is followed by provisions for contents of application for institution of the suit by an indigent person, the presentation of application for the same, the examination of the applicant for the purposes of its claim and the property. Rule 5 of Order XXXIII of the CPC empowers the Court to reject an application for leave to sue as an indigent person.

**3. Benefits to an Indigent Person:**

Rule 8 to Order XXXIII of the CPC provides the procedure if application for suing as an indigent person is admitted by the Court. It states:

**'Procedure when application admitted-**

Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee or fees payable for service of process in respect of any petition, appointment of a pleader or other proceeding connected with the suit.'
Rule 10 to Order XXXIII of CPC[1] provides provisions related to payment of costs where indigent person succeeds in the suit.

**4. Liability of an Indigent Person for Payment of Court Fees:**

Rule 11 to Order XXXIII of CPC provides that the indigent person is liable to pay the Court fees which would have been paid by him if he was not permitted to sue as an indigent person, when the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed on certain conditions. The constitutional validity of Rule 11 of Order XXXIII of CPC would be contemplated in this section on the basis of the provisions of CPC and the legal jurisprudence. The text of Rule 11 of Order XXXIII of CPC states:

[1] Rule 10 to Order XXXIII of CPC states: 'Costs where indigent person succeeds- Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person; such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same and shall be a first charge on the subject matter of the suit.'

'**Procedure where indigent person fails-**

Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or
(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.'

Rule 11 to Order XXXIII of CPC provides that the indigent person is liable to pay the Court fees which would have been paid by him if he was not permitted to sue as an indigent person, when the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed, in following cases:

1. due to non- delivery of summons to the defendant in consequence of the failure of the plaintiff to pay the Court fee or postal charges chargeable-

The person who files the suit for the plaintiff is bound to abide by the provisions related to contents of plaint provided in Rule 1 of Order 7 of CPC. These provisions include specific statement about jurisdiction of the Court, the Court fees annexed, the valuation of the suit, the number of plaintiffs and the number of defendants, etc. Further, Order 7, Rule 11 of the CPC provides the instances which empower the Court trying the suit to reject the plaint. It states:

'**Rejection of plaint-**

The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;
(b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;
(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the court, fails to do so;
(d) where the suit appears from the statement in the plaint to be barred by any law;
(e) where it is not filed in duplicate;
(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.'

Rule 11 of Order 7 of CPC provides the failure of plaintiff to comply the provisions of rule 9 of Order 7 of CPC to be one of the grounds for the rejection of plaint. Rule 9 to Order 7 of CPC states:

"**Procedure on admitting plaint-**

Where the Court orders that the summons be served on the defendants in the manner provided in rule 9 of Order V, it will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within seven days from the date of such order along with requisite fee for service of summons on the defendants."

It is pertinent to note that the proviso to sub-rule (3) of rule 9 of Order V of CPC states: "Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff." Thus, these provisions

require the plaintiff to submit the copies of the plaint equivalent to the number of defendants and also to deposit the requisite fee for delivery of such summons to the defendants. The application for delivery of summons filed before the Honorable High Court of Chhattisgarh requires affixing of Court fees provided in the Chhattisgarh High Court Rules and Orders 2007 and the process fee for delivery of such summons to the defendants on the basis of weight of the postal envelope. It would be pertinent that an indigent person is exempted from payment of Court fees and the process fees in accordance to the provisions of Order XXXIII of CPC. Rule 8 of Order XXXIII of CPC states:

"Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee or fees payable for service of process in respect of any petition, appointment of a pleader or other proceeding connected with the suit." So, rule 8 of Order XXXIII of CPC purports that if the Court grants permission to sue as an indigent person, it is the State exchequer which becomes liable to deposit the requisite Court fees as well as the fees payable for service of process in order to summon the defendants or the witness for the defendants, as the case may be, and the Counsel for the plaintiff or the plaintiff himself is exempted from payment of any such fees.

The second part of sub-rule (a) of rule 11 of Order XXXIII of CPC states plaintiff to be bound to pay the requisite Court fees as if he had not been permitted to sue as an indigent person in cases where the summons for the defendant to appear and answer has not been served due to failure of the plaintiff to present copies of the plaint or concise statement. Such alleged failure to present copies of the plaint or concise statement is a ground for rejection of the plaint according to sub-rule (f) to rule 11 of Order 7 of CPC. The sub-rule (f) of rule 11 of Order 7 of CPC states the plaint shall be rejected where the plaintiff fails to comply with the provisions of rule 9 of Order 7 of CPC. Rule 9 of Order 7 of CPC requires that the number of copies of the plaint equivalent to that of the number of defendants shall be served through registered post or or by courier services approved by the Court. The proviso to sub-rule (3) of rule 9 of Order V of CPC mandates the payment of expenses for delivery of summons to be made at the expense of the plaintiff.

It is pertinent to note that the provisions of rule 8 of Order XXXIII of CPC specifically exempts the plaintiff from payment of fees payable for service of process in respect of any petition. This provision therefore, includes expenses for delivery of copies of the plaint to the defendants. So, it would be unjust to make the plaintiff liable for payment of Court fees as if he has not been permitted to sue as an indigent person in cases of non-delivery of summons either due to non-payment of Court fee, process fee or non-supply of requisite number of copies of the plaint to the defendant.
(ii) because the plaintiff does not appear when the suit is called on for hearing:

The regular procedure for institution of a suit of civil nature requires filing of a plaint and compliance of procedure for issuance of summons to the defendant in order to show-case the grievance of the plaintiff. Plaint is usually drafted by the Counsel for the plaintiff on his (plaintiff's) instructions and filed by the Counsel for the plaintiff after due verification of signatures and authorization by the plaintiff. However, the plaint could also be drafted by the plaintiff himself and filed by him in the capacity of petitioner-in-person. These stages of filing of plaint and the written statement require appearance of petitioner-in-person or his Counsel when the suit is called on for hearing.

If the plaint is filed before the Court of law by the Counsel or the plaintiff himself in the capacity of petitioner-in-person, then he is bound to appear when the suit is called on for hearing. So, if the plaintiff does not appear, the Court can proceed *exparte* under the provisions of rule 8 of Order 9 of CPC. Rule 8 of Order 9 of CPC states:

'**Procedure where defendant only appears-**

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which

case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.'

Rule 9[2] of Order 9 of CPC provides that where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but on showing sufficient cause for his non-appearance when the suit is called on for hearing, the order shall be set-aside on payment of costs or otherwise as the Court thinks fit. But this general provision for setting-aside the order of dismissal of suit is further penalized under rule 11 of Order XXXIII of CPC requiring an indigent plaintiff to pay the Court fees, as if he had not been permitted to sue as an indigent person. Hence, if an indigent person fails to appear as a petitioner-in-person or if his Counsel fails to appear and satisfies the Court for causes of his non-appearance, then the Court has discretion to impose costs or other penalty under the provisions of Rule 9[3] of Order 9 of CPC.

It would be pertinent to note that notwithstanding such a general provision, Rule 11 of Order XXXIII of CPC makes the Court bound to set-aside its order granting permission to the plaintiff to sue as an indigent person. The provisions of rule 11 of Order XXXIII of CPC are penal in nature which aims to penalize the plaintiff for his non-appearance considering it to be a willful breach of an obligation irrespective of the bona fides shown by the plaintiff. This provision, therefore, excludes the benefits of restoration of the hearing of the civil suit on compliance of the order passed in accordance with the provisions of rule 9 of Order 9 of CPC. The provision for refusal of permission and the consequent setting-aside of order to sue as an indigent person through the provisions of sub-rule (b) to Rule 11 of Order XXXIII of CPC considers the non-appearance of the plaintiff to be a misuse of:

(a) the regular procedure of Courts; and
(b) its grant of the order to sue as an indigent person.

However, it is pertinent to note that such setting-aside of the order which grants permission to sue as an indigent person requires contemplation on following grounds:

firstly, that the petitioner-in-person and the Counsel for the plaintiff are attributes of same capacity when the suit is called on for hearing before the Court of law. So, the benefits and privileges in respect of adjournments of a suit under Order XVII of CPC and restoration of suit under the provisions of Order 9 of CPC available to a Counsel for the plaintiff or the defendant are not subject to any express limitation or exception by any provision of CPC in respect of the petitioner-in-person;

secondly, it would amount to double jeopardy for the petitioner-in-person as well as the Counsel for the plaintiff, if the dismissal of suit for his non-appearance is set-aside under rule 9 of Order 9 of CPC either with or without costs and the Court further deprives him to sue as an indigent person setting-aside the order granting such permissions under rule 8 of Order XXXIII of CPC.

Therefore, in view of these grounds, Rule 11 of Order XXXIII of CPC requires review.

**5. Permission to Sue as an Indigent Person Extends Throughout the Suit:**

Rule 8 to Order XXXIII of CPC provides that the court fees, the process fee for service of summons, the expenses for appointment of pleaders and for other proceeding connected with the suit shall not impose any pecuniary liability upon the indigent plaintiff. This rule does not provide any time limit for such benefits to an indigent person, so, in the absence of any express bar through the words of the statute, the benefits must extend

[2] Rule 9 of Order 9 of CPC reads:
'Decree against plaintiff by default bars fresh suit-
(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.
(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.'

[3] ibid.

throughout the finality of the suit for an indigent person. It would be pertinent to note that rule 11-A of Order XXXIII of CPC provides that in case of death of an indigent plaintiff, the State Government shall be entitled to recover the whole expenses of litigation on behalf of the plaintiff from the estate of the deceased plaintiff, in the same manner as if the indigent plaintiff has not been granted any permission to sue as such. Rule 11-A of Order XXXIII of CPC states:

'**Procedure where an indigent person's suit abates-**

Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the Court shall order that the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State Government from the estate of the deceased plaintiff.'

So, rule 11-A is a mandatory provision which obliges the Court to order that the amount of Court-fees which would have been paid by the plaintiff if he has not been permitted to sue as an indigent person shall be recoverable by the State Government from the estate of the deceased plaintiff. This provision must be contemplated on following grounds:

1. Rule 8 of Order XXXIII of CPC provides in general terms that the court fees and other expenses connected with the suit shall be exempted for an indigent plaintiff. It does not contain any express restriction to purport that the permission granted to sue as an indigent plaintiff extends for a particular stage/s of the suit and not till final decision in the suit;
2. Rule 2[4] of Order XXXIII of CPC requires filing of an application to sue as an indigent person and provides the contents of such an application. Rule 3 of Order XXXIII of CPC provides that the indigent plaintiff shall present such an application before the Court by himself or his authorized agent. Rule 4 of Order XXXIII of CPC empowers the Court to examine the applicant regarding the merits of the claim and the property of the applicant (indigent plaintiff). However, these rules does not provide for any such application by the indigent plaintiff during the course of proceedings of the suit.
3. It is pertinent to note that the Court can reject the application of an indigent person, if he has within two months next before the presentation of the application, disposed of any property in order to be able to apply for permission to sue as an indigent person.[5]
4. Rule 9 of Order XXXIII of CPC provides the conditions for withdrawal of permission to sue as an indigent person. It states:

'**Withdrawal of permission to sue as an indigent person-**

The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order that the permission granted to the plaintiff to sue as an indigent person be withdrawn-

(a) if he is guilty of vexatious or improper conduct in the course of the suit;
(b) if it appears that his means are such that he ought not to continue to sue as an indigent person; or
(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.'

It is therefore, certain from the conditions stated in rule 9 that the indigent person continues in that capacity during his life time. So, it would be contrary to withdraw such permission from him through recovery of the Court fees and other expenses from the estate of the deceased indigent plaintiff.

5. Rule 11-A of Order XXXIII of CPC mandates the Court to order for recovery of the Court fees from the estate of the deceased indigent plaintiff, if the suit abates by reason of death of the plaintiff or of any person added as a co-plaintiff. It is pertinent to note that such a provision for recovery of Court fees from the estate of a deceased plaintiff necessarily implies breach of an obligation on the part of the

[4] Rule 2 of Order XXXIII of CPC states: "Contents of application: Every application for permission to sue as an indigent person shall contain the particulars required in regard to plaints in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings."
[5] Rule 5 of Order XXXIII of CPC.

indigent plaintiff and is aimed to protect any misfeasance of funds from the State exchequer by an application to sue as an indigent person. However, it would be wrong to penalize a deceased indigent plaintiff because life and death cannot be the tools to commit fraud.

6. Sub-rule (2)[6] of Rule 3 of Order XXII of CPC confers discretion to the Court stating that, 'on the application of the defendant, the Court may award to him the "costs" which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff'. Therefore, rule 3 of CPC merely entitles the defendant, on application, to recover the "costs" of the suit and the Court is not bound to order for such recovery of the costs of suit. However, rule 11-A of Order XXXIII of CPC mandates the Court to recover 'Court fees and all other expenses' exempted for an indigent plaintiff by the inclusive ambit stated in rule 8 of Order XXXIII of CPC'. It is pertinent that the State is not a private litigant and it sues the plaintiff, even in capacity of the defendant, merely to show case the legal propriety of the rights and claims of the plaintiff. So, the State must not be relegated to the status of a private defendant. Further, India is socialist democratic welfare State which aims for good governance for the welfare of its citizens under article 38 to the Constitution of India. The entitlement to sue as an indigent person is a 'welfare measure' of the State. Hence, it could be arbitrary to entitle the State to recover the expenses more than that is entitled to a private defendant from the estate of a deceased indigent plaintiff.

Therefore, on the basis of these rationales, the legal propriety of rule 11-A of Order XXXIII of CPC is determinable.

**6. Conclusion:**

Justice Holmes stated, 'A word is not crystal, transparent and unchanged. It is the skin of the living thought and it may vary greatly in colour and content according to the circumstances and the time in which the word is used.'[7] Order XXXIII of CPC provides provisions for suit by an indigent person. These provisions confer indispensable judicial relief in the form of exemption from Court fees, process fees, fees for appointment of a Counsel and other matters connected with the suit. Rule 11-A of Order XXXIII of CPC provides the instances where an indigent person is obligated to deposit the Court fees as if he had not been permitted to sue as an indigent person. This provision needs to be reviewed on the basis of grounds that the failure to deposit Court fees or process fees causing non-delivery of summons to the defendant is not the obligation of an indigent plaintiff rather rule 8 of Order XXXIII of CPC exempts him from payment of any such litigation expenses. Rule 11-A of Order XXXIII of CPC also confers authority to the Court to revoke the permission granted to sue as an indigent plaintiff if the plaintiff does not appear when the suit is called on for hearing. This provision requires review because such non-appearance could be adjudged by the Court under rule 9 of Order 9 of CPC and the suit can be restored either with or without costs, so, it would be unfair to penalize the indigent plaintiff twice. Order 9 of CPC is a specific provision that provides for 'appearance of parties and consequences of non-appearance', so it is not necessary to draw any exceptions to such special provision in case of the suit by an indigent person.

This paper further endeavors to state that India is a welfare State, so the State must not mandate recovery of 'Court -fees and other expenses' incurred, in lieu of the grant of permission to sue as an indigent plaintiff, from the estate of the deceased plaintiff. This averment is stated on the basis of premise that State is not a private defendant when it grants permission to sue as an indigent person and allows its treasury to disburse the Court fees and all other litigation expenses covered by rule 8 of Order XXXIII of CPC. Such exemption from Court fees and other litigation expenses is a welfare measure of the Government of India and is even not liable to be

[6] Rule 3 of Order XXII of CPC states:
**'Procedure in case of death of one of several plaintiff or of sole plaintiff"**
(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative, of the deceased plaintiff to be made a party and shall proceed with the suit.
(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.'

[7] https://www.iilsindia.com/blogs/golden-rule-of-interpretation/ (last visited 26.07.2022).

construed within the expression 'costs' of the suit under Rule 3 of Order XXII of CPC. It is pertinent to note that these are the provisions of British regime.

It is imperative that rule 1 of Order XXXIII of CPC requires possession of property worth less than one thousand rupees in order to get permission for entitlements of an indigent person. The value of one United States Dollars (hereinafter 'USD') in the year 1947[8] was equivalent to one Indian National Rupee (hereinafter 'INR') whereas 1 USD is equivalent to 83.00 INR on 25.10.2022 (Reserve Bank of India reports). This shows sharp devaluation of INR from the years before independence till today. Consequently, the devaluation of Indian rupee to approximate 0.01 USD in the year 2022 purports one thousand rupee would equal to ten USD. It would be pertinent to note that 1000 INR was equivalent to 1000 USD in the year 1947 or more in the year 1908 when the CPC was enacted. Therefore, in light of contemporary devaluation of rupee, it is imperative that the person who possesses property less than rupees one lakh (equivalent to one thousand USD) shall be entitled for benefits accorded to an indigent person. So, sub-rule (b) of Explanation I to rule 1 of Order XXXIII of CPC requires review.[9]

Order XXXII, Rule 2-A, sub-rule (2)[10] of CPC requires an indigent person to deposit the Court-fees in the form of security when a suit is filed by or against minors and persons of unsound mind. This provision is lucidly abhorrent to rule 8 of Order XXXIII of CPC[11] which exempts the deposit of Court-fees for an indigent person (whether a minor or a person of unsound mind).[12]

Therefore, in view of these arguments, sub-rule (2) to Rule 2-A of Order XXXII of CPC, rule 11 and rule 11-A of Order XXXIII of CPC needs to be reviewed and expunged in the interests of justice and the principles of equity.[13] Such a review would further require review of rules 12,[14] 13[15] and 14[16] of Order XXXIII of CPC which provides the procedure to recover such Court fees and other litigation expenses for the State Government. This is because Sir Paton observed, 'Law is the product of human reason and is intimately related to the notion of purpose_... An analysis of the judicial method shows that law is not a body of rules, but an organic body of principles with an inherent power of growth.'[17]

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[8] It is imperative to note that on **15th August 1947** the exchange rate between Indian rupee and US Dollar was equal to one (i.e., 1 $= 1 Indian Rupee);

[9] Sir Friedmann writes in his *Legal Theory* (1967): This is for the reason that 'Every legal system is oriented towards certain purposes which it seeks to implement. In this sense, every legal system is of necessity a "purposeful enterprise".'

[10] Sub-rule (2) to rule 2-A of Order XXXII of CPC reads: 'Where such a suit is instituted by an indigent person, the security shall include the Court-fees payable to the Government.'

[11] see *Supra* section on 'Benefits to an indigent person'.

[12] Here the following observation by Lord Reid is worth quotable, 'If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.' see *Gill* v. *Donald Humberstone and Co. Ltd.,* [1963] 1 W.L.R. 929, at p. 934.

[13] Sir Dicey stated, '... it is still true to-day as a proposition of the law of the United Kingdom to say that Parliament has the right to make or unmake any law whatever.

[14] '**State Government may apply for payment of court-fees-** The State Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10, rule 11 or rule 11A.'

[15] '**State Government to be deemed a party-** All matters arising between the State Government and any party to the suit under rule 10, rule 11, rule 11A or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.'

[16] '**Recovery of amount of court-fees-**Where an order is made under rule 10, rule 11 or rule 11A, the Court shall forthwith cause a copy of the decree or order to be forwarded to the Collector who may, without prejudice to any other mode of recovery, recover the amount of Court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue.'

[17] Sir Henry Maine stated '...the sign of a progressive human society is whether law keeps on growing after its codification'.

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# Reconstruction of the People's Economic Model: Development of Micro, Small and Medium Businesses Based on Digital Transformation as a Strengthening Economy Post-Covid-19 Pandemic

Elli Ruslina[1], Tuti Rastuti[2], Zakki Abdilah Sjam[3]

[1,2,3] Faculty of Law, Universitas Pasundan, Indonesia

Correspondence: Elli Ruslina, Faculty of Law, Universitas Pasundan, Indonesia
E-mail: elli.ruslina@unpas.ac.id

**Abstract**
The people's economy is one of the principle instruments of Indonesian economic democracy. To overcome economic conditions during the Covid-19 pandemic, people are motivated to overcome problems to meet their needs for life independently. Communities and digital-based small and medium enterprises have unwittingly formed a mutually beneficial relationship between business transactions. The concept of populist economy is re-actualized in their economic activities. This study aims to examine the reconstruction of the populist economic model as the development of small and medium-sized businesses based on digital transformation in a post-covid-19 pandemic. This research is a literature study with descriptive-analytic research specifications. The results of the study show that the concept of a populist economy and digital transformation in small businesses is a model for strengthening the populist economy during the COVID-19 pandemic, but it has not yet been measured regarding the sustainability of the model's reconstruction after the pandemic. This concept can become a new paradigm in order to strengthen the national economy after the COVID-19 pandemic.

**Keywords:** Reconstruction, People's Economy, Digital Transformation, Post-Covid

## 1. Introduction

History has carved out how the concept of populist economy was discovered as a solution to balance the weaknesses of classical economic thought to contemporary economics, from the capitalist school of economics and socialist economics. The classical flow initiated the development of economic thought. Adam Smith, who is known as the father of economics in this school, introduced the "invisiblehand". This flow emphasizes several things that were not unexpected at the time, including in terms of resource sharing arrangements. Furthermore, in the 20th century there were developments in society in economic activities. This condition requires the community to study, conduct studies on economics in various forms. Thoughts about the science of economics gave rise to various schools or schools. Driven by increasingly rapid developments, many studies have formulated laws to be used in economic activities and economic goals. Economic goals to realize prosperity, prosperity, social justice, and economic growth began to be echoed as the goals of the state. For this reason, there are ways to make it happen. Based on the methods and objectives to be achieved, two major schools or schools of thought emerged which gave birth to a capitalist economic system and a socialist economy (Euis Amalia, 2010) which were considered as two opposite poles. The flow of capitalist economics holds that the

owners of wealth are those who always try, humans have the freedom to carry out all their actions as long as they do not conflict with the regulations, and they have full rights to use these assets without limit. Their ideology is based on a competitive market, which is controlled by distribution and consumption. The capitalist view equates between needs and wants, and needs are limited to material things. This view has received criticism, because basic human needs are limited, while human wants will never be satisfied, and indeed are unlimited. (Arifqi MM, 2020) The purpose of capitalist economy is only to aim at increasing the total wealth of the country. Trying to increase production as high as possible, and realize the prosperity of community members as high as possible as a result of the increase in national income and the increase in state production. In their view, this can be realized if it gives freedom to the community to work as freely as possible. The capitalist view is distinguished from the socialist flow. The socialist school holds the view that all forms of sources of wealth and means of production are shared property. Individuals in society are considered as part of the material (objects) that will change following changes in material in general, and the factor that determines change is economic factor. Therefore, it is the distribution tools that determine the law in the system of people's lives. In general, the principle of socialist economy is based on; (a) realize equality, (b) abolish private ownership, and (c) regulate production and distribution collectively. Solialism views human happiness as measured materially, namely when physical needs are met. Individual members of the community have rights except for the retribution that they receive as a form of public service. (Muhammad Thoin, 2015) There have been criticisms of the two major camps for various weaknesses. The aspect of tyranny is the most basic weakness of the two systems. In the capitalist economic system, the small community as laborers get arbitrary treatment from the owners of capital, especially in relation to the wage policy for workers, while in the socialist economic system, the government prohibits individual rights. This condition encourages the emergence of the concept of a middle way (between capitalists and socialists) as a new paradigm of the welfare state concept. The concept of providing opportunities for the owners of fixed capital to run their business without harming the workers or others, and the ownership of personal assets is still recognized within the specified limits. This concept is elaborated in the principle of Indonesian economic democracy which is still running limply amid the principles of economic globalization. Even though the Indonesian constitution has the mission of a welfare state, in the development of economic growth, social problems that occur in society are still found, including poverty, inequality and unemployment. This occurs as a result of unfair distribution. Meanwhile, the existing economic system has not been able to provide a solution to solve this problem. The economic crisis that occurred as a result of the Covid 19 pandemic in Indonesia has added to the impact of the economic collapse, on various economic elements. These economic elements include the decline in the exchange rate of the rupiah, scarcity of basic needs products, unemployment and new poverty, so that many people experience economic downturn.( Nasution A. 2022) Based on the values of local wisdom and religious values, the community began to move and look for innovations in an independent economic system to support and fulfill their needs in the midst of the economic downturn due to the COVID-19 pandemic. One of the economies that have been actualized by several economic groups is a digital-based populist economic system. People are forced to adapt to information technology, including using smartphones both in ordering goods, distributing goods, and producing basic necessities during the Covid-19 pandemic which hinders people's movement. The principle of people's economy is one of the solutions to save the economic situation during the pandemic, which unites people, especially in small communities to help each other in meeting their needs, but does not rule out the possibility that this principle can be actualized on a medium and large scale. This populist economic model during the covid-19 pandemic was constructed using digital media. Taking into account the aspects of strength-weakness-opportunities-treaths (SWOT). The people's economic system is believed to be the solution to a system that is in accordance with Indonesian values. Learning from the experience of the economic crisis conditions in 1997-1998 proved that the people's economy played a very good role in helping Usaha mikro kecil menengah/cooperatives, especially in relation to the production and distribution of basic needs of the community. People's economy is understood as a religious socialist system (Sri-Edi Swasono, 2010), an economic system characterized by the values of Pancasila, as the foundation of democratic economic principles. This principle refers to Article 33 of the 1945 Constitution, which is an economic system that aims to realize the people's economic sovereignty, or people's economic independence. (Sri-Edi Swasono, 2015) The principles of togetherness and mutual cooperation are used as the basis for implementing people's economic activities. In this case, the community plays an active role in implementing the economic system.

## 2. Method

This research is a literature study research, which examines and analyzes legislation, research results from experts related to the object of research. Field studies were conducted through observations and interviews with related parties, including small and medium-sized businesses and cooperatives, the community as consumers. To analyze the data, it was done qualitatively juridically, namely by interpreting several regulations, then analyzed using data from observations and interviews. Then deductive proof is carried out on the major and minor premises, in order to obtain a conclusion.

## 3. Results

The populist economic system was first coined by Moch. Hatta who gave his views and thoughts on the people's economic system which was applied in the form of cooperatives. Understanding cooperatives in this case must be interpreted broadly. That is, in addition to cooperatives as a form of business entity, cooperatives are also a "build and structure". ( Sri-Edi Swasono, 1985) Cooperatives are a joint business with the principle of "from, by, for," the welfare of community members. As with the populist economy which is applied in the form of Micro, small and medium businesses which are expected to be able to provide economic strengthening. The spirit of the principle of economic democracy leads to welfare goals. In a country, welfare is the most important aspect that is very influential on the pace of the nation's economy or the government order (Subandi, 2008). During the COVID-19 pandemic, this populist economic system was unwittingly actualized in the pattern of connectivity between business actors, especially Micro, small and medium businesses and cooperatives with the community as consumers in meeting their needs, namely realizing community welfare independently with/or without government intervention. In this section, the pattern of connectedness of the three economic pillars, namely between business actors, consumer society, and government forms a triple helix.

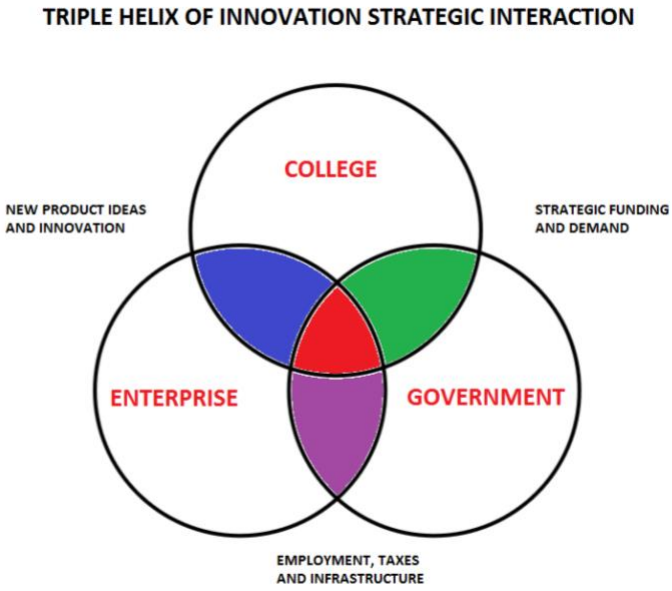


Figure 1: Triple Helix of innovation strategic interaction

Business actors as providers of goods and services, the public as users of goods and services provided by business actors, and the government as supervisors or regulators to ensure that the pattern of connectedness is mutually beneficial (symbiotic mutualism). Discussions about the populist economy that have been carried out in previous studies, among others, are about the local potential-based populist economy, (Fifi Hasnawati, 2018); Reassessing the People's Economy, (AS MF, 2019); The Model for the Implementation of the People's Economy, (Awan S., 2012); Islamic economics based on people's economy, (Suhendi S, 2012); While the discussion of Micro, small and medium businesses, digitalization, and the COVID-19 pandemic period carried out by previous research, among others, the impact of the Covid pandemic on economic growth, (Junaedi D,

Salistia F. 2020); strategies to improve food security during the Covid 19 pandemic, (Fajri Hemi HA, 2020); Culinary business startups during the Covid 19 pandemic (Pratiwi AI. 2021**)**; Culinary business startups during the Covid 19 pandemic; The Concept of a People's Economic System in Empowering Indonesian Micro, small and medium businesses, (Setyaningrum F, 2021); Development of Digital Micro, small and medium businesses during the Covid-19 Pandemic,(Arianto Bambang, 2020); Determinants of Micro, small and medium businesses Digital Transformation, (Farhani I, Chaniago H, 2021), the application of digital transformation to Micro, small and medium businesses during the COVID-19 pandemic, (Windayani NM, Astitiani NLPS & Putri BCL, 2021).

This research is a continuation of previous research that examines "Reactualization of the People's Economy during the Covid-19 Pandemic Through the Application of Mutualism and Family Principles in the Framework of National Economic Recovery".(Elli Ruslina, Tuti Rastuti & MZA, 2021). The results of the study show that the principles of Indonesian economic democracy with the concept of cooperative structures applied to Micro, small and medium businesses are a feasible solution and according to the characteristics of the Indonesian people who have the values of God, Humanity, Unity, Deliberation and Social Justice. These values are considered capable of being used as the basis for implementing the concept of a people's economy in digital-based Micro, small and medium businesses as a new paradigm.

*3.1. Results of Literature Review*

The concept of the populist economy is understood as one of the family-based concepts. The family system will more easily realize prosperity. Even though the views of economists differ on the people's economy, it is better to take some understanding from the experts, among others, Zulkarnain (Zulkarnain, 2006) stated that, the people's economy is an economic system adopted by the Indonesian people according to the philosophy of the State which involves two aspects, namely: (a) justice and economic democracy; and (b) in favor of the people's economy. According to Mubyarto (Mubyarto, 2014), "people's economy is a democratic economy that is aimed at the prosperity of the small people". This understanding aims to build a grassroots economic system. In addition, the goal of a populist economy is an economy in which the implementation of supervision and the results of economic activities can be enjoyed by the whole community. People's economy can also be interpreted as an economic system built from the economic strength of the people. People's Economy is an economic activity that provides the widest opportunity for the entire community to participate so that the economy can be carried out and develop properly. (Sumawinata, 2004) Ginanjar Kartasasmita argues that, in a populist economic system, it is not only understood for economic activities that are short-term in nature, and have dimensions. Financial aspect which favors investors who have a lot of money, but the people's economy can be understood comprehensively in terms of paying attention to quantitative and qualitative aspects, financial and non-financial aspects, and environmental aspects. People's economic politics is not only based on growth, stability, and equity, but more on justice, participation and business sustainability of the community's economic actors. (Ginanjar Kartasasmita, 2014) Departing from the above understanding, the people's economy is understood as the economy of community groups that involve components of all levels of society in the development process which are closely related to aspects of justice, economic democracy, taking sides with the people's economy which is based on a fair market mechanism and includes all elements of society in development, as well as behaving fairly for the whole community with the aim of improving the community's economy. (2) The people's economic system can be broadly interpreted as one part of the existing economic system. The populist economy is a sub-system of the Pancasila economy. Terminologically, the word people refers to the whole community or many people (5) who are in a certain region or country. Therefore, the people's economy is the entire economy of Indonesia. Constitutionally, the people's economy is contained in Article 33 of the 1945 Constitution. The explanation of Article 33 of the 1945 Constitution states that: (Republik Indonesia, 1945)

a. The principle of kinship in the explanation of the 1945 Constitution states that the economy is structured as a joint effort based on the principle of kinship;
b. Principles of justice. The implementation of a populist economy must be able to realize social justice for all Indonesian people. This system can provide opportunities for all Indonesian people, whether as consumers, perpetrators of hardship or workers, there are no differences in ethnicity, religion and gender, all are equal in the economic field.

c. The principle of income equality. The community as consumers and business actors as producers must feel income distribution. If the government has been concerned with high economic growth, it turns out that economic growth is not synonymous with welfare. Because the growth is only felt by a handful of people or big entrepreneurs while the majority of people are in a poor and destitute position. Growth does not lead to income equality.
d. The principle of balancing the interests of individuals and the interests of the community, Economic activities must realize the synergy of individual and community interests, as mandated by Article 27 Paragraph (2) which states that: "Every citizen has the right to work and a decent living for humanity".
e. The principle of partnership or mutual relationship building, this principle directs economic activities based on cooperation or mutual assistance to each other as business activities, both small and large businesses that will be easy to control.

People's economy is very closely related to the empowerment of Micro, small and medium businesses. When viewed from the Law Number 20 of 2008 concerning Micro, Small and Medium Businesses, it is stated that, trading businesses managed by business entities or individuals refer to productive economic businesses, the criteria of which are stipulated by law. Initially one of the criteria was determined by the number of employees, but in its development the type of business grouping is based on assets and turnover. Micro Business is a productive business owned by individuals and/or individual business entities that meet the criteria for a maximum net worth of Rp. 50 million, excluding land and buildings for business premises. In addition, it has an annual turnover of a maximum of IDR 300 million. The criteria for small businesses are net worth ranging from more than IDR 50 million to IDR 500 million, excluding land and business buildings. In addition, it has annual sales of more than IDR 300 million to a maximum of IDR 2.5 billion. Medium Enterprises are productive economic businesses that stand alone and do not include subsidiaries or branches of certain companies. Meanwhile, the criteria for the amount of net worth must be more than IDR 500 million to a maximum of IDR 10 billion. In addition, annual sales are more than IDR 2.5 billion to a maximum of IDR 50 billion. In addition, annual sales are more than IDR 2.5 billion to a maximum of IDR 50 billion. During the last two decades, Micro, small and medium businesses in Indonesia have experienced development, the factors that influence it include; (a) use of technology, information and communication facilities; (b) ease of loan capital; (c) Lowering the tax rate. The results of the study state that one of the successes of business is good and targeted technology support. (Dina Lathifa, 2019) In Indonesia, it is estimated that the number of Micro, small and medium businesses is around 67 million business units, and of that total in 2017, there were 8 million micro, small and medium business units operating in Indonesia, already went digital. This figure is expected to continue to grow for the sake of business continuity and progress in Indonesia.
Basically, Micro, Small and Medium Businesses have a variety of characteristics. Based on their development, Micro, Small and Medium Businesses are classified into 4 criteria, namely: (Jurnal entrepreneur, 2021)

1. Livelihood Activities: Micro, small and medium businesses that are used as job opportunities to earn a living. Generally known as the informal sector.
2. Micro Enterprise: Micro, small and medium businesses that have craftsmanship, but are not entrepreneurial.
3. Small Dynamic Enterprise: Micro, small and medium businesses that have an entrepreneurial spirit and are able to accept subcontract and export work.
4. Fast Moving Enterprise: Micro, small and medium businesses that already have an entrepreneurial spirit and will transform into a big business.

There are several efforts in developing People's Economy which can be considered from 3 important points as stated by Mubyarto (Mubyarto, 2014):

1. Creating or shaping a climate that is very helpful for the development of the potential of different people. These potential differences need to be fostered and developed so that they can be useful.
2. Strengthening the economic potential of the community, this effort can be carried out by increasing knowledge of improving health degrees and opening opportunities to take advantage of these economic opportunities.

3. Provide protection and prevent unfair competition, as well as prevent exploitation of the strong economic group against the weak economic group.

Micro, small and medium businesses become a benchmark for the ability of the community's economic activity. The presence of Micro, small and medium businesses is a solution to improve the national economy. This is because Micro, small and medium businesses are considered to have a large contribution to employment compared to large business sectors. The role of Micro, small and medium businesses as the backbone of the economy at a time when large companies fall. To examine how the reconstruction of the populist economic model in digital-based Micro, small and medium businesses during the pandemic or post-covid-19 pandemic period, it is necessary to first review the digital transformation itself. Digital transformation is defined as the radical use of digital technology that can improve and achieve the company's expected performance and objectives (Panggabean, AN, 2018).

There are a number of strategies to exist in the era of digital transformation.(Royyana, 2018) Digital transformation can also be interpreted as a process that aims to improve an entity by triggering significant changes in its properties through the adoption of information technology, computing, communication, and connectivity. (Putri, Herdiana, Munawar et al, 2018) Based on research by Schwertner (Schwertner, K, 2017), in (Small and Medium Enterprises) digital transformation in their business is very important to build competitive advantage and maintain market competitiveness, both locally and internationally. Nevertheless, there are a number of major difficulties and obstacles in the digital transformation process. The barriers are not in technology, but in human factors themselves, such as resistance to change, lack of knowledge and experience with digital, and lack of motivation.

*3.2. Scientific findings (scientific finding)*

Based on the results of research that has been carried out, supported by data, it was found that the changes in the People's Economic Model after the Covid-19 Pandemic Period were as follows:

| ENTREPRENEUR | MODEL 1 | MODEL 2 | MODEL 3 |
|---|---|---|---|
| Micro, small and medium businesses/ COOPERATION | Start-up new business-communication between local residents. whatsapp group digital tool | Existing businesses are being developed-communication is strengthened by digital communication between neighborhood residents. Digital tools via social media and having groups. | Medium and established businesses adapt to digital as a tool through digital marketplaces, sophee, bibli, etc. |
| CUSTOMER | group members | Old customers are retained - expansion by old customers attracts new customers through intergroups or between communities | Adaptation following the trends and conditions of the pandemic, and efficiency |
| REGULATOR | The rules are created in groups | Several regions have issued local regulations to facilitate the Digital Micro, small and medium businesses program | The government's strategy for the direction of economic policy |

Figure 2: Research Result Data: Changes in Populist Economic Models Post-Covid-19 Pandemic

The populist economic model in the form of the application of the principles of togetherness and kinship is woven into the attachment of a community on social media. Social media is used as a communication tool to establish togetherness in the distribution chain, ordering goods or services, and producing goods. The

sustainability of this economic activity is highly dependent on the establishment of togetherness and the nature of mutual assistance from the community in the social media.

| PURPOSE | GOOL | STRATEGIES | POLICIES |
|---|---|---|---|
| Productivity-boosting policy Micro, small and medium businesses | Increased income and development | Develop entrepreneurship and competitive advantages | 1. Improved facilitation and standardization of Micro, small and medium businesses products<br>2. Increasing entrepreneurship-based management of Micro, small and medium businesses<br>3. Improved database Micro, small and medium businesses & Cooperationi |
| | | Developing a business support system for Micro, small and medium businesses | KUB or Micro, small and medium businesses Cluster Development |
| | Increase active cooperatives | Improving the quality of the cooperative institutions | 1. Improving entrepreneurship-based cooperative management<br>2. Increasing supervision of cooperative regulatory compliance |

Figure 3: Strategies and policy directions for the development of Micro, small and medium businesses /Cooperatives

Factors for Changes in the Populist Economic Model after the Covid-19 Pandemic

1. During the Covid-19 pandemic, the virtual world has become much busier and busier than before. This happens because more and more people are switching to using gadgets and computers as a means of survival to replace various activities directly. These changes in society have an impact on the development of the economy by accelerating its digital transformation.
2. The COVID-19 pandemic has increased the number of unemployed and poverty levels. However, society is distorted to accept digital transformation to find a number of jobs to support themselves and their families so that digital transformation develops and disrupts the business sector and grassroots economy.
3. The development of the digital economy with various types of e-commerce and also financial technology (fintech) services are increasingly prevalent among the public. The digital economy is developing and the pandemic is accelerating the development of digitization in people's economic activities.
4. The Covid-19 pandemic crisis accelerates digital transformation, which is influenced by several factors, including:

a. The push to reduce face-to-face interactions during the Covid-19 pandemic has prioritized digitization and automation.
b. From the very beginning of the pandemic, digitization and automation have been sought to accelerate in part because their adoption helps reduce the need for physical contact.
c. There is an increase in micro-enterprises and companies in the manufacturing sector that have adopted the use of digital platforms as much as 59% since October 2020.
d. COVID-19 has driven changes in consumer and business behavior, many of which will persist to varying degrees in the long term.

**4. Conclusion**

The online lifestyle will still exist, some will be run in a hybrid (online and offline) manner after the pandemic era. Within a decade or two, the digital economy will expand more widely, all economic sectors in all regions will be digitized. Existing businesses have to anticipate and adapt if they are to survive and grow. The COVID-19 pandemic has had a significant impact on human life in almost all parts of the world. The Monetary Fund stated that the Covid 19 pandemic had caused a world recession marked by an increase in unemployment and poverty in every country in the world. Even the strongest countries, such as the G7 countries, have experienced economic recessions, including Canada, France, Germany, Italy, Japan and the USA.) Economic stimulation is carried out through local strategies as an alternative to restore economic institutionalization in each country in order to recover and strengthen the economy. Every country is obliged to strengthen economic stimulus to maintain the nation's economic stability. (Bambang Arianto, 2020) The Covid 19 pandemic has affected the stability of the world economy to become stagnant and negative. Policies to restore the economy to a pre-pandemic state require reflection on national economic policies and correcting systemic weaknesses. “The moment of the pandemic must be used as a trigger to correct the national economy back to the mandate of the Constitution. **(**Hempri Suyatna, 2020)

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# Fulfillment of the Right to Health for Women Workers of Public Refueling Stations (Gas Station) in the Perspective of Law in Indonesia

Fathimah Azzahro[1], Riris Ardhanariswari[2], Muhammad Fauzan[3]

[1] Faculty of Law, Universitas Jenderal Soedirman, Purwokerto, Indonesia. Email: fathimah.a@mhs.unsoed.ac.id
[2] Faculty of Law, Universitas Jenderal Soedirman, Purwokerto, Indonesia.
Email: riris.ardhanariswari@unsoed.ac.id
[3] Faculty of Law, Universitas Jenderal Soedirman, Purwokerto, Indonesia.
Email: muhammad.fauzan@unsoed.ac.id

Correspondence: Fathimah Azzahro, Faculty of Law, Universitas Jenderal Soedirman, Purwokerto, Indonesia.
E-mail: fathimah.a@mhs.unsoed.ac.id

**Abstract**
The right to health is the right to obtain and enjoy the highest standards of health that can be achieved for everyone because naturally every human being is born free and equal. The equation applies to everyone including workers, both male workers, and female workers without being discriminatory. Especially for women workers of public refueling stations (gas stations) in fulfilling the right to health in a positive legal perspective amid the challenges of patriarchal culture faced. This study discusses the fulfillment of the right to health for women workers of public refueling stations (gas stations) from the perspective of law in Indonesia and the implementation of the fulfillment of these rights. The method used in this study is normative juridical with descriptive research specifications analysis, namely research by describing the applicable laws and regulations associated with legal theories and the practice of implementing positive laws related to problems. The research uses secondary data obtained through literature and is systematically described. The results showed that regulations regarding the fulfillment of the right to health for women gas station workers still refer to arrangements that are general and have not specifically regulated the right to health for female workers. The implementation can be seen from five factors that affect the fulfillment of the right to health for women gas station workers.

**Keywords:** The Right to Health, Women Gas Station Workers, Indonesian Law

## 1. Introduction

Indonesia as a country that participated in ratifying the International Covenant on Economic, Social, and Cultural Rights (ICESCR) through the ratification of Law Number 12 of 2005 automatically binds itself to all norms and values of human rights contained in the international covenant, especially those related to economic, social, and cultural rights. One of them is the right to health as stipulated in the provisions of Article 12 paragraph (1) of ICESCR which states that states parties to this covenant recognize the right of everyone to enjoy the highest attainable standard of physical and mental health. The right to health is not only interpreted as the right of everyone to be healthy or to be free from disease (Hartono et al., 2021). However, the right to health is the right to obtain

and enjoy the highest standards of health that can be achieved for everyone because naturally every human being is born free and equal (Hartono et al., 2021).

Further provisions regarding the right to health are accommodated in the constitution, especially the provisions of Article 28H paragraph (1) Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 NRI Constitution) which states that everyone has the right to live a prosperous life born and mentally, to live, and to have a good and healthy living environment and the right to obtain health services. The realization of this right to health must rest on the principle of non-discrimination, including for workers, both men, and women wherever they are.

Specifically, regarding the legality of labor regulation in Indonesia, it is comprehensively regulated in Law Number 13 of 2003 concerning Manpower and some of its changes in Law Number 11 of 2020 concerning Job Creation. Article 1 number 2 of the Manpower Law defines labor as a person who can do work to produce goods and or services both to meet his own needs and for the community. Juridically, the definition does not distinguish between male labor and female labor. Moreover, the phenomenon that has occurred recently in the world of work, some formal sectors of work not only involve men in their implementation but also involve women. This is motivated by the rapid progress of civilization, especially science and technology, which triggers changes in society, including the role of women. The formal sector as referred to is the sector where a person works for another person or agency or office or employer by receiving a salary in return for services (Novita, 2022). One of the formal sectors as referred to is working at public refueling stations (gas stations).

Based on the results of the population census of the Central Statistics Agency (BPS) in 2018 the female population in Indonesia is 131.9 million people, while the male population is 134 million people so almost the same number between male and female populations indicates that women are one of the contributors to the country's progress, especially in the field of employment (Databoks, 2018). BPS also recorded that the percentage of formal labor by gender in 2021 was 43.39% filled by men and 36.20% filled by women. The large number of women working in the formal sector creates various kinds of negative stigmas in society. This is because the patriarchal social system is still thick and closely held by several people in Indonesia. This assumption implies that women have always been left behind and marginalized in the fields of economics, education, health, employment, and politics fields caused of patriarchal culture. In societies with patriarchal cultures, men play more of a role in holding power which can automatically degrade the role and existence of women (Kurniawan, 2011). A woman is seen as someone who is not supposed to work and only serves her husband and does housework. Even if there is also a view that is reasonable for female workers but in the sector of work that is specifically for them such as being a sales promotion girl (SPG), shop assistant, or tailor. Thus, jobs that are considered abusive such as being a gas station operator are considered unsuitable for female workers.

The female workers who work at gas stations are certainly not a few experienced this gender discriminatory action. The Constitution in the provisions of Article 27 paragraph (1) of the 1945 NRI Constitution states that every citizen has concurrent positions in law and government. This provision is further elaborated in Article 5 of the Manpower Law which states that every worker has the same opportunity without discrimination to obtain employment. Then Article 6 of the Manpower Law reads that every worker or laborer has the right to get equal treatment without discrimination from employers. The acquisition of equal rights between male and female workers is also seen in the fulfillment of the right to health which is part of the constitutional mandate. Furthermore, the regulation regarding the right to health is contained in Article 164 of Law Number 36 of 2009 concerning Health which mandates that there is a need for occupational health efforts aimed at protecting workers to live healthy lives and be free from health problems and adverse influences caused by work.

As for the right to health owned by male and female workers, several differences are innate or natural. If women need additional rights such as the right to give birth, the right to miscarriage leave, and the right to breastfeed then male workers cannot have these rights. Protection of health rights for female workers at gas stations is very important considering that gas stations are open places, directly facing customers, and directly exposed to pollution coming from vehicles. The importance of fulfilling the right to health for female workers, especially those who work at gas stations, is very necessary. Therefore, this study was made to determine the fulfillment of the right to

health for women gas station workers from a legal perspective in Indonesia and the extent of the implementation of the rule of law.

## 2. Method

The approach method stated in this study is the normative juridical method, namely legal research carried out by prioritizing researching library or documentary materials in the form of primary, secondary, and tertiary legal materials (Soekanto, 1986). The approaches used to obtain information related to legal materials in this study include the statute approach and the case approach. The research specifications used are descriptive-analytical, namely by describing the applicable laws and regulations associated with legal theories and the practice of implementing positive laws related to problems (Soemitro, 1990).

The type of data used in this study is secondary data. The main activity of searching for secondary data is by conducting library research. The method of collecting legal materials used in this study is the literature method, which is a method carried out by tracing library materials. Legal materials that have been systematically organized according to classification are then analyzed and conclusions are drawn which produce prescriptions (solutions that should be). The method of presenting legal materials in this study will be presented in the form of a description that is arranged systematically, logically, and rationally. All existing data will be linked to one another in accordance with the subject matter studied, namely the Fulfillment of the Right to Health for Women Workers of Public Refueling Stations (gas stations) in a Legal Perspective in Indonesia so that it becomes a whole unit presented in narrative form.

The Method section describes in detail how the study was conducted, including conceptual and operational definitions of the variables used in the study, Different types of studies will rely on different methodologies; however, a complete description of the methods used enables the reader to evaluate the appropriateness of your methods and the reliability and the validity of your results, It also permits experienced investigators to replicate the study, If your manuscript is an update of an ongoing or earlier study and the method has been published in detail elsewhere, you may refer the reader to that source and simply give a brief synopsis of the method in this section.

## 3. Results and Discussion

### *3.1 Fulfillment of the Right to Health for Women Workers of Public Refueling Stations (Gas Station) in the Perspective of Law in Indonesia*

The right to health is part of Human Rights as stipulated in the constitution, especially Article 28H paragraph (1) of the 1945 NRI Constitution which states that everyone has the right to live a prosperous life in birth and mind, to live, and to have a good and healthy living environment and the right to obtain health services. The responsibility to protect, advance, uphold, and fulfill the right to health as part of this human rights lies with the state, especially the government as mandated by Article 28I paragraph (4) of the 1945 NRI Constitution. The state's obligation to respect the right to health requires the state not to take actions that negate or diminish everyone's ability to enjoy the right to health (Hartono et al., 2021). Then the obligation of the state to protect (obligation to protect) the right to health requires the state to ensure that no person or group of people, including state apparatus and corporations can eliminate or reduce everyone's opportunity to enjoy the right to health (Hartono et al., 2021). Meanwhile, the state's obligation to fulfill the right to health refers to the state's obligation to take administrative, legislative, judicial, and policy steps to ensure that the right to health is fulfilled until maximum achievement (Hartono et al., 2021). What is meant by legislative action is to ensure and make laws and regulations that guarantee the fulfillment and protection of the right to health as part of human rights.

The General Commentary of the International Covenant on Economic, Social, and Cultural Rights that there are four indicators to assess the fulfillment of the right to health:

1. Availability guides so that the implementation of public health functions and health service facilities, goods and health services, as well as programs must be available in sufficient quantity. The adequacy of the facilities

of goods and services varies and depends on many factors, including the level of development of the country. However, it also includes certain factors that affect health, such as healthy drinking water, adequate sanitation, hospitals, clinics, and health-related collaterals, as well as experienced and professional media personnel with competitive incomes and good drugs as referred to in the WHO Action Program on Essential Drugs.

2. Accessibility provides guidance that health facilities, goods, and services must be accessible to everyone without discrimination within the jurisdiction of the country. Healthcare providers must develop reasonable accommodation that meets the needs of the community in an inclusive manner. Accessibility has four interrelated dimensions:
   a. Non-discriminatory. Health facilities, goods, and services must be accessible to all, especially to marginalized communities or communities not protected by law without discrimination on any basis.
   b. Physical access. Health facilities, goods, and services must be physically affordable and safe for all, especially for vulnerable or marginalized groups. For example, ethnic minorities or alienated communities, women, children, people with disabilities, and people with HIV/AIDS. Accessibility also means that health services and health determinants, such as healthy drinking water and adequate sanitation facilities are physically accessible, including in suburban areas. Furthermore, accessibility includes access to buildings for people with disabilities.
   c. Economic access. Health facilities, goods, and services must be economically affordable for all. The payment of health care services as well as services related to health determinants should be based on the principle of equality, by ensuring that services available both privately and publicly are affordable to all, including socially disadvantaged groups. Similarities require that the poor should not be burdened with health costs unprofessionally compared to the rich.
   d. Access to information. Accessibility includes the right to seek and receive or share information regarding health issues. Access to this information must be managed while protecting the confidentiality of health data.
3. Affordability guides so that all health facilities, goods, and services must be accepted by medical ethics and culturally appropriate. For example, respecting the culture of individuals, minorities, groups, and societies, and being sensitive to gender and life cycle requirements. It is also designed to respect the confidentiality of health status and the improvement of health status for those in need.
4. The quality aspect provides guidance that in addition to being culturally accepted, health facilities, goods, and services are scientifically and medically appropriate and good quality. This requires, among others, medically capable and authorized personnel, medicines and hospital equipment scientifically recognized and not decades old, safe and drinkable drinking water, and adequate sanitation (Komisi Nasional Hak Asasi Manusia, 2009).

Specifically, regarding the fulfillment of the right to health for workers in Indonesia, it can be further reviewed, one of which is based on labor law. In essence, the position of employers and workers is balanced and equal in accordance with the provisions of Article 27 paragraph (1) of the 1945 NRI Constitution. However, in the aspect of employment, according to Sudarjadi in Riyadi and Talib, under certain conditions the position can turn out to be unbalanced because workers are often in a weak position (Riyadi & Thalib, 2020). This is what causes the protection and fulfillment of the right of workers, including the right to health in the workplace, to be important to protect.

The right to health for workers has been regulated both through Law Number 13 of 2003 concerning Manpower and its amended rules in Law Number 11 of 2020 concerning Job Creation. The basic right of workers to occupational safety and health is contained in the formulation of Article 86 paragraph (1) of the Manpower Law which states that every worker/laborer has the right to obtain protection, one of which is occupational safety and health. Furthermore, the provisions of paragraph (2) order that to protect the safety of workers/workers to realize optimal work productivity, it is necessary to organize occupational safety and health efforts. These efforts in Article 87 are realized by the implementation of an occupational safety and health management system. Regulations regarding the occupational safety and health management system are then further regulated through Government Regulation Number 50 of 2012 concerning the Implementation of the Occupational Safety and Health Management System.

According to Article 1 paragraph (2) of Government Regulation Number 50 of 2012 concerning the Implementation of the Occupational Safety and Health Management System, what is meant by occupational safety and health (K3) is all activities that are sought to ensure and protect the safety and health of workers through efforts to prevent accidents and occupational diseases. In the formulation of Article 6 of the Government Regulation, it is regulated that the occupational safety and health management system (hereinafter referred to as SMK3) is an effort carried out by entrepreneurs including the determination of K3 policies, K3 planning, implementation of K3 plans, monitoring and evaluating K3 performance, and reviewing and improving K3 performance. SMK3 must be applied by every company that employs at least 100 workers/laborers or has a high level of potential danger in accordance with the provisions of Article 5 paragraph (2) of the Government Regulation.

In this case, public refueling stations (gas stations) are workplaces with a fairly high potential for danger because they are related to fuel oil (BBM). According to the Ministry of Energy and Mineral Resources, there are 4 potential dangers caused by fuel, including fire and explosion hazards, poisoning hazards, environmental pollution, and static electricity hazards (Tim Independen Pengendalian Keselamatan Migas Dirjen Minyak dan Gas Bumi Kementerian ESDM, 2018). Some examples of accidents that occurred at gas stations such as the gas station fire on Jalan Mayjen Sungkono, Bumiayu, Malang on March 18, 2021, ago. This fire incident originated from one of the public transport cars that were filling up with gasoline in the state running engine (Arifin, 2021). In addition, another incident occurred on August 6, 2021, when a gas station in the Semen Tonasa Office Area, Pangkep Regency caught fire and caused one resident to die on the spot while two other residents suffered burns (Yunus, 2021). These two events are enough to illustrate the high potential dangers of working at gas stations. Therefore, in seeking the protection of the right to safety and health of workers at gas stations, employers, in this case, PT Pertamina, are required to make K3 guidelines for workers who work at gas stations in accordance with the provisions of Government Regulation Number 50 of 2012 concerning the Implementation of the Occupational Safety and Health Management System.

In addition, the Ministry of Energy and Mineral Resources has issued a Gas Station Safety Guideline which is a guideline for gas station business license holders in the health aspects of gas station operations, namely as follows:

1. The management of gas stations must ensure that all workers included in the gas stations are in good health.
2. Management must inspect and monitor all potential health hazards in the gas station work environment regularly and continuously at least once a year.
3. Management should check the health of all its workers at the time of admission and during regular employment.
4. The management of the gas station must have and store data on the health condition of all gas station workers.
5. Gas stations must include their workers in the applicable national health insurance (Yunus, 2021).

Furthermore, regarding the protection of the right to health for female workers at gas stations, Article 28D paragraph (2) of the 1945 NRI Constitution formulates that everyone has the right to work and receive fair and decent remuneration and treatment in employment relations. In terms of gender between men and women who work, some things are natural in women that make them deserve certain protections and rights that are different from men. Based on data from the National Statistics Agency, the Labor Force Participation Rate (TPAK) of women in 2021 was 66.35% compared to men as much as 69.39%. This number has increased since 2019, namely 55.51%, and in 2020 as much as 61.26% (Badan Pusat Statistik, 2019-2021). Increasing women's participation in the world of work, especially in the public sector, should be a common concern, especially for countries and employers who employ women to protect rights that should be fulfilled.

The Manpower Law also provides rights to female workers in accordance with applicable regulations. Women's rights regulated in Law Number 13 of 2003 concerning Manpower are related to their reproductive functions, namely regarding menstruation, pregnancy, childbirth, miscarriage, and breastfeeding. The provisions of Article 81 of the Manpower Law contain the formulation that female workers who are in their menstrual period feel pain and inform employers that they are not obliged to work on the first and second days of menstruation. Then Article 76 of Manpower Law stipulates that employers are prohibited from hiring pregnant female workers who according to doctors are dangerous to the health and safety of the womb and herself when working between 23.00 and 07.00.

If a female worker gives birth, she is entitled to rest for 1.5 months before giving birth and 1.5 months after giving birth as stipulated in the provisions of Article 82 of the Manpower Law. As for female workers who experienced their death, they are entitled to a break for 1.5 months. Furthermore, female workers are also allowed to breastfeed their children if this must be done at work time. After Law No. 13 of 2003 concerning Manpower was amended by Law Number 11 of 2020 concerning Job Creation, the provisions in these articles have not changed.

In addition, Law Number 36 of 2009 concerning Health also provides special arrangements regarding the protection of the right to health for workers as stated in Chapter XII concerning Occupational Health. Article 164 paragraph (1) of the Health Law stipulates that occupational health efforts are aimed at protecting workers to live healthy lives and be free from health problems and adverse influences due to work. Article 164 of the Health Law emphasizes how the government must set occupational health standards and workplace managers are obliged to implement these established health standards in the workplace to protect workers to live healthy lives and be free from health problems and adverse influences caused by work, both formal and informal workers. If taken from the example of a case of the right to health for female workers at gas stations, gas station managers must pay attention to a healthy and responsible gas station environment. Observing a healthy gas station environment will have a good impact on female workers who are pregnant for the health of the fetus and themselves. Then Article 165 paragraph (1) and Article 166 paragraph (1) of the Health Law instructs the obligations that must be obeyed by the workplace manager. Article 165 paragraph (1) states that workplace managers are obliged to carry out all forms of health efforts through prevention, improvement, treatment, and recovery efforts for the workforce. Furthermore, Article 166 formulates that the employer or employer is obliged to guarantee the health of workers through prevention, improvement, treatment, and recovery efforts and bear the entire cost of maintaining the health of workers.

Some of these provisions regulate the obligation of employers to make efforts to ensure the health of workers. If it is related to the context of the right to health for women workers at gas stations, gas station managers need to take preventive measures to avoid an unhealthy gas station area environment by improving the governance of gas stations that meet workplace health standards. This is needed because the work environment has risk factors for the onset of disease. Then the gas station manager is also obliged to carry out treatment or recovery for his workers, especially for female workers if there is a condition that results in the worker's illness due to unhealthy work environment conditions.

Arrangements regarding the fulfillment of the right to health of female workers are very adequate. In relation to labor, especially the right to health for female workers, it is regulated in Article 49 of Law Number 39 of 1999 concerning Human Rights which reads:

1. Women have the right to vote, be elected, be appointed to jobs, positions, and professions in accordance with the requirements and laws, and regulations.
2. Women are entitled to special protection in the performance of their work or profession against matters that may threaten their safety and or health concerning women's reproductive function.
3. Special rights attached to women due to their reproductive function are guaranteed and protected by law.

Under these provisions, it is known that female workers obtain the same rights as male workers under certain conditions and get special protections that may threaten their safety or health concerning the female reproduction function guaranteed and protected by law. The protection provided by this human rights law to female workers is something that confirms that the right to health for female workers is a top priority because of certain conditions that are not owned by male workers. Thus, the protection of the right to health for female workers, especially those who work at gas stations, has certainly been regulated and paid attention to by lawmakers as stated in several positive laws in Indonesia. The protection of the right to health for female workers is something that must continue to receive attention. This attention is due to the vulnerability of violations of the right to health that should be obtained by female workers.

Thus, the protection of the right to health of women gas station workers as contained in the Manpower Law which is further regulated in Government Regulation Number 50 of 2012 concerning the Implementation of the Occupational Safety and Health Management System, the Health Law, and the Human Rights Law has been

comprehensively accommodated and does not conflict with human rights, especially women's rights. However, what needs to be considered is that in making K3 guidelines, employers should specifically regulate the safety and health of female workers. In addition to being related to reproductive function, of course, it must also be considered regarding the safety and psychological health of female workers considering that in the world of work female workers can experience unreasonable treatment such as sexual violence which is very detrimental.

Based on the explanation above, basically in Law Number 13 concerning Manpower, Law Number 36 of 2009 concerning Health, and Government Regulation Number 50 of 2012 concerning the Implementation of the Occupational Safety and Health Management System do not regulate the protection of the health of female workers separately from male workers. Thus, the fulfillment of the right to health for women gas station workers refers to the Manpower Law, the Health Law, and the Government Regulation Number 50 of 2012 concerning the Implementation of the Occupational Safety and Health Management System which has implications for legal protection to review the health rights of female workers at gas stations still refers to general arrangements that generalize the position of male and female workers.

*3.2 Analysis of the Implementation of the Fulfillment of the Right to Health for Women Workers at Gas Station*

The preamble to the 1945 NRI Constitution explains the purpose of the Indonesian nation, namely to protect the entire Indonesian nation and all Indonesian bloodshed and to promote the general welfare, educate the nation's life, and participate in carry out world order based on independence, lasting peace, and social justice. According to Thomas Aquinas, the well-being of society itself is the purpose of the law as a rational arrangement (Marzuki, 2017). In the end, enforcement of laws related to the public interest is carried out by the state (Marzuki, 2017). Law enforcement is the activity of integrating the relationship of values described in the rules of a stable embodiment and attitude of action as a series of elaboration of final stage values to create, maintain, and maintain social peace in life (Soekanto, 2008). Soerjono Soekanto at least provided the determining factors that the law would be effective. These legal factors include:

1. Its legal factors (legislation),
2. Law enforcement factors, namely the parties who form and apply the law,
3. Factors of means or facilities that support law enforcement,
4. Community factors, namely the environment in which the law applies or is applied,
5. Cultural factors, namely as a result of work, creation and taste based on human nature in the association of life.

Laws or statutes in a material sense include written regulations that are generally accepted and made by the ruler both at the central and regional levels. According to Soerjono Soekanto, the measure of effectiveness in the first factor, namely the law or law:

1. The existing regulations regarding certain areas of life are already quite systematic.
2. The existing regulations regarding certain areas of life are quite synchronous, hierarchically and horizontally there is no conflict.
3. Qualitatively and quantitatively the regulations governing certain areas of life are sufficient.
4. The issuance of certain regulations is in accordance with the existing juridical requirements (Soekanto, 2008).

If looking at the regulations governing the protection and fulfillment of the right to health for female workers in general, it is quite adequate. Starting from the 1945 NRI Constitution which guarantees the right to health constitutively in Article 28H paragraph (1), Articles 86-87 of the Manpower Law regarding the right to safety and health for workers, Chapter XII of the Health Law on Occupational Health, and Article 49 of the Human Rights Law which regulates the rights of women in carrying out work. At the level of norms, all these rules do not conflict with each other in regulating the right to health for female workers. Unfortunately, specifically, the regulation on the protection of rights for female workers in the employment sector that has a high potential for danger such as gas stations is inadequate, including the right to health. This has implications for legal protections to examine the health rights of female workers at gas stations still referring to general arrangements that generalize the position

of male and female workers. In fact, as a workplace with a high potential for danger, gas stations should be able to accommodate natural differences between men and women, especially related to their reproductive function.

Related to law enforcement factors, what is meant by law enforcement is those who are directly involved in the field of law enforcement which not only includes law enforcement but includes peace maintenance (peaceful enforcement). Law enforcement includes those serving in the judiciary, prosecutors, police, civil service, and society (HS&Nurbani, 2017). Soerjono Soekanto sees that the problems that affect the effectiveness of written law in terms of officials will depend on the following:

a. To what extent officers are bound by existing regulations?
b. To what extent officers are allowed to give discretion?
c. What kind of example should be given by officers to the community?
d. To what extent the degree of synchronization of the assignments given to the officer thus gives strict limits to his authority (Soekanto, 2008).

The issue of fulfilling the right to health for female workers at gas stations, especially when viewed from law enforcement factors, should each of the officials, both the judiciary, the prosecutor's office, the police, the judiciary, and the correctional service synergize with each other in upholding the formulations in the Manpower Law, the Health Law, the Human Rights Law, and the Occupational Safety and Health Management System Regulation in seeking the protection of the right to health for female gas station workers. Judicial power as part of the judicial institutions based on Article 24 of the 1945 NRI Constitution plays a role in adjudicating violations of the law. Therefore, an important role lies in the institution of judicial power in adjudicating cases of violations of the provisions of the Manpower Law, the Health Law, the Human Rights Law, and the Occupational Safety and Health Management System Regulation, especially against articles related to the right to health for female workers. Then if you look at the role of the prosecutor's office, there is in terms of prosecuting criminal acts that are related to / injuring the right to health for female workers at gas stations. The police act as investigators in criminal acts related to/injuring the right to health for female workers at gas stations. The authorship itself certainly plays its role as an assistant to the judge in seeking material truth by siding with the interests of the suspect/defendant in similar cases (Marpi, 2020). Finally, the correctional institution or prison plays a role in guiding prisoners who are proven to have violated the law against the provisions of the right to health for female workers at gas stations.

To examine how the role of law enforcement officers is implemented in the context of protecting the right to health for women workers at gas stations that have been running, we can first observe how the right to health for gas station workers is empowered by employers and highlighted by law enforcement. Although no data shows the number of gas station workers who experience health problems nationwide (Universitas Pahlawan Quality and Entrepreneurship, 2018). However, based on studies conducted by several parties at certain gas stations, it is proven that gas station operator workers are prone to health problems. However, there has been no effort towards changes made by law enforcement to address this problem, especially preventively. In the event of an accident such as a gas station fire that threatens the health of the worker, responsibility for the incident is viewed on a case-by-case basis (Dananjaya, 2020). Or it can be said, the mechanism for solving cases by law enforcement is only limited to finding which party is responsible and then being asked for compensation. When viewed from the perspective of workers, such an event can endanger their health and safety and should be sought to be avoided.

Another factor in law enforcement efforts to fulfill the right to health for women gas station workers is facilities and facilities. The facilities and facilities as referred to include educated and skilled human resources, good organization, adequate equipment, sufficient finances, and so on (HS&Nurbani, 2017). In reality, working at gas stations makes female workers inseparable from the environment which poses a bad risk to health. In general, this is in line with what was conveyed by Dr. dr. Nendah Roestijawati, MKK. States when interview that five risk factors for the work environment can cause disease, these five factors include physical, biological, chemical, psychological, and ergonomic factors.

As for the specifics according to Laila and Shofwati. one of the locations of the source of lead exposure is a gas station. Exposure to gas station lead comes from premium gasoline fuel released in the form of steam. Some of the impacts that can be caused by exposure to this lead include anemia, increased risk of reproduction, to a decrease

in sexual arousal, especially in the intensity of high exposure (Laila & Shofwati, 2013). The research on Blood Lead Levels and Health Complaints at Female Gas Station Operators also tried to describe data on complaints of the digestive system and nervous system experienced by 34 female gas station operators in the Ciputat and Ciputat Timur Districts of South Tangerang. Some of the complaints of the digestive system experienced are nausea, reduced weight, and anorexia. Meanwhile, complaints of the nervous system include fatigue, headaches, and ringing in the ears (Laila & Shofwati, 2013). Thus, facilities and facilities are one of important things in supporting the fulfillment of the right to health for female workers at gas stations. Although in fact facilities such as adequate equipment for occupational health care the last protection of controlling work environment factors. This is as stated by dr. Wening Tri Maranti, Sp.Ok. when interview that related to the hierarch of controlling work environment factors ranging from elimination, substitution, engineering control, control, administrative, and the last is personal protective equipment. That way, the personal protective equipment needed by women gas station workers must refer to the potential dangers around, if there are large amounts of chemicals, then nose and mouth protection is important. If exposed to sunlight, sunglasses are needed, and use long sleeves to avoid exposure to ultraviolet rays. Furthermore, it is related to the factors of society that can be interpreted as several people in the broadest sense and bound by a culture that they consider to be the same so that in the context of law enforcement it is closely related to where the law applies and is applied (HS&Nurbani, 2017). This community factor can be in the form of stigma against female workers at gas stations and how public awareness is to protect their right to health. Women as operators of workers at gas stations are characterized as being able to attract attention and work more dexterously than men. In an interview conducted with Mr. Singgih the person in charge (PIC) of gas stations in Purwokerto with unit number 44.531.19 said that the reason for hiring female employees tends to be a marketing strategy. Ironically, in a study conducted by Lamopia and Wulandari, data was found that a gas station in Denpasar, Bali with unit number 54,801.50 hired female workers by telling them to dress sexily when working instead of the usual gas station operator uniforms (Lamopia&Wulandari, 2017). This kind of condition shows the stigma adopted by certain communities that women's bodies can be used as separate commodities to increase economic benefits, especially at gas stations. Here else, all gas station workers, both men, and women, should be dressed according to the prescribed standards that will protect the body more than skimpy clothing. Meanwhile, in a study on the protection of women gas station workers conducted at 6 gas stations in Padang city, it was revealed that there was discrimination against female workers. Gas stations do not accept married female workers, so their right to get a job is limited. In addition, they also do not get the protection of the right to health specifically from gas stations under the pretext of gender equality (Sari&Montessori, 2018). The existence of these events is enough to prove how the stigma of society, towards women in particular, greatly affects the fulfillment of the right to health for women workers at gas stations.

The last factor is the cultural factor which can be interpreted as a habit that is constantly carried out by the community regarding the treatment of a legal provision. One of the habits of some people who are prohibited when in the SBPU area is smoking. Smoking at gas stations can cause fire hazards because when refueling, around the dispenser area there will be fire vapor. The fire vapor will cause a fire when given a lighter such as embers (one of which is from a cigarette), camera flashes, and telephone signals (Pertamina, 2021).

The ban on smoking at gas stations has become part of the SOP (Standard Operating Procedure) which is manifested in the form of warning signs installed in each gas station unit. Nevertheless, there are still consumers who do not heed the warning signs to the point of fatality. In line with what was conveyed by Ayu Anggraeni, who is a female gas station worker in Sokaraja, Banyumas with unit number 44.531.16, who said that there are still many motorists who ignore the appeal of smoking bans at gas stations. On the other hand, there was a mini SPBUN fire in Labuhan Village, Sreseh District, Sampang Regency, Madura. The fire was triggered by the presence of cigarette butts lying in the area of the fuel-filling machine (Sutriyanto, 2020). Besides being able to trigger fires, the culture of smoking gas stations is also detrimental to the health of female gas station workers. If the worker is pregnant, exposure to cigarette smoke can affect pregnancy because cigarette smoke contains carbon monoxide and nicotine which can adversely affect the fetus (Hanum & Wibowo, 2016). Thus, there is a need for awareness and support from the community to participate in realizing the fulfillment of the right to optimal health for women workers at gas stations.

**4. Conclusion**

Based on the results of the research and discussion that has been described earlier, the author provides the following conclusions:

1. The fulfillment of the right to health for women gas station workers is generally accommodated in laws and regulations in Indonesia, such as the 1945 NRI Constitution which guarantees the right to health constitutively in Article 28H paragraph (1), Article 86-87 of the Manpower Law on the right to safety and health for workers, Chapter XII of the Health Law on Occupational Health, and Article 49 of the Human Rights Law which regulates the rights of women in carrying out work. At the level of norms, all these rules do not conflict with each other in regulating the right to health for female workers. However, specifically, the regulation on the protection of rights for women workers in the formal sector such as gas stations is inadequate, including the right to health. Because the regulation does not specifically regulate the protection of the health of female workers separately from male workers. This has implications for legal protections to examine the health rights of female workers at gas stations still referring to general arrangements that generalize the position of male and female workers.
2. The implementation of the fulfillment of the right to health for women gas station workers can be seen from five factors, namely their legal factors (laws), law enforcement factors, factors of facilities or facilities that support law enforcement, community factors, and cultural factors. These five factors influence each other in optimizing the fulfillment of the right to health for workers, especially women at gas stations.

**5. Suggestion**

Based on these conclusions and consideration of several aspects of this study, the author gives the following suggestions:

1. It is necessary to establish a comprehensive regulation regulating the rights to health for women, especially those who work at gas stations, not only limited to regulations that are common in nature for both men and women as they are currently in force.
2. The need for further research on the implementation of the regulation of the right to health for women workers at gas stations, especially related to community factors due to stigma and patriarchal culture that causes women to still have difficulty working in the formal sector and is more emphasized to be in the domestic sector.

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# The Strategy of Defence Diplomacy in Achieving National Interests and Maintaining the Sovereignty of the Republic of Indonesia

Amany Lubis[1]

[1] Professor of Islamic Political Law at Syarif Hidayatullah State Islamic University Jakarta, Indonesia. Rector of Syarif Hidayatullah State Islamic University Jakarta. Email: amany.lubis@uinjkt.ac.id

**Abstract**
Maintaining national unity and sovereignty is Indonesia's main goal to protect the people and promote general welfare. In addition, Indonesian defense is also the main focus of the government in realizing the integrity of the country. In achieving and securing these interests, diplomacy has always been the choice of the state as the dominant way to achieve these goals. Defense diplomacy is also part of Indonesia's total diplomacy. It means that the national defense system is carried out early by the government and carried out in a total, integrated, directed, and continuous manner. In practice, the state could use the resources it has, including military, economic, political, intelligence, natural and human resources, etc. All parties must agree that in conducting diplomacy, negotiation is very vital, so it could be said that the successful negotiations could also be interpreted as victory in diplomacy. To be able to negotiate well, the strength and ability of the bargaining position is an important requirement that must be owned by a nation. The bargaining position of a nation is strongly influenced by the nation's national power and one of the prominent components of that national power is the military component. This what makes the military difficult to separate from state diplomacy. This research is designed to gain an understanding of the defense diplomacy of the Republic of Indonesia in achieving national interests and defending the sovereignty of the nation. This study aims to analyze the role of Indonesia's defense diplomacy in achieving national interests and defending the nation's sovereignty. In addition, in this research the author also analyzes the factors that influence the role of defense diplomacy in achieving national interests and maintaining national sovereignty. This study uses a qualitative method with descriptive-analytical specifications, with the data obtained through observation and literature study. Data analysis techniques are more carried out in conjunction with data collection during research. The results of the study can be concluded that the role of defense diplomacy in achieving national interests is not optimal and its achievements are still limited to only defense issues; The factors that affect the role of defense diplomacy are viewed from several dimensions, which are the dimensions of the capacity and capability of the Indonesian National Military (Tentara Nasional Indonesia/TNI), the dimensions of cooperation between agencies and the dimensions of the arranging a diplomatic strategy, and based on this situation, Indonesia must strengthen its defense diplomacy strategy in order to achieve national interests and maintain the sovereignty of the Indonesian nation.

**Keywords:** Defense Diplomacy, Sovereignty, National Interest, Diplomacy Strategy

## 1. Introduction

In international relations, each country has its own national interests. Not infrequently found, the national interests of a country intersect and even clash with the interests of other countries. This is prone to bringing the country

into tension and sometimes leading to conflict. Countries use diplomacy to secure or achieve their national interests. Diplomacy tends to be associated with soft power and the use of military force is seen as hard power. In The advance learners dictionary of current English, it is stated that "*Diplomacy is skill in making arrangements, cleverness in dealing with people so that they remain friendly and willing to help*". Meanwhile, Sir Ernest Satow, defines it as "*The application of tact and intelligence to the conduct of foreign relations between government and independent state*". (Departemen Pertahanan Republik Indonesia, 2008)

This could be interpreted that diplomacy is a skill in determining how to win our interests without causing hostility. In this case, the author provides a definition of diplomacy as the implementation of a country's foreign policy. In relation to this, the Indonesian government currently spawns a concept known as total diplomacy. In total diplomacy, all stakeholders of Indonesian diplomacy are invited to take an active (selective) role because diplomacy is essentially the responsibility of all components of the nation or the main components supported by reserve components and supporting components as well as the main elements supported by other elements as a national power. Diplomacy will be stronger, when all components of the nation participate in promoting Indonesia and fighting for Indonesia's national interests. (Setyawan & Wahyudi Sumari, 2016)

Associated with defense, defense diplomacy can be meaningful as a way to win the interests of the nation by using the military/defense as a tool or resource without having to prioritize violence as a way. Defense diplomacy could also be understood as a series of activities which are mainly carried out by representatives of the defense department or other government institutions with the aim of winning national interests in the security and defense sector by using negotiations and other diplomatic instruments. (Syawi, 2004)

In this context, defense diplomacy has consequences that must implemented totally, integrated, directed, and continuous manner as the meaning of the state defense system (hanneg) itself. For example, things that stand out and are still carried out by parts of the TNI / main components (military defense). In this context, defense diplomacy can also be interpreted as diplomacy carried out by the *TNI* for supporting foreign policy or implementing state political policies and decisions/defense policies and supporting resolving various international problems. Related to that, Martin Griffiths and Terry Callaghan stated that "*Diplomacy is the overall process conducted by a country in international relations*". (Hermansyah, 2022)

At this level, defense diplomacy, which is still conducted by the TNI, is also part of total diplomacy which is considered very strategic in order to achieve the goals of the Unitary State of the Republic of Indonesia *(Negara Kesatuan Republik Indonesia)*. Today, the use of the military in the affairs of state diplomacy is no longer considered purely as the use of violence (violence means), that is when many countries have transformed their military role into one of the diplomatic tools for achieving goals by not involving elements of violence or threats in it. Many countries have given examples of how the military has become one of the diplomatic packages whose use is not only limited to defense and security matters. An example that can be taken from the use of the military in diplomatic affairs without involving elements of violence in it and not directly related to security issues was shown by China when the country tried to win the tender for the construction of airports and roads in Tanzania. China uses its military as a diplomatic tool by providing military assistance to the Tanzanian military and contributing to the construction of thousands of houses for Tanzanian soldiers. This method succeeded in winning the hearts of the Tanzanian government and in the end the tender was won by China. The involvement of the *TNI* in state diplomacy is carried out in various roles. (Hermansyah, 2022)

To maintain world peace, the TNI has become one of the regular participants in the UN peacekeeping mission. In the ASEAN region, the TNI also plays an active role in establishing communication with the military of state friends through meeting forums such as the ASEAN Defense Ministerial Meeting which is a forum that aims to build the same perception as the armed forces of ASEAN countries and their partners regarding regional security and enhance mutual trust and identify new areas for cooperation. Indonesia has even been the initiator of the Jakarta International Defense Dialogue (JIDD) meeting, which is an international communication forum that discusses about the world security. This is in accordance with one aspect of defense diplomacy, namely building mutual trust (Defense Diplomacy for Confidence Building Measures). (Rafikasari, 2021) From the description of the explanation of the role of the TNI, the involvement of the TNI in state diplomacy is still limited to diplomacy

that is directly related to the interests of the state in defense and security. The involvement of the TNI in diplomacy in order to fight for the interests of the state in other sector, especially economics and politics, is still not significant. The military involvement in the country's total diplomacy is not yet maximal, of course, there are causes and backgrounds. It happen because, first, the relationship between institutions has not been in synergy, especially with the Ministry of Foreign Affairs. Second, the capacity and capability of the TNI is still limited in terms of its involvement in total state diplomacy. There are several conditions that must be possessed by the TNI in order to make it the country's main choice in conducting diplomacy, for example, the TNI must have a good bargaining price, bargaining position, at least in the Asian region. (Lal, 1984)

In addition, the connection of relations with the military of a particular country also affects the way they behave and the behavior of other countries towards the TNI. Thus, the TNI must be more observant in determining priorities for fostering military cooperation relations with state friends. In fact, before deciding to increase military cooperation relations with other countries, the TNI should look at the priorities of national interests that can be fought for through diplomacy by coordinating with the Ministry of Foreign Affairs regarding which countries are the targets of state diplomacy. From the brief explanation above, it could be seen that the TNI is quite actively involved in state diplomacy activities. However, the role of the TNI in diplomacy is not maximized and need to be more optimized. In fact, the military can play an important role in diplomacy to support state diplomacy. Military involvement in state diplomacy can make it easier for states to achieve their national interests. (Drab, 2018) Based on this description, the formulation of the problem that will be raised in this study is how Indonesia's defense diplomacy achieves national interests and maintains Indonesian sovereignty. Referring to the formulation of the problem, the research questions are what is the role of the TNI in the context of defense diplomacy, how to optimize the role of defense diplomacy in achieving national interests and maintaining state sovereignty, how is the relationship between the TNI and the Ministry of Foreign Affairs, as the leading sector of state diplomacy?

## 2. Literature Review: Concept and Theoretical Study

### *2.1. The Concept of a Free and Active Foreign Policy*

As regulated in Articles 2 and 5 of the Republic of Indonesia Act Number 37 Year 1999 concerning Foreign Relations, foreign relations are conducted based on Pancasila, the 1945 Constitution, foreign policy, national laws and regulations and international law and practice. The foreign policy in Articles 3 and 4 states that it adheres to the principle of free and active which is perpetuated for the national interest and implemented through diplomacy which is creative, active and anticipatory, not just routine and reactive, firm in principles and stance, as well as rational and flexible in approach. The meaning of "free and active" is a foreign policy which is not essentially a neutral policy, but a foreign policy that is free to determine attitudes and policies towards international problems and does not bind itself a priori to one world power and actively contributes both in the form of thoughts and ideas as well as active participating in resolving conflicts, disputes and other world problems, for the sake of realizing world order based on freedom, eternal peace and social justice. The first vice president of the Republic of Indonesia, Mohammad Hatta, in fromt of the Working Body of the Central Indonesian National Committee (*Badan Pekerja Komite Nasional Indonesia Pusat/BP-KNIP)* on September 2, 1948 in Yogyakarta, said: "*But should we Indonesians who fight for the independence of our nation and country, only have to choose pro Russia or not? pro american? Is there no other position we must take in pursuing our goals? The government's opinion said that the position we must take is that we should not become objects in the international political struggle, but rather we must become subjects who have the right to determine our own attitude, have the right to fight for our own goal, a fully independent Indonesia*". (Hatta, 1988)
This concept of thought was then used as the basis for the state in determining Indonesia's foreign policy, which was then set forth in the Act of the Republic of Indonesia Number 37 Year 1999 about Foreign Relations.

### *2.2. Defense Diplomacy Theory*

Defense diplomacy is a whole way and strategy through various aspects of cooperation such as economics, culture, politics, defense and diplomacy so that countries can have friendly relations, further cooperate with each other, and most importantly increase trust. Defense diplomacy is used as a tool to achieve a country's foreign policy

targets. Gregory Winger in his writing The Theory of Defense Diplomacy explains that "*Defense diplomacy is a way of using the military not for violence, such as exchange of officers, warship visits, joint military exercises in order to achieve the international interests of a country. "* Still in Winger's writings, Andre Cottey and Anthony Foster state that "*Defense diplomacy is the use* of the military in peacetime as a tool for security policy and foreign relations". It is reinforced by Martin Edmons who defines defense diplomacy as the use of the military for operations other than war by utilizing its training experience and discipline to achieve national interests both at home and abroad. (Pedrason, 2015)

The success of the implementation of defense diplomacy is highly dependent on diplomatic efforts which applied at the global, regional and bilateral levels. Of all that, diplomacy at the bilateral level plays a very important role. The success of a country's defense diplomacy strategy is a collaboration of diplomacy, defense and development components. However, partially there are main characters of a country's defense diplomacy:

1) Defense diplomacy for Confidence Building Measures;
2) Defense Diplomacy for defense capabilities;
3) Defense Diplomacy for Defense industry.

In the context of Indonesian history (Act No. 29/1954; Act No. 20/1982; Act No.1-2/1988) and its development process, defense diplomacy, including military diplomacy, is constitutionally embodied through various laws and regulations. For example, Act no. 37 Year 1999 about Foreign Relations, Act no. 24 Year 2000 about International Agreements, Act no. 3 Year 2002 about National Defense, as well as Act no. 34 Year 2004 about the TNI. In fact, Act 17/2007 has supported it by stating that defense development includes systems, TNI professionalism, development of defense technology in supporting the availability of defense equipment, reserve components, and defense support, directed at continuous efforts to realize the capability defense that goes beyond minimal defensive power. The defense capability is continuously improved so that it has a respected deterrent effect to support the bargaining position in the diplomatic arena. Likewise, the issuance of Act 17/2011 about State Intelligence which views a threat in a comprehensive/total analogy with defense diplomacy itself. (Berridge, 2005)

As a form of the implementation of defense diplomacy related to the latest military/TNI (actors) was in March 2014. The Indonesian Air Force's Boeing 737 reconnaissance plane joins 10 other countries on a mission to find the missing Malaysian Airlines plane (MH-370) that is believed to have disappeared in the Indian Ocean. In that mission, at least the nuances of diplomacy, including humanitarian diplomacy as part of the mandate of the 1945 Constitution of the Republic of Indonesia, were very strong. Departing from that description, it can be understood that the defense diplomacy carried out by the ranks of the TNI and/or military defense implemented in the execution of the task of searching for the missing aircraft can also be categorized as public diplomacy. Likewise, with regard to sending peacekeeping troops (Peace Keeping Operation/PKO) or Mechanical Yon and the like. With due observance, at least the use of TNI forces in the context of world peace tasks, must be carried out in accordance with Indonesia's foreign policy policy and provisions of national law. (Syawfi, 2009)

### *2.3. Synergy Theory*

Covey defines synergism as, "*A combination of elements or parts that can produce a better and greater output than being done alone, besides that a combination of several elements will produce a superior product."* Therefore, synergy in development means the integration of various elements that can produce better and larger outputs. Covey added that synergism will easily occur if the existing components are able to think synergistically, there is a common view and mutual respect. (Covey, 2005)

### *2.4. Strategy Concept*

Tjiptono conveyed that strategy was adopted from the Greek language which means a science or art to become a general. Strategy can also be interpreted as a plan to divide military power, use it and place it in certain places in order to achieve certain goals. Meanwhile, Rangkuti argues that strategy is a comprehensive master plan, which explains how the company will achieve all the goals that have been set based on the mission that has been set previously. Additionally, according to Joni's opinion in Anitah, strategy is the knowledge and ability to utilize all available and/or available resources to achieve the stated goals. In line with that, Mc Nichols in J. Salusu states

that strategy is an art and skill in using an organization's resources to achieve its goals through effective relationships with the environment in the most favorable conditions. From the explanation above, it can be concluded that the strategy is a plan that contains ways to achieve the goals in accordance with the vision that has been set by utilizing all available resources. (Kuswardini, 2016)

*2.5. Concept of National Interest*

National interest is a concept that is often discussed in studies and issues of international relations. Every country must have a national interest which is often the basis for every country in formulating its international relations strategy. The foreign policy of a country is strongly influenced by the national interest of that country. (Chandra & Mahindra, 2012) The state is the most dominant actor in playing a role to achieve the national interest. Experts have varying opinions in interpreting and defining national interests. According to H.J. Morgenthau, National interest is the minimum ability of a state to protect and defend its physical, political and cultural identity from interference from other countries. From this review, state leaders formulate specific policies towards other countries that are cooperative or conflicting. Meanwhile, Paul Seabury defines the national interest through two points of view, namely descriptively which has the meaning as a goal that must be achieved by a nation on a regular basis through government leadership and normatively, the national interest is a collection of ideals of a nation which the nation seeks to achieve by way of dealing with other countries. Daniel S. Paap, said that in the national interest there are several aspects, such as economy, ideology, military strength and security, morality and legality. From the explanation above, it can be concluded that the national interest is an ideal that is a target that must be achieved by the state, where these ideals have multi-dimensional political, economic, social and defense and security dimensions. (Covey, 2005)

*2.6. Foreign Policy Concept*

Foreign policy is a policy taken by the government of a country or other political community in relation to states and non-state actors in the international world. According to Walter Carlsnaes, foreign policy is actions directed to goals, conditions and actors (both governmental and non-governmental) who are outside their territory and who they want to influence. These actions are expressed in the form of explicitly stated goals, commitments and or directions, and are carried out by government representatives acting on behalf of a sovereign state or community. Meanwhile, according to K. J. Holsti, foreign policy is an action or idea designed by policy makers to solve problems or promote a change in the environment, namely in the policies of attitudes or actions of other countries. The idea of foreign policy can be divided into four components from general to more specific, which are foreign policy orientation, national role, goals, and actions. (Chandra & Mahindra, 2012)

Meanwhile, Mark R. Amstutz, defines foreign policy or policy as "*As the explicit and implicit actions of governmental officials designed to promote national interests beyond a country's territorial boundaries*". In this definition, it emphasizes the actions of government officials to design the national interest of their country in order to promote the national interest, beyond the territorial boundaries of a country. So, in general it could be said that foreign policy is a concept used by the government or state or non-government to plan and commit to be a guide in dealing with other parties in the external environment. (Holsti, 1970)

**3. Research methods**

In this study, the method used is a qualitative method with descriptive-analytical specifications, which is a research method with the intention of understanding the phenomena experienced by the subject of the perpetrator, including behavior, perception, motivation, action, and others holistically, which then expressed in the form of words and language, naturally and by utilizing various scientific methods. (Kumar, 2014) The research subjects are informants who are related in their respective fields of duty. The object of this research is the role of the TNI in defense diplomacy, the capacity and capability of the TNI in diplomacy, and the working relationship of the TNI with the Ministry of Foreign Affairs in terms of diplomacy, and the role of defense diplomacy in achieving national interests and defending the sovereignty of the Republic of Indonesia.

## 4. The Result of Research

### *4.1. The Role of TNI Defense Diplomacy*

In this defense diplomacy role, it will only focus on defense diplomacy through sending peacekeepers and placing defense attaches. This is because the two focuses, in accordance with the problems in the research, which are in the spotlight are the absence of a comprehensive defense diplomacy strategy that involves all stakeholders. This is clearly illustrated in the implementation of the defense attaché's duties. Also the use of defense diplomacy for interests other than defense and security issues is still not optimal, which could be seen in defense diplomacy through the sending of UN peacekeepers.

### *4.2. Indonesian Peace Troops*

The sending of TNI troops on peace missions is one tangible form of the implementation of defense diplomacy carried out by the TNI. One of the goals of defense diplomacy is to prevent conflict and influence the policies of the target country or at least create a positive perception of the military (TNI) or the state. There are two forms of participation that can be carried out by a country in UN peace operations, first is the countries that are members of the United Nations can participate by donating funds to support the peace operation and second, by sending peacekeepers directly to conflict areas. The involvement of the TNI in peacekeeping missions began in 1957 when for the first time the TNI sent a peacekeeping force of 559 personnel who were members of the United Nations Emergency Force (UNEF) in order to help ease the conflict between Egypt and Britain. The first mission of the TNI peacekeeping force was considered a success by the United Nations and since then the TNI has continued to gain the trust of the United Nations to assist peace in various parts of the world. The second UNOC mission in the Congo in 1960 with the number of 1,074 people, then the missions followed by the Garuda Contingent were deployed to maintain peace in various countries, including UNEF in Egypt (1973-1979), UNIMOG in Iraq (1988, 1989, 1990), UNTAC in Cambodia (1992-1992), UNIKOM in Kuwait (1993), UNPROFOR in Bosnia (1995), UNPREDEP in Macedonia (1996), UNTAES in East Solovenia (1997), UNAMSIL in Siera Leone (2002), Monuc in Congo (2004) , and since 2006 until now Indonesia has sent UNIFIL (United Nations Interim Force in Lebanon) missions to Lebanon, Kizi to Congo and Haiti and Unamid (United Nations Mission In Darfur) to Darfur-Sudan, and Mali in 2015.

So far, the implementation of the TNI's peacekeeping duties under the United Nations is considered quite successful, especially in communicating and fostering citizens in conflict areas. The application of the territorial development method in the implementation of peacekeeping tasks has produced very positive results in achieving the task. One of the areas where TNI troops are regularly stationed is in Lebanon. The opportunity to interact with local communities in South Lebanon was well utilized by the TNI. The interaction carried out by the TNI with the community in South Lebanon resulted in a very good acceptance of the presence of TNI troops in the region. Efforts to gain acceptance and management of these interactions have become a phenomenon of their own, both among the UNIFIL contingent and the Indonesian people. This phenomenon is related to the difficulty of UNIFIL contingents from other countries to be well received by the people in South Lebanon. Despite the various successes, the implementation of the tasks of the Indonesian peacekeepers, which is also a form of defense diplomacy and aims to achieve the national interest, has not been fully utilized. Military diplomacy carried out by TNI peacekeeping is only limited to issues of defense and security, even though the opportunity to be able to take advantage of this mission to achieve national interests in other fields, especially the economy is quite wide open. Several contributing countries to the UN peacekeeping force have demonstrated that in carrying out their duties, these troops also participate in marketing their domestic products in the countries where they are assigned. This certainly needs to be a concern for the TNI to be able to contribute more actively in achieving national interests to play it role as a military diplomacy.

### *4.3. Defense Attaches of the Republic of Indonesia Abroad*

Diplomatic representatives are state institutions abroad whose task is to foster relations in politics, economy, social, culture, defense and security with other countries. These duties and authorities are carried out by the

diplomatic corps, which are ambassadors, attorneys and attaches. The attaches consist of two parts, namely defense attaches and technical attaches. The defense attache is held by a military officer who is seconded to the Ministry of Foreign Affairs and is stationed at the embassy of the country concerned, and is given the position of a diplomat. The job is to provide advice in the military, defense and security to the plenipotentiary Ambassador. In carrying out their duties, the defense attache has not maximally achieved the target. It is often in their duties miscommunicate between the defense attaché and the ambassador as the head of representative. There are several cases when the mission carried out by the defense attache has not been in sync with the mission of the head of representative, so the implementation of diplomatic tasks seems to run independently. There are several factors that cause this to happen:

1) There is no common understanding that the ambassador is the head of the representative who serves as the head of mission and controls the implementation of diplomatic tasks in accredited countries. There is still an assumption that the ambassador is a representative of the Ministry of Foreign Affairs, even though the ambassador is a representative of the state to carry out the duties of state diplomacy.
2) The preparation of the mission paper by both the Ministry of Foreign Affairs and the TNI has not been carried out in a coordinated manner. The mission paper is a guide to the implementation of diplomacy in a country that contains priority targets and strategies that will be used to achieve diplomatic goals. The preparation of the mission paper for the head of representative is still being carried out by the ambassador candidate and has not been carried out by the Ministry of Foreign Affairs so that the mission paper has not been achieved. However, what is even more unfortunate is that most, if not all, of the Indonesian Defense Attaches do not have mission papers to guide the implementation of their diplomatic duties.

### *4.4. TNI's Capacity and Capability in Implementing Defense Diplomacy*

In the implementation of defense diplomacy, the capacity and capability of the military is one of the main determinants of the successful implementation of such diplomacy. A military that has good capacity and capability tends to be successful in doing its diplomatic mission. It is common knowledge that diplomacy carried out generally aims to change or influence a country's policies, either by hard or by subtle means, which in practice often makes bargaining, so that a strong bargaining position guarantees the success of the diplomacy being carried out. The bargaining position of diplomatic instruments, in this case is the military, highly dependent on the capacities and capabilities it has. Currently, the capacity possessed by the TNI is still far from being expected to be able to carry out military diplomacy tasks with the target of being able to influence or change the policies of the target country. The TNI does not yet have the means to accommodate military diplomacy such as completeness of weapons and defense equipment as well as ideal budget support.

The bargaining position of the military is very dependent on the strength of the military, especially in terms of the completeness of war equipment. In capabilities that lead to diplomatic tasks, it is openly acknowledged that the TNI also does not have sufficient capabilities both in personnel and strategy. In term of personnel, it is realized that TNI personnel still do not have the knowledge and abilities expected in diplomacy. Limitations of language and insight become the dominant obstacle in doing diplomatic tasks. Currently, the TNI has a lot of cooperation with the military of state friends, both through joint training programs, education and operations. From this collaboration, not a few TNI soldiers were sent abroad to carry out these programs, but it must be admitted that the contribution of soldiers, especially those related to diplomacy, still needs to be increased. In terms of strategy, TNI still needs to reformulate an accurate and comprehensive strategy in diplomacy.

Diplomatic activities carried out by the TNI, both by TNI Headquarters and Army Headquarters, are continuously implemented and have even become a permanent program, but their implementation has not been structured in a complete TNI diplomacy strategy. The implementation of diplomacy by the forces (army, navy and air force) is still implemented separately without a clear strategy so that the results couldn’t be felt. This is what prompted the TNI Commander, Marshal Hadi Tjahjanto, in his work program to include strengthening military diplomacy as one of the targets to be achieved. The implementation of diplomacy doing by the Army, Navy and Air Force and even TNI Headquarters still seems to be a mere routine program without any specific achievement targets like a

strategy. Each force's diplomacy has not been based on a certain strategy that requires a predetermined achievement target.

## 5. Discussion of the Research Results

In achieving and securing the interests of the state, diplomacy has always been the choice of the state as the dominant way to achieve the goals. Practically, the state can use the sources of power it has, including military, economic, political, intelligence and so on. The use of the military as an instrument in diplomacy has become unavoidable. Furthermore, the following authors describe further explanations related to the results of the study, as follows:

### *5.1. The Role of the TNI's Defense Diplomacy in the UN Peacekeeping Force*

The sending of peacekeepers who are members of the UN peacekeeping mission is a form of the Indonesian government's strong commitment to world peace as well as giving importance to the implementation of foreign relations and a real manifestation of a free and active foreign policy. Also for improving Indonesia's image in the international world. In doing the task of maintaining world peace, the TNI as one of the spearheads of military forces representing Indonesia under the control of the United Nations has achieved many successes so that it continues to gain the trust of the United Nations to carry out peace missions. In the context of diplomacy, the success of TNI troops in UN missions indirectly, besides playing the role of military diplomacy, also plays the role of public diplomacy. The implementation of the territorial development method in peacekeeping mission by the TNI in its implementation, social communication and interaction with the community are routinely carried out by TNI troops. Public diplomacy is one of the diplomatic strategies played by many countries in order to influence the perceptions and opinions of the people of other countries through psychological approaches to achieve their political agendas and goals. This, according to the definition given by Jarol B. Mainheim, public diplomacy has the meaning as an attempt by a country to influence public opinion and leaders in other countries with the aim of facilitating the achievement of the goals of its foreign policy. The application of the territorial development method is a very effective of taking a psychological approach to the community in while doing the mission.

The application of the method of territorial development which implemented by TNI troops includes several things, among others; providing assistance to the community around the operating area, assistance to schools, providing assistance to orphanages, medical assistance or treatment for residents around the operating area, as well as visits religious events which involve the community leaders. It is not surprising that the public's acceptance of the TNI in each of its peacekeeping mission is very good. The TNI's ability to interact with the community as well as sensitivity to the environment is the basic capital for TNI soldiers in developing defense diplomacy, especially related to the implementation of public diplomacy. The TNI's ability to take a psychological approach to the community in the assigned area can certainly provide good opportunities in state diplomacy in order to achieve national interests, considering that public opinion in a country will greatly influence the country's political policies. Several countries have used their peacekeepers to carry out diplomacy by strengthening public diplomacy strategies in order to achieve their economic goals. One example of a country that has done this is the South Korean peacekeeping force when assigned to Lebanon. The success of public diplomacy carried out by South Korean peacekeepers has succeeded in influencing the perception of the Lebanese community, especially regarding the production of South Korean-made vehicles. Unfortunately, the TNI has not done the same. Meanwhile, the non-optimal use of TNI peacekeepers in conducting defense diplomacy for economic purposes may be due to the lack of a common understanding that diplomatic activities carried out by any institution can be an entry point to achieve national interests regardless of the form of their interests. The sending of TNI peacekeepers is still considered a purely defense matter and has no connection with other national interests. Such thinking makes it difficult for synchronization in the formulation of a comprehensive diplomacy strategy between government institutions.

### *5.2. Defense Attache of the Republic of Indonesia*

One of the dimensions of defense diplomacy is the exchange or placement of defense attaches as the mouthpiece of the country's defense policy. To applied the function of defense diplomacy, the role of a defense attaché is very

important. In addition, to do their main duties, defense attaches play a role in realizing defense interests and are able to improve bilateral relations through improving the quality of relations and cooperation in the defense sector. In carrying out diplomatic duties, the Indonesian Defense Attaché is part of the Indonesian diplomatic mission within the Indonesian Embassy *(Kedutaan Besar Republik Indonesia/KBRI)* which is headed by the Ambassador Extraordinary and Plenipotentiary *(Duta Luar Biasa dan Berkuasa Penuh/LBBP)*. As part of Indonesia's diplomatic mission, it is appropriate that the Indonesian Defense Attaché in doing his mission must be in line with the diplomatic mission formulated by the *LBBP* Ambassador as head of mission.

The existence of asymmetry between the missions carried out by the *LBBP* Ambassador and the Indonesian Defense Attaché certainly has a negative impact on the efforts to achieve national interests which has been executed by diplomatic representative offices in a country. As explained in the research sub-chapter, there is a critical factor that causing desynchronize the mission of the Indonesian Defense Attachee with the mission carried by the *LBBP* Ambassador, which is in the preparation of the mission paper by the *LBBP* Ambassador, was not coordinating properly with the Indonesian Defense Attachee. The existence of a common vision between the *LBBP* Ambassador as the head of the Indonesian diplomatic representative office abroad and the components of diplomacy actors including the Indonesian Defense Attaché under his representative office, is very important in ensuring the successful implementation of the diplomatic tasks by the Indonesian representative office. With this common vision, it will facilitate the creation of synergy between diplomacy actors from various institutions in order to achieve the national interest easily.

### *5.3. TNI's Capacity and Capability in Implementing the Defense Diplomacy*

Referring to the results of research, it is recognized that our military capacity and capability still need to be improved, of course this indirectly implies that our military's bargaining position in diplomacy is not yet at an ideal level. To achieve the ideal conditions, an armed force is very dependent on the allocation of the military budget provided by the state, and this cannot be separated from the national budget or state budget. The financial capability of the armed forces can be a bargaining chip in the implementation of military diplomacy. This ability is very powerful in influencing the policies of a country. It is very clearly illustrated in the pattern of military diplomacy applied by the American military. The American military diplomacy method is called military aid or military assistance. Every year, America spends more than billions of dollars in providing military aid to dozens of countries around the world, expected that the aid will strengthen America's influence over the recipient countries. In terms of dealing with terrorism, America has provided military assistance to many countries, including; Azerbaijan, Tajikistan, Pakistan, Ethiopia, Nigeria, Oman, Yemen, Georgia, Uzbekistan and Columbia. The results of this military assistance were very clearly seen when Georgia as a token of gratitude was willing to send 2000 military personnel to help the American military who was fighting in Iraq. Patterns like this become a weapon for America to regulate the policies of a country. Military aid is America's medium of exchange with the policies of the recipient country. As long as the recipient country is willing to change its policies to be in line with American interests, the military assistance continues to flow. The example of the pattern applied by the American military in strengthening its military bargaining position through the military aid program cannot be fully implemented in our defense diplomacy, considering that, as we all know, the state's financial capacity is still not able to meet the needs of the state defense budget. However, the pattern of using military assistance is not the only way to improve defense diplomacy capabilities. Military assistance also does not always have to be related to aid in the form of funds or donations of war equipment, but military assistance can be provided in the form of military assistance in the field of training and operations.

### *5.4. The Relations between the TNI and the Ministry of Foreign Affairs in diplomacy*

Faced with the relationship between the TNI and the Ministry of Foreign Affairs, especially with regard to diplomacy, in general, the results of the research seem to be going well. Regular communication is established between the two institutions in discussing diplomatic issues. However, the communication that has been established is only limited to operational matters, while at the policy level it has not gone well, especially related to the preparation of diplomatic strategies. In general, the decision-making process and policy formulation at the Ministry of Foreign Affairs are based on two dimensions, namely reactive and routine (regular). In the context of

routine formulation, the Ministry of Foreign Affairs will base its activities and policies on the annual Work Plan of Ministries of Agencies *(Rencana Kerja Kementerian Lembaga/Renja-KL).* This plan is usually held one year before the start of the budget. There is a crucial thing that causes the preparation of a joint diplomacy strategy between the TNI and the Ministry of Foreign Affairs has not been able to work, which until now the Ministry of Foreign Affairs does not yet have a white book or white paper on diplomacy policies that become a reference for a national diplomacy, although at the level of on-daily diplomacy policy coordination base has been going well. Diplomatic policy white paper is an important thing for the Ministry of Foreign Affairs because the white paper will be a reference and corridor for the preparation of diplomacy strategies by government agencies that carry out diplomatic activities.

Even though it is generally understood that diplomacy has many scopes, as much as the terms of the scope of defense development, without neglecting all of them to be realized according to their priorities. TNI's military diplomacy is part of Indonesia's total/defense diplomacy. Its application cannot be separated from the comprehensive/total results of a state policy and political decision. Where in turn, the implementation is carried out by state instruments in defense, based on legislation or Act No.37/1999 Article 10. It is stated that the sending of troops or peacekeeping missions is determined by the president by considering the opinion of the House of Representative *(Dewan Perwakilan Rakyat/DPR).* In other words, the task of the Garuda Contingent so far can in turn be categorized as public diplomacy. The main argument for this categorization is taken from the thoughts of Paul Sharp which states that public diplomacy is "*the process by which direct relations with people in a country are pursued to advance interests and extend the values of those being represented"*

From that definition, it is stated that public diplomacy is a process in which direct relations are carried out with the people of a country in order to fight for the national interest and spread its values. More sharply, Anthony Pratkanis defines public diplomacy as "*the promotion of the national interest by informing and influencing the citizen of other nations*". In public diplomacy, it is clearly stated that the public diplomacy is for the people of other countries and not for the government elite or political entities. In addition, public diplomacy is also an effort to promote national interests through influences in the form of changing/forming public opinion and perceptions, beliefs, attitudes and habits, expectations, and motivations in the desired direction. In practice, the principles developed in public diplomacy are, in fact, already embedded within the TNI soldiers.

Particullary, within the Air force, known as territorial development or binter, which both aim to win the hearts of the people. In line with that, it can be said that the military diplomacy that has been practiced so far has applied the principles of (public) diplomacy in order to win the hearts and minds of the local people in the territory of the country where the Garuda Contingent is assigned. The universal and basic (intrinsic) values shown in the attitudes and behavior of TNI soldiers in the UN peace/humanitarian mission have proven to be well received and appreciated by all parties. Armed with this positive reality, the opportunity for the TNI to continue to take part in international fora is predicted to remain. In fact, it will continue to increase along with the spread of conflicts in various parts of the world and the increasing world's trust in the Indonesian government as a country that upholds and loves peace and independence/sovereignty.

But, it is not time for the TNI to be complacent. The road to sharpening the optimal capabilities of military diplomacy for TNI Soldiers who are members of the Garuda Contingent, in strategic, operational and tactical levels is still quite long and winding. TNI leaders need to formulate a policy that refers to the laws and regulations so that the military's diplomacy capabilities are increasingly qualified from time to time. Not only just skill based, but also knowledge based. Diplomacy experts and practitioners need to be invited and give advice so, the policies that drawn up could be synergize with other diplomatic efforts, especially the Ministry of Foreign Affairs (oneway gate) because the successful of total diplomacy is not only the success of the government, but also in all components/nations of Indonesia, and the results of total diplomacy will ultimately be shared by all Indonesian people. In this context, the success achieved by Garuda soldiers in every UN peacekeeping mission has resulted in the support, trust and respect of the international community for the Indonesian nation and state in UN forums.

This proud thing in turn really helps Indonesia in implementing and continuing development in order to achieve national goals. It is no exaggeration if military/TNI diplomacy through the delivery of the Garuda Contingent

always needs to be maintained and improved with full confidence and enthusiasm for its success. As reflected in the greetings of every TNI soldier who served in every UN peacekeeping mission. Since the 1956s, Indonesia has built mutual trust among friendly countries as part of enhancing defense diplomacy by repeatedly sending troops or peacekeeping missions as part of implementing foreign policy supported by various laws, regulations and fully supported by the Indonesian government as the instruction of Indonesian Constitution 1945

## 6. Conclusion

Based on the results and analysis of the research focus that has been described in the previous chapter, it can be concluded several things as follows:

1. The role of TNI defense diplomacy is generally seen from the two roles played, which become part of the UN peacekeeping force, the TNI has played an active role in supporting diplomacy, especially public diplomacy by forming a positive image of the TNI and Indonesia in the eyes of the public in doing the operation. However, the TNI's success in diplomacy has yet to be utilized to support other national interests, especially the nation's interests in the economy. The diplomacy carried out by the TNI in its involvement as part of the UN peacekeeping force is only limited to efforts to achieve national interests in the defense sector. Furthermore, the TNI's defense diplomacy by sending the Indonesian Defense Attaché in a country has not yet achieved optimal because of the miscommunication and discrepancies between the diplomatic priorities of the head of mission, the ambassador, and the diplomatic priorities of the Indonesian Defense Attache. This condition occurs because there is no coordination and synchronization between relevant ministries and institutions in the preparation of mission papers for the Indonesian diplomatic representative office
2. The capacity and capability of the TNI in supporting TNI defense diplomacy is still not in an ideal condition. The ability of the defense equipment and combat equipment of the TNI is still not able to provide a maximum deterrent effect in order to increase Indonesia's bargaining position in the international community. In addition, the ability of budget support to support defense diplomacy is still limited so that the flexibility in carrying out diplomacy is limited. The ability of TNI personnel as diplomatic officers is also still limited, this reduces the effectiveness of the TNI in doing diplomacy.
3. The relationship between the Ministry of Foreign Affairs and the TNI in terms of diplomacy is generally well established. Coordination and communication relations have been going well at the operational level, but at the strategic level, especially in the preparation of a joint strategy with diplomacy, it is still need to be improved. The Ministry of Foreign Affairs has not yet involved the TNI in diplomatic affairs at a strategic level, although the diplomacy issues discussed have relevance to the TNI.
4. The shifting behavior in resolving conflict problems from aggressive to prioritize softer ways through negotiation (diplomacy) does not eliminate the importance of the military role (soft power soldiers/TNI) as part of military defense which was previously interpreted in its historical context as part of Indonesian Armed Forces's *(Angkatan Bersenjata Republik Indonesia)* dual function role. Although external threats (multidimensional military/traditional/conventional threats) which come from other countries to fellow sovereign countries have a small chance to occur. Considering the increasing role of various international institutions, such as the United Nations through consultations and negotiations. However, this will never be able to erase the military's very important role in increasing a country's bargaining position in diplomacy with other countries and maintaining the existence of a country. Likewise, there is a priority strategic target for bilateral cooperation (US-Indonesia). Therefore, total diplomacy and successively lower hierarchies carried out by all stakeholders must continue to be carried out. Besides the realization of defense development, especially military/TNI defense (professional-soft power TNI) which is directed at continuous efforts to realize defense capabilities that exceed the minimum defense power. Then, the defense capabilities were continuously improved to have a respected and formidable deterrent effect.

## 7. Suggestion

Based on the conclusions above, the authors convey suggestions that need to be followed up, which are:

1. Arrange the Standard Operational Procedures (SOPs) in preparation of diplomacy strategies within the TNI to regulate the coordination of the management of TNI defense diplomacy, while at the

national level it is necessary to have a Joint Agreement *(Surat Kesepakatan Bersama/SKB)* among the ministries to minitreis and to the institutions to coordinate the preparation of diplomacy strategies as a solution to the absence of derivative rules from Act Number 37 of 1999, about Foreign Relations. With the SOP and SKB, the preparation of diplomatic strategies both at the national level and especially at the TNI level can be done properly and directed.

2. Prepare a white paper on TNI diplomacy as a reference in the preparation of TNI diplomacy strategies, so that the direction of diplomacy carried out by the TNI can be more measurable and directed.
3. Currently within the TNI there is no unit specifically in charge of TNI defense diplomacy. In order to facilitate the preparation of the TNI's defense diplomacy strategy, it is necessary to form a special unit that is specifically in TNI defense diplomacy.

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# Servant Leadership, Innovativeness, and Servant Performance

Ana Mariana[1], Bram Hadianto[2], Catherine Suyanto[3]

[1] Management Department, Business Faculty, Maranatha Christian University.
Email: ana.m4riana@gmail.com
[2] Management Department, Business Faculty, Maranatha Christian University.
Email: bram.hadianto@eco.maranatha.edu
[3] Management Department, Business Faculty, Maranatha Christian University.
Email: catherinesuyanto17@gmail.com

Correspondence: Bram Hadianto, Management Department, Business Faculty, Maranatha Christian University, Jl. Prof. drg. Suria Sumantri, MPH. No. 65, Bandung, Indonesia. Email: bram.hadianto@eco.maranatha.edu

**Abstract**
This study aims to examine and analyzes the effect of servant leadership on servant performance and innovativeness. Besides, the impact of servant leadership on innovativeness is also checked and analyzed. Moreover, to attain this goal, this study applies the servants from one of the churches in Bandung: *Gereja Kristen Kemah Daud,* as a population. Based on the calculation of Issac dan Michael's formula, the samples needed are 164. However, after data collection by survey in November 2021, the responded servants were 90. Therefore, the response rate is 54.88%. This study utilizes a structural equation model based on a partial least square by considering the total samples below 100. After testing the data, this study concludes that servant leadership positively affects servant performance and innovativeness. Also, this positive sign is obtained in the association between servant leadership and innovativeness.

**Keywords:** Innovativeness, Servant Leadership, Servant Performance

## 1. Introduction

The church is the body of Christ (Barth, 1958). Furthermore, God sets the people to be apostles, prophets, and teachers to serve the congregations as the body (I Corinthians 12:28, KJV). Indeed, to execute it well, they are equipped with specific gifts from Holy Spirit: speaking with wisdom and knowledge, getting faith, performing healing, miracles, and prophecy, discriminating various spirits, and speaking and translating the tongues (I Corinthians 12: 8-10, KJV). According to Ngatang (2010), wisdom becomes a tool for leaders to create proper leadership.

Related to this issue, what is leadership style suitable for the congregation? The biblical papers recommend that servant leadership be precise for the church (Flanike, 2006; Machokoto, 2019; Lewis, 2019; Du Plessis & Nkambule, 2020; Kambey, 2022). It happens because Jesus Christ teaches His disciples to be servants (see Matthew 20:26-28 and Luke 22:27, KJV). Besides, He proves what He teaches by cleaning the foot of His disciples (see John 13:14, KJV). Also, Paul in Philippians 2:7 (KJV) affirms what Jesus takes place in His incarnation as

the man as the servant. Furthermore, this leadership will direct the congregations' lifetime toward Jesus Christ (Fransisca & Laukapitang, 2020) through faith-building through Biblical study (Hill, 2014).

During the Covid-19 pandemic, churches need innovation, especially in worship, teaching, evangelism, service, and fellowship (Covarrubias et al., 2021). Because of the social distance to prevent coronavirus infection, these activities are no longer conducted on-site but virtually (Mahiya & Murisi, 2022). Furthermore, churches use live streaming media to facilitate worship, such as YouTube, which everyone can access (Kgatle, 2020), and online platform meetings, like Zoom, to make fellowship (Mahiya & Murisi, 2022), which their invited members can join (Addo, 2021).

The papers focusing on servant leadership in the church are numerous. Unfortunately, they are conceptual and do not statistically examine the relationship between servant leadership and performance (Flanike, 2006; Machokoto, 2019; Lewis, 2019; Du Plessis & Nkambule, 2020). The papers with employees from non-organizational churches dominate this research: faculty members (Saleem et al., 2020), employees working in the third sectoral entity (Hernández-Perlines & Andrés Araya-Castillo, 2020), forest department (Tripathi et al., 2021), university (Sarwar et al. 2022).

Related to innovation, the study of Parulian S. et al.(2021) only describes the survey outcome about leadership in the church. Unfortunately, it does not statistically associate innovation with servant leadership and performance. Also, the existing papers investigating the relationship between servant leadership and innovation still utilize the employees working in a manufacturing company (Opoku et al., 2019), the third sectoral entity (Hernández-Perlines & Andrés Araya-Castillo, 2020), firms in the sector of information technology and communication (Iqbal et al., 2020; Bou Reslan et al., 2021). Besides, the manuscripts investigating the association between innovation and performance take the employees working in small-medium firms (Saunila, 2017) and the third sectoral entity (Hernández-Perlines & Andrés Araya-Castillo, 2020).

Regarding these gaps, this study wants to enrich theological research literature with the quantitative method through hypothesis development by surveying the servants of congregations in *Gereja Kristen Kemah Daud*, Bandung. Furthermore, the servants intended are under the board of elders as the top leader in the organizational structure.

## 2. Literature Review and Hypothesis Development

### *2.1. Servant leadership and performance*

In their study, Hernández-Perlines and Andrés Araya-Castillo (2020) demonstrate a positive association between servant leadership and the performance of the employee working in the third sectoral entity. Employing employees in the Forest Department of Uttar Pradesh, Tripathi et al. (2021) confirm this positive tendency. Sarwar et al. (2022) also confirmed this positive sign when inspecting the impact of love, altruism, trust, and service as four dimensions of servant leadership on the enactment of employees from the University of Sargodha. However, empowerment as another dimension of servant leadership does not affect this performance. Besides, by utilizing faculty members in Pakistan as the samples, Saleem et al. (2020) prove a positive tendency of servant leadership on subordinates' job performance. By denoting this evidence, this study offers the first hypothesis as follows.
$H_1$: Servant leadership positively affects servant performance

### *2.2. Servant leadership and innovativeness*

With servant leadership in manufacturing firms, Opoku, Choi, and Kang (2019) prove that the company can create innovative employees to search for new working techniques and to support and implement creative ideas in their workplace. In their study, Hernández-Perlines and Andrés Araya-Castillo (2020) demonstrate a positive association between servant leadership and innovative capability. Besides, Iqbal et al. (2020) affirm this evidence when researching employees working in an information technology company in Pakistan. Also, Bou Reslan et al. (2021) demonstrate that by applying servant leadership in the information and communication technology

companies in Latvia, the innovative working of employees becomes increases. By denoting this evidence, this study offers the second hypothesis as follows.
$H_2$: Servant leadership positively affects innovativeness.

*2.3. Innovativeness and servant performance*

Saunila (2017) uses the innovative capability aspects covering seven dimensions: (1) external knowledge, (2) work climate and well-being, (3) creativity and organizing structures, (4) regeneration, (5) participatory leadership culture, (6) individual activity, and (7) know-how development. Furthermore, she relates them with performance based on the perception of managers and employees in Finnish small and medium firms. Based on the managers' perspective, the performance is affected by dimensions three positively and five negatively. By mentioning the employees' viewpoints, the achievement is only positively influenced by the seventh. Furthermore, in their study, Hernández-Perlines and Andrés Araya-Castillo (2020) demonstrate that innovative capability is positively associated with performance. By denoting this evidence, this study offers the third hypothesis as follows.
$H_3$: Innovativeness positively affects servant performance

*2.4. Research Model*

By denoting three hypotheses formulated previously, the research model can be seen in the first diagram:

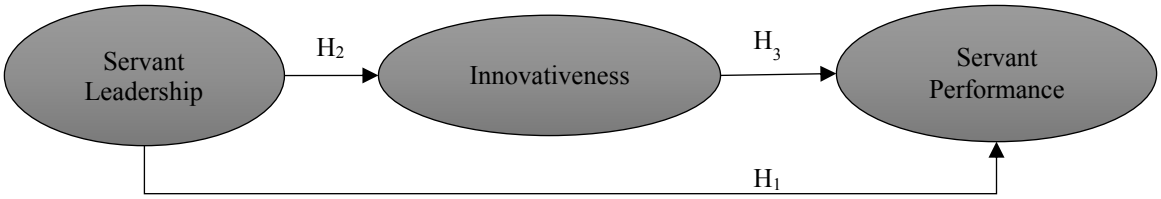


Diagram 1: Research Model
*Source: Hypothesis Developed*

**3. Research Method**

*3.1. Variable Definition*

Servant leadership (SL) acts as an exogenous variable in this study. Meanwhile, innovative capability (IC) and servant performance (SP) are endogenous. Mentioning Hernández-Perlines and Andrés Araya-Castillo (2020), SL is modeled as the first-order construct covering ten items (see Table 1).

Table 1: Servant leadership and its items

| Indicator | Source |
|---|---|
| SL1: My leader executes his preaching.<br>SL2: My leader serves the people without seeing race, gender, religion, etc.<br>SL3: My leader perceives that his service is the responsibility of the others<br>SL4: My leader acts humanly to everyone.<br>SL5: My leader always prioritizes serving.<br>SL6: My leader surrenders his life to assist everyone.<br>SL7: My leader teaches me to have self-assurance rather than fear.<br>S8: My leader is honest.<br>S9: My leader contributes his work to society.<br>S10: My leader encourages values exceeding his self-interest and successful substances. | Hernández-Perlines and Andrés Araya-Castillo (2020) |

Additionally, innovativeness (INN) is modeled as the second-order construct by mentioning and modifying the items of Ruvio et al. (2014) in five dimensions: openness, future orientation, risk-taking, and proactiveness. Furthermore, each item of these dimensions is available in Table 2.

Table 2: The innovativeness: Its dimensions and their items

| Dimension | Indicator | Source |
|---|---|---|
| Creativity | My leader stimulates me to be creative (C1).<br>My leader can solve the problem creatively (C2).<br>My leader requests that I develop service in the ministry (C3).<br>My leader respects my creativity (C4).<br>My leader encourages me to use a Holy Bible-based approach to handle the problems (C5). | Ruvio et al. (2014) |
| Openness | My church allows me to give my opinion (O1).<br>My church allows me to create and develop ideas (O2).<br>My church is positively open to change (O3).<br>My leader constantly searches for new ways to solve problems (O4). | |
| Future orientation | My church sets clear goals (FO1).<br>My leader ensures that the servants have the same vision (FO2).<br>My leader communicates the future direction to the follower (FO3).<br>My leader has a realistic vision for each ministry (FO4). | |
| Risk-taking | The riskier the action, the higher the benefit (RT1)<br>My church applies an innovative strategy to take risks (RT2). My church prefers ministry with risk (RT3).<br>My church does not like to play it safe (RT4) | |
| Proactiveness | My leader searches for opportunities for ministry development (P1).<br>My leader initiatively shapes the environment for the result (P2).<br>My leader always modified the function of ministry for the congregation (P3).<br>My leader imitatively introduces a new administrative method to serve the congregation (P4). | |

Furthermore, servant performance (SP) acts as the dependent variable. Again, to measure it, this research utilizes the idea of Otniel and Ardi (2022) based on the Christian values: spiritual gifts, heart, abilities, personality, dan experience (Warren, 2002). Based on them, this study proposes the items to measure servant performance:

1. The servant can develop and utilize my talents from God to serve the congregations (SP1).
2. The servant assists the community with all of my heart (SP2).
3. The servant utilizes the capability to help God through assemblies (SP3).
4. The servant uses the Christ-based temperament to serve God through communities well (SP4).
5. The servant shares the experiences with God to strengthen the faith of the congregations (SP5).

*3.2. Population and Samples*

As the population, this study employs the servants from *Gereja Kristen Kemah Daud,* Bandung, where the size (N) is 284. The formula of Issac dan Michael in Sugiyono (2017) is utilized to calculate the number of representative samples (RS). Moreover, this formula adopts the chi-square at the 5% significance level, P and Q of 0.5, and d of 0.05 (see the first equation).

$$\text{RS} = \frac{\chi^2\ statistic.N.P.Q}{d^2(N-1)+\chi^2\ statistic(0{,}5)(0{,}5)} = \frac{\chi^2\ statistic.N.(0{,}5)(0{,}5)}{0{,}05^2(N-1)+\chi^2\ statistic(0{,}5)(0{,}5)} \quad (1)$$

After this formula is utilized, we find $\text{RS} = \frac{3.841.(284)(0.5)(0.5)}{0{,}05^2(284-1)+3{,}841(0.5)(0.5)} = \frac{272.74}{1.67} = 163.529 \approx 164$. Moreover, this study uses the simple random sampling method to take them.

*3.3. Method for data collection*

This research surveys the respondents as samples to get their responses to items. According to Hartono (2013), this survey involves questionnaire distribution utilizing a five-point Likert scale, between 1 and 5, to demonstrate agreement and disagreement, respectively. Based on a survey in November 2021, of 164 servants selected as the sample, only 90 persons joined. Therefore, the response rate is 90/164 x 100% = 54.88%.

*3.4. Method for analyzing responses*

Because the total number of respondents is below 100, i.e., 90, this study employs the structural equation model based on variance to analyze the obtained response, as Ghozali (2021) explains. Moreover, the intended model can be seen in the second and third equations.

$$INN = \gamma_1 SL + \zeta_1 \quad (3)$$

$$SP = \gamma_2 SL + \beta_1 INN + \zeta_2 \quad (4)$$

Next, we test the validity and reliability of the collected responses. The answer to items or all items in each dimension is accurate if the loading factor is higher than 0.7 (Ghozali, 2017) and reliable if the Cronbach Alpha for them is above 0.7 (Ghozali, 2018).

Then, this model needs assessment by analyzing the contribution of all dependent variables (R-square), effect size (f-square), and predictive relevance (Q-square) (Ghozali, 2021).

- The cut-off value of the R-square for low, middle, and high contributions is 0.19, 0.33.and 0.67.
- The cut-off value of the f-square for weak, middle, and strong influence is 0.02, 0.15, and 0.35.
- If the Q-square is higher than 0, the model has predictive relevance.

Finally, to examine the proposed hypotheses, we compare the probability of the t-statistic with a 5% significance level for $\gamma$ and $\beta$. The research hypotheses are acceptable if this value is lower than 5%.

**4. Result and Discussion**

*4.1. The organizational structure of Gereja Kristen Kemah Daud*

Denoting the organizational structure of *Gereja Kristen Kemah Daud* (GKKD) in Bandung in the second diagram, the intended servants have a position under the elder board of three members. Under this board, the general secretary, assisted by office staff members and the treasurer, exists. In the line and staff organization, the deacon bureau performs as an adviser for the general secretary to formulate the policy in the church.

Under the general secretary, two shepherding departments exist. The first is for managing the established areas in Bandung; the second is for managing the development areas outside Bandung. Besides them, the youth department exists. Furthermore, apostolic, teaching, social service and congregation enablement, prophetic, and digital departments are available.

- The apostolic department has four divisions: (1) pionner, (2) maturation, (3) information and communication, and (4) area coordination of West Java.
- The teaching department has two divisions: (1) substance and curriculum and (2) training and equipment.
- The department of social service and congregation enablement department has two divisions. The first is related to the service to society, and the second is associated with the involvement of people in church activities.
- The prophetic department has six divisions: (1) praying, (2) worship leader, (3) choir and singer, (4) music, (5) dancer, and (6) assistance.
- The digital department has three divisions: (1) digital image, (2) content creator, and (3) technological information and media.

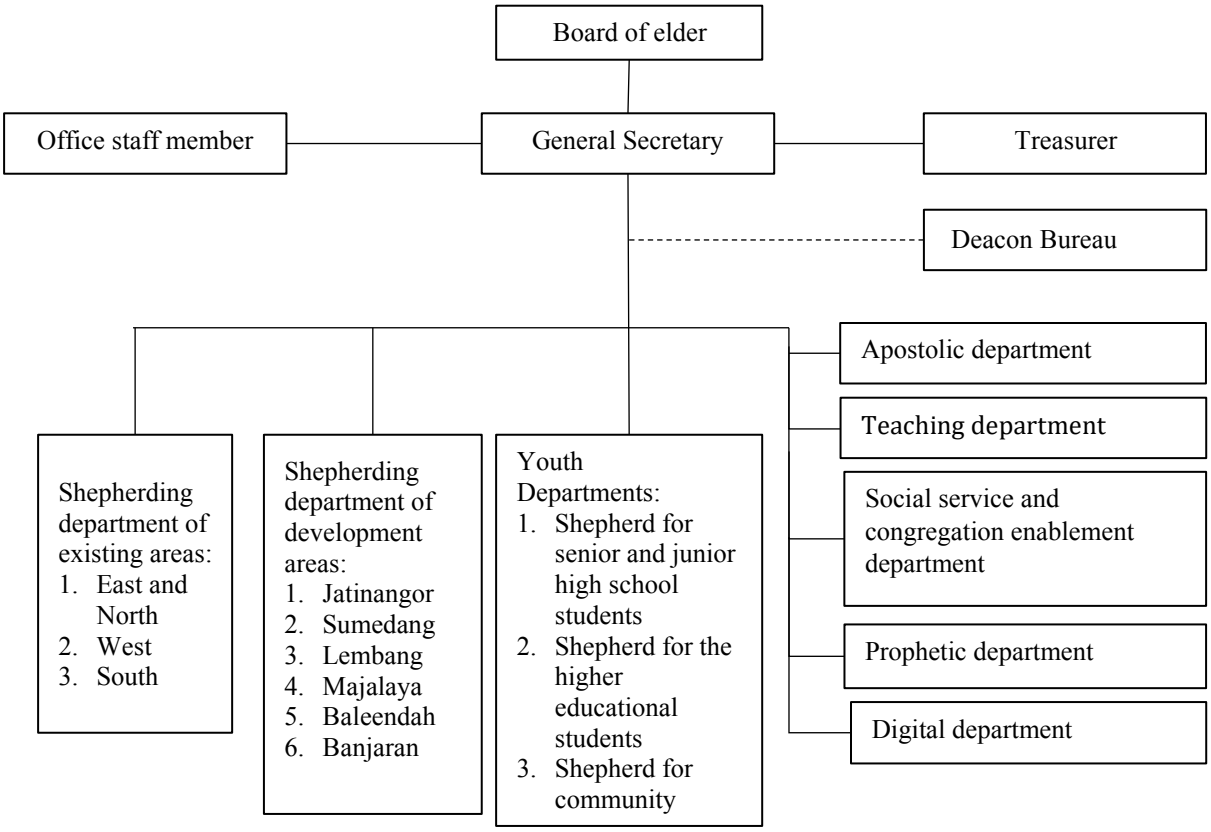


Diagram 2: Organizational Structure of *Gereja Kristen Kemah Daud* in Bandung
*Source: GKKD database*

*4.2. Descriptive Statistics*

Of 164 servants chosen as the samples in *Gereja Kristen Kemah Daud*, only 90 persons give a complete response to the items. Furthermore, they are classified by demographic features, like age, gender, and last formal education, and church-related features, like position and duration to serve. The intended detail on the classification is obtainable in Table 3.

Table 3: The demographic and church-related features

| Feature | Description | Total |
|---|---|---|
| Age | < 30 years old | 2 |
| | 36 – 40 years old | 12 |
| | 41 – 45 years old | 23 |
| | 46 – 50 years old | 21 |
| | 51 – 55 years old | 23 |
| | 56 – 60 years old | 7 |
| | Above 60 years old | 2 |
| Gender | Man | 52 |
| | Woman | 38 |
| Last formal education | Senior high school | 12 |
| | Vocational school | 11 |
| | Bachelor | 56 |
| | Master | 10 |
| | Doctor | 1 |

Table 3: The demographic and church-related features

| Feature | Description | Total |
|---|---|---|
| Position in the church | Office administrative staff | 1 |
| | The head of shepherding and non-shepherding departments | 9 |
| | The pastors in shepherding departments | 13 |
| | Division coordinators in the non-shepherding departments | 17 |
| | Deacon Bureau | 22 |
| | Leader of the fellowship | 19 |
| Duration to serve in the church | From 0 to 5 years | 6 |
| | From 6 to 10 years | 10 |
| | From 11 to15 years | 5 |
| | From 16 to 20 years | 15 |
| | From 21 to 25 years | 20 |
| | From 26 to 30 years | 20 |
| | From 31 to 35 years | 11 |
| | From 36 to 40 years | 3 |

*4.3. Instrumental Testing Result*

At the starting step, this study finds some invalid items: SL10, O2, RT1, P1, and SP5 with loading factors below 0.5: 0.432, 0.467, -0.055, 0.428, 0.449. After that, this study removed them, and the result is shown in Table 4:

a. The loading factor of SL1 until SL9 is more significant than 0.5: 0.641, 0.626, 0.519, 0.609, 0.675, 0.586, 0.501, 0.711, and 0.658. Therefore, the answers to these indicators are accurate.
b. The loading factor of CR1 until CR4 is higher than 0.5: 0.804, 0.721, 0.808, and 0.766. Hence, the answers to these indicators are accurate. Similarly, the loading factor above 0.5 exists in O1, O3, and O4: 0.737, 0.847, and 0.879, FO1, FO2, FO3, and FO4: 0.639, 0.724, 0.710, and 0.763, RT2, RT3, and RT4: 0.845, 0.768, and 0.823, P2, P3, and P4: 0.591, 0.816, and 0.808. Also, the loading factor for LV_CR, LV_O, LV_FO, LV_RT, and LV_P is higher than 0.5: 0.800, 0.835, 0.870, 0.803, and 0.835. Thus, the dimensions meet the validity.
c. The loading factor of SP1 until SP4 is upper than 0.5: 0.783, 0.503, 0.774, and 0.720. Therefore, the answers to these indicators are accurate.

Besides the validity result, Table 4 presents the reliability testing result reflected by its composite coefficient. In this table, the coefficients are above 0.7 for SL, CR, O, FO, RT, P, INN, and SP: 0.846, 0.858, 0.863, 0.802, 0.853, 0.787, 0.917, and 0.793. Based on this condition, the reliability test is already accomplished.

Table 4: Loading factor and composite reliability coefficient

| Indicators/ | Loading factor | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Dimension | SL | CR | O | FO | RT | P | INN | SP |
| SL1 | 0.641 | | | | | | | |
| SL2 | 0.626 | | | | | | | |
| SL3 | 0.519 | | | | | | | |
| SL4 | 0.609 | | | | | | | |
| SL5 | 0.675 | | | | | | | |
| SL6 | 0.586 | | | | | | | |
| SL7 | 0.501 | | | | | | | |
| SL8 | 0.711 | | | | | | | |
| SL9 | 0.658 | | | | | | | |
| CR1 | | 0.804 | | | | | | |
| CR2 | | 0.721 | | | | | | |

Table 4: Loading factor and composite reliability coefficient

| Indicators/ Dimension | Loading factor | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | SL | CR | O | FO | RT | P | INN | SP |
| CR3 | | 0.808 | | | | | | |
| CR4 | | 0.766 | | | | | | |
| O1 | | | 0.737 | | | | | |
| O3 | | | 0.847 | | | | | |
| O4 | | | 0.879 | | | | | |
| FO1 | | | | 0.639 | | | | |
| FO2 | | | | 0.724 | | | | |
| FO3 | | | | 0.710 | | | | |
| FO4 | | | | 0.763 | | | | |
| RT2 | | | | | 0.845 | | | |
| RT3 | | | | | 0.768 | | | |
| RT4 | | | | | 0.823 | | | |
| P2 | | | | | | 0.591 | | |
| P3 | | | | | | 0.816 | | |
| P4 | | | | | | 0.808 | | |
| lv_CR | | | | | | | 0.800 | |
| lv_O | | | | | | | 0.835 | |
| lv_FO | | | | | | | 0.870 | |
| lv_RT | | | | | | | 0.803 | |
| lv_P | | | | | | | 0.835 | |
| SP1 | | | | | | | | 0.783 |
| SP2 | | | | | | | | 0.503 |
| SP3 | | | | | | | | 0.774 |
| SP4 | | | | | | | | 0.720 |
| Measurement | SL | CR | O | FO | RT | P | INN | SP |
| Composite Reliability | 0.846 | 0.858 | 0.863 | 0.802 | 0.853 | 0.787 | 0.917 | 0.793 |

*Source: The modified output of Warp PLS*

*4.4. The model assessment result*

Table 5 shows the model assessment result based on R-squared, f-squared, and Q-squared. For the first model, the R-squared is 0.373: the contribution of servant leadership in explaining the variance of innovativeness is medium because this value is closely above 0.33. Furthermore, an f-squared of 0.373 shows a strong partial influence because of higher than the required level of 0.35. Meanwhile, the Q-squared of the first model is 0.371. Because this value is higher than 0, this model has the power to predict.

Table 5: The variance-based structural equation model estimation result

| The related determinant | Model I: INN = f(SL) | Model II: SP = f(SL, INN) |
|---|---|---|
| | f-squared | f-squared |
| SL | 0.373 | 0.182 |
| INN | - | 0.450 |
| R-squared | 0.373 | 0.633 |
| Q-squared | 0.371 | 0.630 |

*Source: The modified output of Warp PLS*

For the second model, the R-squared is 0.633, which means the contribution of servant leadership and innovativeness in explaining the variance of servant performance is almost strong because this value is next to 0.67. Furthermore, an f-squared of 0.182 for SL and 0.450 for INN. Because 0.182 is above 0.15 as the cut-off

value showing a medium influence, and 0.450 is upper than 0.350 as the cut-off value showing a substantial impact, servant leadership and innovativeness have partial medium and powerful effects, respectively.

### *4.5. The estimation model result*

Table 6 presents the estimation result of the variance-based structural equation model consisting of the probability of the t-statistic. In the first model, this value is <0.001 for servant leadership. Because this value is lower than the 5-significance level, the second hypothesis is not rejected: servant leadership positively affects innovativeness. In the second model, this value is 0.002 for SL and <0.001 for INN. These values are still below the 5-significance level; consequently, the first and third hypotheses are acceptable.

Table 6: The variance-based structural equation model estimation result

| Related determinants | Model I: INN = f(SL) | | Model II: SP = f(SL, INN) | |
|---|---|---|---|---|
| | Coefficient | Probability of t-statistic | Coefficient | Probability of t-statistic |
| SL | 0.611 | <0.001 | 0.285 | 0.002 |
| INN | - | - | 0.591 | <0.001 |

*Source: The modified output of Warp PLS*

### *4.6. Discussion*

The first, second, and third hypotheses are accepted by mentioning the result of hypothesis testing in the earlier section. Receiving the first hypothesis proves a positive effect of servant leadership positively on performance. As the top leaders in the church, their actions have to be an example for the congregation serving as the servant, especially doing what their preach, realistically helping the unknown people and the assemblies without viewing their background, and conducting the service in ministry responsibly. They need to focus on assisting society in trouble and improving the self-confidence of the servants. These actions will be followed by servants to elevate their performance. Although having a different context, the positive impact of servant leadership on performance in this study confirms Hernández-Perlines and Andrés Araya-Castillo (2020), Tripathi et al. (2021), Sarwar et al. (2022), and Saleem et al. (2020).

Receiving the second hypothesis validates the positive influence of servant leadership on innovativeness. To make the ministry successful, the top leaders in the church should give their servants a chance to be creative in solving problems and developing ministry based on biblical concepts. Also, they need to allow the servants to provide constructive ideas. Importantly, leaders have to unite the visions and missions of the church by socializing them with the congregation through a meeting. Furthermore, the leaders must derive objectives and goals from the mission to support this situation. Based on the objectives, they formulate strategy and policy. To implement strategy, they must make programs and their budget and procedure. Besides, the leaders must take risks by faith, especially to share Gospel with the unbelievers through innovative techniques, such as utilizing YouTube channels. Furthermore, leaders must be proactive in developing the ministry by adding the functional scope. Even though having a different context, the positive impact of servant leadership on innovativeness in this study confirms Opoku et al. (2019), Hernández-Perlines and Andrés Araya-Castillo (2020), Iqbal et al. (2020), Bou Reslan et al. (2021).

Acknowledging the third hypothesis demonstrates a positive tendency of innovativeness on servant performance. This situation indicates the innovativeness of the church will effectively support the servants to work with their talents to glorify God. Despite having an unlike context, this positive tendency is in line with Saunila (2017) and Hernández-Perlines and Andrés Araya-Castillo (2020).

## 5. Conclusion

This study aims to enrich the Christian theological manuscripts designed quantitatively in the church context. The quantitative aspect can be seen through three hypotheses formulated: (1) a positive relationship between servant leadership and performance, (2) a positive association between servant leadership and innovativeness, and (3) a positive relationship between innovativeness and servant performance. Furthermore, to support this intention, this study uses the servants in *Gereja Kristen Kemah Daud*, Bandung to be respondents as the population and sample through the survey. This study reveals that three positive associations exist by denoting the response testing by structural equation model based on partial least square.

As the frontier, this research only utilizes two determinants of servant performance: servant leadership and innovativeness. This circumstance allows the subsequent researchers to add other factors affecting this performance, like organizational citizenship behavior and culture. Besides, they can treat innovativeness as the antecedent of the congregation's commitment. Testing these relationships together in one model can enrich the related findings.

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# Indonesian Legal Policy in Treating International Refugees Based on Human Rights Approach

M. Alvi Syahrin[1], Anindito Rizki Wiraputa[2], Koesmoyo Ponco Aji[3]

[1] Hukum Keimigrasian, Politeknik Imigrasi, Indonesia, Email: ma.syahrin@poltekim.ac.id
[2] Hukum Keimigrasian, Politeknik Imigrasi, Indonesia, Email: anindito.wiraputra@poltekim.ac.id
[3] Hukum Keimigrasian, Politeknik Imigrasi, Indonesia, Email: ponco@poltekim.ac.id

**Abstract**
Indonesia is one of the countries that is often a transit point for immigrants who want to seek asylum in other countries. This illegal arrival is certainly very detrimental to Indonesia. This is because the arrival of these refugees is considered a threat to national security and resilience. The trend of the number of refugees that continues to increase every year has caused various problems in handling foreign refugees in Indonesia. Indonesia did not ratify the 1951 Refugee Convention and the 1967 Protocol, but on the basis of human rights. As a transit country, Indonesia is experiencing a build-up of refugee flows due to the uncertain timing of the status granting process from UNHCR and moreover third countries limit the acceptance of refugees. However, Indonesia continues to provide various forms of assistance in dealing with the problems faced by refugees. The government has also issued several regulations including Presidential Decree Number 125 of 2016 and other technical regulations. Indonesia also collaborates with non-governmental institutions, such as academics, humanitarian activists, and faith and charity-based organizations. This collaboration has implications for the existence of asylum seekers and refugees in Indonesia. It is hoped that with this regulation and cooperation, it can provide legal certainty regarding solutions to refugee problems in Indonesia.

**Keywords:** Law Policy, Refugees, Human Rights, Indonesia

## 1. Introduction

Refugees are one of the global issues that are widely discussed by the international community. The problem of refugees is of particular concern to the international community because the number continues to increase and has become an issue that requires special attention from the international community.

The emergence of refugees is caused by deteriorating conditions in the political, economic, and social spheres of a country, forcing its people to leave the country and seek safer shelter in other countries, with the reason of wanting to seek protection and save themselves from the dangers that threaten to threaten their physique. The high number of refugees who leave their country and enter another country illegally directly causes a lot of losses for the security and defense of a destination country for the immigrants (Allain, 2001).

Basically, every refugee who seeks asylum to another country has the right to obtain legal protection as well as safety and security from threats that are guaranteed by the destination country. Asylum is the granting of protection within the territory of a country to people from other countries who come to the country concerned because they avoid being pursued or in great danger.

Indonesia is one of the countries that is often a transit point for immigrants who want to seek asylum in other countries. Immigrants who transit to Indonesia are usually immigrants who go to Australia as their destination. Indonesia is often a transit point for immigrants due to its position flanked by two continents and two oceans. In addition, Indonesia has a very long coastline that allows the formation of illegal ports that are not detected by the Indonesian government. On the other hand, Indonesia's geographical position has the potential as an illegal trade route and a transit location for refugees or asylum seekers who want to go to Australia (Kneebone & Missbach, 2018).

This illegal arrival is certainly very detrimental to Indonesia. This is because the arrival of these refugees is considered a threat to national security and resilience. According to the provisions of Indonesian law, every person entering or leaving Indonesia must have a travel document. From this provision, it can be seen that Indonesia is actually very opposed to the existence of illegal immigrants who come to Indonesia.

## 2. Method

The method that is used in this study is social legal research. This research was conducted by examining the situation based on the statutory and empirical approach that is related to the existing phenomenon (Susanto, 2014). The data collection was conducted through a literature review, existing legal material, and social facts that correspondent to the topic. While the analytical technique is conducted by constructing legal arguments by argumentative technique.

## 3. Discussion

### *3.1 Problems with the Presence of Refugees in Indonesia*

The refugee problem is a global issue that involves more than one country, including Indonesia. Based on data from the United Nations High Commissioner for Refugees (UNHCR), during 2020 at least 82.4 million people in the world made forced migrations, and this figure has an increasing trend. As of September 2021, UNHCR recorded the number of refugees registered in Indonesia reached 13,273 people. Of these, 73 percent are adults and 27 percent are children, of which 7,458 people are from Afghanistan, 1,364 people are from Somalia, 707 people are from Myanmar, 677 people are from Iraq, and the rest are from other countries (Purwanti, Zahidi, & Aufiya, 2022).

The trend of the number of refugees that continues to increase every year has caused various problems in handling foreign refugees in Indonesia. In addition, the non-optimal arrangements for handling refugees in Indonesian laws and regulations have also resulted in the handling of foreign refugees in Indonesia not being well coordinated and integrated, particularly regarding the determination of refugee status, refugee period, and local government budget contributions.

The increasingly stringent requirements and quotas for accepting foreign refugees by destination countries have implications for the increasing number of foreign refugees in Indonesia. This number is also predicted to continue to increase, especially considering the current political and government situation in Afghanistan (Collins, 2016). An increase in the number of refugees will result in an increasing number of problems that accompany it.

The problem of handling refugees is not only faced by the Central Government, but also by the Regional Government, where refugees are temporarily placed. Some of the problems in handling foreign refugees in Indonesia can be mapped as follows (Cristiana, 2021):

a. Refugee status and data: (i) the waiting period for determining the status of refugees or asylum seekers from UNHCR is not clear; (ii) it is difficult to collect data on independent refugees, because they live outside the designated shelters; and (iii) refugee data held by UNHCR or the International Organization for Migration (IOM) are not immediately submitted/reported to local governments.
b. Placement to a refugee-receiving country: (i) the period of placement to a refugee destination country is uncertain. Some refugees have been in Indonesia for more than ten years. The Covid-19 pandemic has further slowed the deployment process; and (ii) third refugee-receiving countries, such as Australia and the United States, are increasingly tightening and reducing the quota of refugees entering these countries.
c. Social problems: (i) some community houses are less suitable for habitation and exceed capacity; (ii) the emergence of mental and physical health problems experienced by refugees; (iii) limited access to health and education services; and (iv) various other social problems between the refugees and the community and local officials.
d. Budget: (i) Australia has stopped funding through IOM for new refugees entering Indonesia after 2018. The Indonesian government needs to anticipate funding for refugees from abroad entering Indonesia after that year whose numbers are predicted to continue to increase, especially from Afghanistan; and (ii) Presidential Decree Number 125 of 2016 concerning Handling of Refugees from Overseas mandates that the State Budget can be used as a source of funding for refugees. However, there is no more detailed regulation that regulates the mechanism for the use of the said State Budget.
e. Coordination between agencies: (i) coordination and communication between the Central Government, Regional Governments, and IOM in dealing with foreign refugees in Indonesia has not been maximized; (ii) there is no clear division of roles, responsibilities, and budget allocations between the Central Government and Regional Governments (Provincial Government and Regency / City Governments) in handling refugees from abroad; and (iii) not all regions that have refugee shelter centers have established a Refugee Handling Task Force, as an effort to encourage better coordination at the regional level.

*3.2 Legal Arrangements for Refugees in the Framework for the Protection of Human Rights*

To deal with the problem of refugees internationally, there are legal rules regarding international refugees, namely The 1951 Convention Relating to the Status of Refugees, The 1967 Protocol Relating to the Status of Refugees, the Convention Relating to the Status of Stateless Persons (1954), and the Convention Governing the Specific Aspects of Refugees Problems In Africa (1969). These conventions are a form of protection for refugees.

Protection of refugees is related to the recognition of their basic rights as human beings, which are regulated in the following international guidelines: UN Charter, United Nations Human Rights Declaration of 1948, International Convention on the Elimination of All Forms of Racial Discrimination of 1965, International Covenant on Civil and Political Rights of 1966, International Covenant on Economic, Social and Cultural Rights of 1966, International Convention on the Elimination of All Forms of Discrimination against Women of 1979, International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, International Convention on the Rights of the Child of 1989. Formation of international human rights norms that have been made and adopted into various forms of international agreements, both bilateral and multilateral that bind the parties.

In Indonesia, there are two international organizations dealing with refugee issues, namely the United Nations High Commissioner for Refugees (UNHCR) and the International Organization of Migration (IOM). Foreigners who declare themselves as refugees or asylum seekers cannot be subject to sanctions like illegal immigrants. However, they will be handed over to UNHCR and IOM in their handling until they are placed in third countries (Setiyono, 2018).

UNHCR is one of the humanitarian agencies established by the United Nations, with the existence of this humanitarian agency, it is hoped that the victims of conflicts that occur in their environment can find security, can seek asylum, get a safe place in other regions or in other countries. UNHCR and IOM have their respective functions, the first is that UNHCR is the party that has the right to determine a person's status as a refugee or not, while IOM does not have this right. The second difference is that UNHCR is the party that determines the third

country for refugees, while IOM provides assisted voluntary return facilities to the refugees' countries of origin (Fiddian-Qasmiyeh, Loescher, Long, Sigona, & Goodwin-Gill, 2014).

The Indonesian government has not signed the 1951 Refugee Convention and the 1967 Protocol on refugees. Indonesia is not obliged to admit that it does not even provide protection for asylum seekers residing in Indonesia. However, as one of the countries that received and ratified the General Declaration of Human Rights, Indonesia recognizes the right to seek asylum in other countries. This can be seen in the recognition of the right to seek asylum in the Indonesian laws and regulations. Indonesia has no obligation and authority to take international action against refugees and asylum seekers who enter Indonesia. Indonesia only handles immigrants who are given administrative action by immigration officials (Suwardi, 2004).

For example, the protection status of Rohingya refugees in Indonesia. The status of existence and protection of refugees is closely related to human rights. Everyone who has chosen the path to become an asylum seeker and even a refugee is someone who does not get proper protection in terms of human rights in their country of origin (Syahrin, 2018). Basically the government has the responsibility to provide protection to its people, but it may be possible that the government or the state is unwilling or unable to provide protection to its citizens, so that its citizens are forced to seek protection in other countries.

Initial handling of problems related to asylum seekers and refugees in Indonesia refers to Law Number 6 of 2011 concerning Immigration. This is because both asylum and refugees, they are foreigners who enter the territory of Indonesia, so the provisions are the same as other foreigners who enter Indonesia both legally and illegally. Article 83 paragraph (1) letter b of Law Number 6 of 2011 states that immigration officials have the authority to place foreigners in the Immigration Detention Center if the foreigner is in Indonesian territory without having a valid travel document.

The Indonesian government does not have the authority to determine whether a person or group of people is a refugee or not. The authority rests with UNHCR as the agency that handles refugee issues. Those whose status has not been identified by UNHCR will be placed in the Immigration Detention Center, while those who are declared not as asylum seekers or refugees by UNHCR will be immediately deported.

### *3.3 Legal Consequences when Indonesia Does Not Ratify the 1951 Refugee Convention and the 1967 Refugee Protocol Regarding International Refugees*

The 1951 Refugee Convention and the 1967 Protocol have defined basic rights and freedoms that are urgently needed by refugees. States parties to the convention are obliged to implement these rights and obligations. This is a legal consequence that must be implemented for convention participants, to fulfill the rights and obligations for refugees, a regulation regarding the handling of refugees is needed. This regulation must be made primarily by the state parties that are members of the convention.

If Indonesia becomes a party to the 1951 Refugee Convention and the 1967 Protocol, then Indonesia must implement all the required provisions, in order to achieve the rights of refugees. But in reality Indonesia has not ratified the 1951 Convention and 1967 Protocol, so Indonesia does not have the same authority as the ratifying country, especially in fulfilling the rights and obligations as contained in the convention. This has resulted in Indonesia having limited authority in handling refugees where the authority in dealing with asylum seekers and refugees rests entirely with UNHCR.

In fact, refugees and asylum seekers face obstacles, namely the process of granting status that there is no certainty of time from UNHCR and moreover third countries limit the acceptance of refugees. This has resulted in Indonesia as a transit country experiencing a buildup of asylum seekers and refugees (Primadasa, Kurnia, & Erawaty, 2021). This is a consequence of the law carried out by Indonesia when it did not ratify the 1951 Refugee Convention and the 1967 Protocol, namely that Indonesia did not have the authority to grant refugee status because the granting of status was in the hands of UNHCR.

Indonesia has reasons not to ratify the 1951 Refugee Convention and the 1967 Protocol, because there are several articles that are considered very difficult to implement. Several articles were considered, namely Article 17 regarding the right to work for refugees and Article 21 namely the right to have a home and several articles of the 1951 Refugee Convention which are still possible if implemented by the Indonesian government. However, these provisions can also create gaps for the people of Indonesia if implemented. The provision is in Article 22 concerning the right to education and Article 4, namely the right to freedom of religion.

If Indonesia binds itself to the 1951 Refugee Convention, some parties think that such action will only increase Indonesia's obligations, while the benefits of ratifying the convention are still debated. Some parties believe that there will be some benefits from ratifying the convention, but the position of the balance between the benefits obtained compared to the obligations that are clearly increasing is also still questionable.

In addition, there are several factors that have caused Indonesia to have not been able to handle these humanitarian problems, including (i) Indonesia does not have sufficient human resources in the field to carry out patrols throughout Indonesia's vast territorial waters; (ii) The existence of people smuggling syndicates carried out by elements of the Indonesian people themselves such as fishermen and even the authorities so that they can trick Indonesian patrol boats (Nurhalimah, 2017).

*3.4 Indonesian Government Policy in Dealing with Refugee Problems*

Asylum seekers and refugees are one of the vulnerable groups, generally experiencing discriminatory treatment and human rights violations. Since the past until now, Indonesia is still dealing with the issue of asylum seekers and refugees. The increasing number of asylum seekers and refugees in Indonesia has made Indonesia pay special attention to this problem. Indonesia does not have a specific law regarding the handling of asylum seekers and refugees. Even so, Indonesia continues to provide protection to asylum seekers and refugees (Fiddian-Qasmiyeh et al., 2014).

Indonesia itself has experience dealing with the problem of asylum seekers and refugees, as happened between 1975-1980. Indonesia participates in handling refugees from Vietnam (Viatnamese Boat People). Indonesia has received an influx of refugees, as hundreds of thousands of asylum seekers from Vietnam arrived by boat and were placed on Galang Island, until finally returned to their home country. With a national juridical basis, the implementation of assistance is not only based on Presidential Decrees, but still refers to international provisions. Speaking of international provisions, the protection of asylum seekers and refugees is regulated in the 1951 Refugee Convention and the 1967 Protocol. This convention contains minimum standards for the treatment of states towards asylum seekers and refugees, including their basic rights. While the 1967 Protocol contains the granting of refugee status to asylum seekers. In addition, the protocol also regulates the rights and obligations of asylum seekers and refugees, and contains points of cooperation and agreements agreed between countries and institutions or organizations under the UN, such as UNHCR and IOM.

Even though it is not a country that has ratified the conventions and protocols, Indonesia is still trying to provide protection to asylum seekers and refugees. The efforts made are not much different from the applicable international provisions. Indonesia adheres to the principle of non-refoulement, namely the prohibition of the return or expulsion of asylum seekers and refugees. In addition, Indonesia also cooperates with international organizations. These international organizations are UNHCR and IOM. The existence of this international organization helps relieve countries that become shelters for refugees and asylum seekers. Not only the state, the presence of these two organizations also helps asylum seekers and refugees in fulfilling their rights.

In dealing with the issue of asylum seekers and refugees, Indonesia also makes efforts through the Desk for Handling Overseas Refugees and Human Trafficking under the Coordinating Ministry for Politics, Law and Human Rights. In order to support global efforts in handling and finding sustainable solutions to the global refugee crisis, the Government of Indonesia has played an active role in discussions on the preparation of the Global Compact for Orderly Migration and Refugees since 2015. Until finally, the United Nations General Assembly adopted the New York Declaration for Refugees and Migrants. in 2016.

One of the mandates of the New York Declaration is a series of discussions and negotiations for the preparation of the Global Compact on Refugees (GCR). The GCR is expected to be a reference for handling the global refugee crisis, especially in emergency situations. The main points of interest that Indonesia has always prioritized in the discussion of the GCR are that the GCR is not the establishment of a new legal norm to replace the refugee convention, but rather to strengthen the existing regulatory framework. In addition, the burden and responsibility for handling refugees must be shared proportionally and adjusted to the national capacity of each country, and the GCR must reflect a strong commitment to sustainable achievement efforts, namely solving the root causes of problems in the country of origin and accelerating the resettlement process for refugees (Perez, 2015).

In addition to these efforts, Indonesia also collaborates with non-governmental institutions, such as academics, humanitarian activists, and faith and charity-based organizations. This is an important factor in encouraging the effectiveness of providing protection for asylum seekers and refugees. Just as Indonesia cooperates with non-governmental organizations in the humanitarian field that will assist Indonesia in distributing humanitarian aid to asylum seekers and refugees. This collaboration has implications for the existence of asylum seekers and refugees in Indonesia.

The majority of asylum seekers and refugees in Indonesia come from Middle Eastern and African countries. The majority of the arrival of asylum seekers and refugees to Indonesia by sea. Asylum seekers and refugees came by boat or boat from the western part of Indonesia. Indonesia is one of the countries used as a transit point for asylum seekers and refugees who want to seek asylum in Australia. Indonesia is often a transit point for asylum seekers and refugees, inseparable from Indonesia's strategic location, which has the potential as a transit route for asylum seekers and refugees who want to go to Australia.

The existence of asylum seekers and refugees as individuals or groups has an impact that affects the condition of a country. The same thing happened with Indonesia. There are several serious impacts arising from the increasing presence of asylum seekers and refugees in Indonesia. The impact may not be felt now, but will be felt for years to come. Some of these impacts include ideological impacts, economic impacts, legal impacts, socio-cultural impacts, national security impacts, and potential immigration impacts.

The many impacts caused by the arrival of asylum seekers and refugees to Indonesia, such as security, social, economic, and so on do not make Indonesia silent in facing the problems of asylum seekers and refugees (Fernando, 2014). Despite the impact, Indonesia did not stop its intention to provide protection to them through possible measures, as already explained.

The presence of asylum seekers and refugees is a social phenomenon in international relations, which has a significant impact on state policies, both as recipient countries and transit countries. Indonesia's desire to provide protection for asylum seekers and refugees is a part or form of foreign policy (UNHCR, 2007). This is because Indonesia has issued a decision to accommodate and provide protection for asylum seekers and refugees from outside its territory. These asylum seekers and refugees try to leave their country to seek refuge in other countries that they consider safe from threats.

The Indonesian policy certainly has a basis or reason for Indonesia's decision to accommodate and provide protection to asylum seekers and refugees. Indonesia's policy is inseparable from the factors that influence it. Based on the theory of liberalism used in this study, the theory of liberalism argues that actors in international relations are not limited to state actors, but also include other actors outside the state. This theory is the right theory to analyze how a policy is influenced by actors outside the country.

In the case of Indonesia's policy of providing protection to asylum seekers and refugees, the state is not the main actor in deciding the policy. However, in it there are non-state actors who play a role in influencing policy making. These non-state actors are interest groups. Liberalism assumes that the main actors of international politics are individuals and interest groups, where they can influence the policies of the government with some of their interests. This interest group can put pressure on the government, which determines the direction of state policy.

Besides being able to suppress, the existence of these two actors can also be considered by a country to determine the attitude and direction of policies formed by countries in the international world.

In analyzing this case, there is an influence of interest groups in influencing Indonesia's policy of providing protection to asylum seekers and refugees. This is because problems related to the protection of asylum seekers and refugees also attract the attention of actors outside the country and show their dominant role. There are also interest groups that play a role in influencing state behavior in deciding to provide protection to asylum seekers and refugees, namely humanitarian Non Governmental Organizations (NGOs). The NGOs consisted of the Asylum Organization, Dompet Dhuafa, Jesuit Refugee Service (JRS), Aksi Cepat Tanggap, The Wahid Institute, Humanity First Indonesia, Amnesty International, and Human Rights Watch.

These interest groups exert a strong influence on Indonesia's behavior in deciding to provide protection to asylum seekers and refugees in Indonesia. The influence shown by interest groups through campaign actions, discussion forums, opinion polls, and providing input to policy makers. The influence of interest groups illustrates how these interest groups fight for their interests. This interest group has its own interests in responding to the problem of asylum seekers and refugees in Indonesia. These groups are interested because they are humanitarian groups whose aim is to promote the rights of asylum seekers and refugees and ensure that there are no human rights violations against them.

The presence of interest groups in responding to the issue of protecting asylum seekers and refugees has succeeded in influencing Indonesian policy. In this case, the actions taken by NGOs have succeeded in influencing targeted policy makers to carry out the interests of these interest groups. Thus, interest groups are important actors in the creation of policies to protect asylum seekers and refugees in Indonesia. It is said to be an important actor, because policy makers need support from policy influencers to strengthen the policies issued. In this case the interest groups mentioned are included in the category of interest influencers. Interest influencers are groups of similar interests who use means such as criticism and criticism to influence policy makers.

The President as the decisive party in Indonesia's policy making is the most decisive party at the final level regarding the policy of protecting asylum seekers and refugees. In the policy-making process, it must be rethought to involve the role of non-state actors, such as interest groups (Czaika & De Haas, 2013). In line with Coplin's thinking, that in deciding a policy, a significant role is needed between policy actors. This role is a space for interaction between state actors and non-state actors, who seek to influence the policies to be decided. Policy makers need support from policy influencers to strengthen the policies issued. It must be realized that non-state actors should be treated as partners and not opponents.

Indonesia's policy of providing protection to asylum seekers and refugees is contained in Presidential Decree Number 125 of 2016 concerning Handling Refugees from Abroad. The issuance of the Presidential Decree makes Indonesia have guidelines for dealing with asylum seekers and refugees. Normatively, this Presidential Decree fills the legal void regulating asylum seekers and refugees in Indonesia contained in No. 37 of 1999 concerning Foreign Relations.

The Presidential Decree consists of 45 articles. This regulation regulates coordination between government agencies in regulating the handling of refugees. In Article 2 paragraph (1) of the Presidential Decree, it is stated that the handling of asylum seekers and refugees is carried out based on cooperation between the central government and the United Nations. This collaboration is carried out through UNHCR Indonesia and international organizations in the field of migration affairs or in the humanitarian field which have agreements with the central government. The ministries responsible for handling asylum seekers and refugees are the Coordinating Ministry for Politics, Law and Security, the Ministry of Law and Human Rights, and the Ministry of Foreign Affairs.

The government's handling of asylum seekers and refugees is carried out through four stages, including discovery, shelter, security, and immigration control. This Presidential Decree also regulates the rights of asylum seekers and refugees. These rights include freedom of religion, the right to prosper such as getting clean water, fulfilling food

and drink, health and hygiene services. This Presidential Decree explains that asylum seekers and refugees with special needs can be placed outside shelters facilitated by the relevant international organizations.

The involvement of regional and international interest groups influences Indonesia's policy of providing protection to asylum seekers and refugees. Besides already having a fixed mechanism in handling asylum seekers and refugees, this also has a positive impact on Indonesia itself. Indonesia is currently seen as a country that is seriously committed to dealing with asylum seekers and refugees. This makes Indonesia's presence in the eyes of the world good.

Currently the Presidential Decree has experienced resistance, when various countries such as Australia, the United States, and most Western European countries are tightening their respective borders for asylum seekers and refugees. This regulation is the main step taken by Indonesia in handling asylum seekers and refugees. This regulation is believed to be an alternative to ratifying the 1951 Refugee Convention and the 1967 Protocol.

*3.5 Strategic Efforts in Handling Refugees in Indonesia*

Until now, Indonesia has not ratified the 1951 Refugee Convention and the 1967 Protocol and the 1967 Protocol, so Indonesia actually has no obligation to accept refugees who enter its territory. However, Indonesia is willing to become a country that temporarily accommodates foreign refugees for humanitarian reasons. This is in accordance with the provisions of the 1951 Refugee Convention which requires countries that are not included in the State Party to adhere to the principle of non-refoulement, namely not forcibly repatriating all migrants who come seeking asylum to their country of origin.

The handling, protection, fulfillment of rights, and determination of the status of foreign refugees in Indonesia is carried out by UNHCR in collaboration with IOM. UNHCR and IOM are obligated to finance, facilitate, and find long-term solutions for refugees in temporary host countries, up to being placed in third / refugee-receiving countries. Under international law, asylum seekers who have obtained refugee status will be placed in destination countries, such as Australia, Canada, and the United States. According to UNHCR data, during the January–September 2021 period, only 375 refugees in Indonesia had been placed in refugee-receiving countries.

In addition to working with the Government of Indonesia, UNHCR and IOM also collaborate with the private sector and Non-Governmental Organizations (NGOs) in Indonesia, in handling and financing these foreign refugees. However, the main funding for foreign refugees in Indonesia and the operation of UNHCR and IOM is obtained from donor countries, such as Australia, Canada, Denmark, European Union, Japan, United States of America, and others.

Although conceptually the definition of asylum seekers is different from refugees, based on field observations there is no difference in treatment by the Government of Indonesia towards the two. In Indonesia, refugees from abroad consist of: (i) refugees financed by IOM; and (ii) independent refugees, namely refugees who finance their own lives.

As a transit country, the Government of Indonesia has provided various forms of assistance in dealing with the problems faced by refugees. For example, during this pandemic, the Ministry of Health has issued a Circular Letter dated June 10, 2020 regarding providing access to services related to Covid-19 for registered refugees. As of September 2021, a total of 5,262 refugees have received Covid-19 funding assistance, and a total of 1,155 vulnerable refugees have received monthly financial assistance since June 2020 (Cristiana, 2021).

Furthermore, in order to follow up the Circulars of the Minister of Home Affairs Number 300/2307/SJ and Number 300/2308/SJ concerning the Establishment of a Task Force for Handling Refugees from Overseas, several regions have had a Task Force for Handling Overseas Refugees, such as Semarang and South Tangerang City. With the existence of the Task Force, it is hoped that coordination between agencies in the region will become more integrated and integrated in handling foreign refugees in Indonesia.

Presidential Decree Number 125 of 2016 has provided a corridor for the handling of foreign refugees in Indonesia. The Presidential Decree provides a legal basis for the protection of foreign refugees in Indonesia. It appears that after the Presidential Decree, asylum seekers who were initially placed in the Immigration Detention Center were moved to shelter houses, so that they could be facilitated and financed by IOM.

Given the increasing trend of foreign refugees in Indonesia as well as the problems that arise, it is necessary to amend Presidential Decree. The revised Presidential Decree will regulate in detail, especially regarding the determination of status, period of stay for refugees, and contributions or budget allocations to Regional Governments. In this regard, it is hoped that the revision of Presidential Decree can regulate more strictly matters relating to: (i) emergency status; (ii) the emergency period for handling foreign refugees; (iii) the roles and responsibilities of stakeholders; (iv) establishment of the PPLN Task Force; (v) fulfillment of the rights of foreign refugees in Indonesia; (vi) the use of the budget by the Regional Government; (vii) burden-sharing and responsibility-sharing relationships with International Organizations; and (viii) other things that can improve the quality of handling foreign refugees for the better.

In the context of better handling of refugees and the planned revision of Presidential Decree, there are several things that need attention for strengthening policies for handling foreign refugees in Indonesia, including:

a. There is a mapping of the number of refugees and their distribution in Indonesia, the treatment of asylum seekers who are not yet refugees, because they have not been funded by IOM, and the treatment of refugees who decide to leave their shelters and become independent refugees.
b. Improved coordination and affirmation of the division of authority between the Central Government, Local Governments, and International Organizations including UNHCR and IOM.
c. Additional arrangements related to the mechanism for using the state budget, especially for Regional Governments (Provincial Government and Regency / City Governments).

Better handling and more coordinated and integrated arrangements for foreign refugees have enabled Indonesia to demonstrate its commitment to playing a role in international humanitarian missions and the protection of human rights.

## 4. Conclusion

Indonesia did not ratify the 1951 Refugee Convention and the 1967 Protocol, but on the basis of human rights Indonesia continues to provide efforts to handle refugees by always coordinating with UNHCR and IOM. As a transit country, Indonesia is experiencing a build-up of refugee flows due to the uncertain timing of the status granting process from UNHCR and moreover third countries limit the acceptance of refugees. Indonesia does not have the authority to grant refugee status because the granting of status is in the hands of UNHCR. However, Indonesia continues to provide various forms of assistance in dealing with the problems faced by refugees. The government has also issued several regulations including Presidential Regulation Number 125 of 2016 and other technical regulations.

In addition to these efforts, Indonesia also collaborates with non-governmental institutions, such as academics, humanitarian activists, and faith and charity-based organizations. This is an important factor in encouraging the effectiveness of providing protection for asylum seekers and refugees. Indonesia cooperates with non-governmental organizations in the humanitarian field that will assist Indonesia in distributing humanitarian aid to asylum seekers and refugees. This collaboration has implications for the existence of asylum seekers and refugees in Indonesia. It is hoped that with this regulation and cooperation, it can provide legal certainty regarding solutions to refugee problems in Indonesia.

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# Investigating the (Non-)being: A Spectral Reading of William Faulkner's *As I Lay Dying*

Md. Zubair Rahman[1], Sheikh Saifullah Ahmed[2]

[1] Lecturer, Department of English and Modern Languages, College of Arts and Sciences, International University of Business Agriculture and Technology, Uttara, Dhaka, 1230, Bangladesh.
Tel: - 8801670176211. E-mail: zubair.de@iubat.edu
[2] Lecturer, Department of English and Modern Languages, College of Arts and Sciences, International University of Business Agriculture and Technology, Uttara, Dhaka, 1230, Bangladesh.
Tel: - 8801925674041. E-mail: ahmed.saifullah@iubat.edu

**Abstract**
This paper offers a spectral reading of the representation of Addie Bundren in William Faulkner's novel, *As I Lay Dying* (1930). Spectral Criticism considers literature to be an uncanny affair and reading to be a resurrected, terrifying yet desired communication with the dead. It also approaches a text as "an orphan" which has a connection to its parents but cannot be traced back to them properly. It finds out the return of suppressed past and focuses on the in-accessibilities of getting the complete meaning of a text. Premised on the aforementioned modes of reading, this paper intends to understand how Addie's spectre is represented in the novel, to inquire into the potential of this character as a spectre, and also looks to illustrate the cryptic nature of Addie's monologue. A qualitative content analysis method is adopted to inquire into the spectral discourses in the narrative. The findings show that this narrative manifests the non-present presence to question the hierarchy between life and death; father and mother; and presence and absence. This paper suggests that the spectre of Addie works as a driving force to subvert the social constructions of binary and creates a situation suitable for deconstructive reading.

**Keywords:** *As I Lay Dying*, deconstruction, spectral criticism, the uncanny, William Faulkner

## 1. Introduction

The plot of William Faulkner's southern Gothic novel *As I Lay Dying* revolves around Addie Bundren's passing and the Bundren family's following journey with the body of the deceased. Dead Addie and her uncanny presence in the novel are the tropes that destabilize both the characters and the readers. This paper takes on the practice of research through a spectral perspective. It offers a spectral reading of Addie's representation in William Faulkner's *As I Lay Dying*. First, it inquires into the uncanny nature of Addie's representation and seeks to understand why Addie returns as a spectre. Second, it looks to trace its impact on the characters and the readers. Third, it demonstrates how the spectral representation of Addie offers to destabilize several fixed hierarchies like word over womb; life over death; presence over absence; male over female, and so on. The paper proposes that all the fixed hierarchal positions are always under the threat of deconstruction, and the spectre of the text offers to be the

haunting force that makes the environment suitable for deconstruction. The paper proposes that the death of Addie is the beginning of her empowerment and she remains a non-present presence even at the end.

Spectral criticism, according to David Punter, "takes us into the shadowy realm that lies beyond the word" (Punter, 2002, p. 267). William Faulkner in his novel *As I Lay Dying* opens up that realm not only by the spectral presence of Addie but also by questioning the centrality of words in understanding all physical and metaphysical phenomena. This connection suggests that a spectral reading is necessary for a better understanding of the discourses that the novel present. This research contributes to understanding how the trope of spectre is used to open up several discursive layers of this novel.

## 2. Method

The paper takes on the form of library research. Printed books, journals, and online sites are used to gather data for this research. A qualitative discourse analysis is adopted to investigate how Addie is portrayed in *As I Lay Dying*. The research bases its arguments on Spectral Criticism alongside the notion of the Uncanny. It also utilizes theories like deconstruction, hauntology, and cryptonymy.

### *2.1 Operational Definitions:*

As the focus of this paper is on the spectral reading of Addie's representation in William Faulkner's *As I Lay Dying* and the potential of Addie as a spectre in destabilizing hierarchal notion, the first part of this chapter concentrates on elaborating the concepts (i.e. spectralities, textualities, secret and crypt) that are necessary for understanding the paper. This chapter reviews any cultural, political, and philosophical aspects attached to these concepts.

#### 2.1.1 Spectralities

The notion 'spectral' is very difficult to define. It is connected to 'ghostly' affairs in critical theory. Ghost has been an essential topos in understanding literature which is given focus by Andrew Bennet and Nicholas Royle (2004),

> Ghosts are paradoxical because they are both intrinsic to humanity, genuinely human, and a denial or disruption of humanity, the essence of the inhuman. And we suggest that this scandal of the ghost, and its contradiction, is imprinted in diverse and frightening ways throughout novels, poetry, and plays. (p. 133)

Around the 1990's the term "specter" or "spectrality" is given prominence over the more mundane "ghost" or "ghostliness" for having a more scholarly tone and having its etymological link to visibility and vision (Blanco & Peeren, 2013, p. 2). However, it remains really difficult to conceptualize which is why Derrida (2006) identifies it as "a quasi-concept" or a "concept without concept". According to Derrida, a spectre is something between life and death that is neither living nor dead (as cited in Wolfreys, 2013, p. 70).

The concept of spectre is recurrent in history, literature, and theory. Blanco and Peeren (2013) stretch it from an entity to a metaphor or even a conceptual metaphor (p. 1). For its recurrence, Blanco and Peeren prefer a plural form of 'spectralities' over 'spectrality' (p. 9).

The topos of the spectre is ever present in the literary sphere. Shakespeare's *Hamlet* is tagged as the "greatest ghost work" by Bennet and Royle (p. 134). Gothic literature has much to do with the spreading of this topos in literature. David Punter and Glennis Byron (2004) in their book *The Gothic* illustrate how the topos of spectre has been repeated throughout the history of Literature in English with 18th-century novels like *Castle of Otroano*, *The Mysteries of Udolpho*; Romantic Poetry like Coleridge's "The Rime of Ancient Mariner", Keats' "La Belle Dame Sans Merci"; Victorian novels like *Wuthering Heights*, *The Woman in White* or even postcolonial literature like Amitabh Ghosh's *The Shadow Lines* and Toni Morrison's *Beloved*. They even give an account of postmodern literature and the film industry where the topos of spectre has become more prominent. In one of the chapters, William Faulkner is called the progenitor of Southern Gothic (Punter & Byron, 2004).

Based on *The Spectralities Reader*, Derrida's coinage of the term 'spectre' in *Spectres de Marx* is the catalyst of a "spectral turn" in critical theory (Blanco & Peeren, 2013, p. 2). For Derrida, spectre is something that is both *revenant* (invoking what was) and *arrivant* (signaling what is to come). Derrida even coins another term 'hauntology' to clarify his interest in the spectral (pp. 13-14).

The spectralities have gained further ground in Sigmund Freud's "The Uncanny" which binds spectralities and psychoanalysis together (Blanco & Peeren, 2013, pp. 4-5). Later, Abraham and Torok's theory of "Crypt" also added dimensions to spectralities (Punter, 2002, p. 263). Blanco and Peeren (2013) further stretched the concept of spectralities into politics, media, subjectivity, place, and historiographies in several chapters.

This article looks at the spectre of Addie Bundren by isolating her representation in the novel. It seeks to show how Addie's spectre causes an uncanny experience in reading and how her cryptic monologue destabilizes the socially constructed hierarchy and the concept that everything can be understood through words.

2.1.2 Secret and Crypt

Bennet and Royle (2004) define 'secret', as "[something that] is concealed, deliberately or inadvertently hidden, kept separate and apart" (p. 241). Literature, especially novels necessarily depend on secrets and the gradual revelation of it and secrets attract a lot of readers to novels. However, the word 'secret' has a paradox within itself which poststructuralist critics find out. Once a secret is revealed, it does not remain a secret. Therefore, to remain a secret it must be unrevealed and unconcealed at the same time (p. 246).

Psychoanalysis too has a connection to secrets. In Freud's structure of the psyche, every unacceptable desire and social taboo is repressed by the unconscious. The unconscious, thus in a sense, hides away secrets and sometimes cryptically appears to the subconscious. Nicholas Abraham and Maria Torok present a new theory of the 'crypt' as a "psychic space different from the unconscious" that is the "repository of the secrets of the past" (Punter, 2002, p. 263).

What connects 'secret' and 'phantom' is their cryptic way of communicating with the reader. Bennet and Royle (2004) state, "The Ghost at once tells and does not tell. The Ghost keeps the secrets of its prison-house even as it evokes the effects of their disclosure" (p. 247). Addie's monologue gives us the idea of disclosure of several matters, such as how she had an adulterous relationship, and her revenge. Her message of revenge later becomes cryptic as she does not tell how the journey is going to be the 'revenge'. The additional reasons apart from Addie's burial that make the characters go to Jefferson make us consider whether she takes any kind of revenge at all in the novel.

2.1.3 Textuality

In literature and cultural theories, the text refers to anything that can be read. Textuality then refers to the attributes that distinguish the text. Textuality has infinite connections to spectralities. Textuality for Nicholas Royle is "irreducible to the psychic or the real" (as cited in Wolfreys, 2013, p. 71). A text can never be in isolation. It has a connection to its past writers and in a text, they commune uncannily. A text is never an original one, it is haunted by other texts all the time. While reading, a reader believes in the reality of the characters of a certain text and thus gives it a certain phantasmatic quality (Wolfreys, 2013, pp. 69-73).

In reading a text spectrally, one needs to look at what the text suppresses or what is that the text is haunted by. David Punter uses the term "text instead" to read a text in that way. According to him,

> In any case, we may claim that we are dealing with an extraordinary metaphorical phenomenon, which I will refer to as "the text instead." This tendency causes the reader to question, first, if what is being read is metaphorical, and, second, whether the whole text is, in some way, a metaphor for something else, something "unwritten" that haunts the words on the page. (Punter, 2007, p. 60)

Another way of looking at a text spectrally is looking at the message it provides as something enigmatic. Jean Laplanche criticizes Lacan for assuming the primacy of Language as a mode of communication. He looks for the

possibility of other primal modes of communication. According to him, for assuming the logocentric nature of a text a reader overlooks any other modes of communication thus all the communication remains incomplete. Punter (2002) later extends Laplanche's theory by saying all communication "mysteriously takes place between crypts" (p. 265-266).

This paper will use this definition of textuality to illustrate how the message in a book cannot always communicate or that it sometimes communicates something other than what the author wants to communicate through his writing. Spectral Criticism seeks to read a text as unparented, but it does not deny the influence of other texts rather it seeks to show how a past voice is there but not as an authoritative one. This paper also looks into the thing that how this novel is an echo of other texts and how it becomes an echo of the texts written later.

*2.2 Theoretical Frameworks*

The theoretical frameworks that this paper incorporates are Spectral Criticism, The Uncanny, and Deconstruction. A literature review of these theories is given in the following sections.

2.2.1 Spectral Criticism

In an essay named "Spectral Criticism", Punter (2002) says that spectral criticism cannot still be claimed as a school or even an emerging notion of criticism. It seeks to bring together a series of images or tendencies from various sources which continuously exercise a ghostly influence over critical activities for a few decades now. Punter considers Maurice Blanchot to be an 'originary' point as he talks about the death and dubious returns of literary voice (p. 259). Blanchot refers to the act of reading as "a dialogue with the dead" that favours a "phantomatic reality" over the "bizarre illusion of normalcy" (as cited in Punter, 2002, p. 259-260). He even considers writing to be connected to death as well because for him it is the feeling of dread of death that gives rise to the writing (Haase & Large, 2001, p. 51). So, a text, considered from both perspectives of a writer and a reader, becomes haunted by the communion with the dead or the death. According to Punter, reading is a type of conversation that is both uncanny and perverse. For him, "literature is intertwined with the phantom, the ghost," since the "continued existence and corporeal actuality" of a book might be a source of suspicion, worry, or even terror (260). This ongoing survival and frequent connections to classic books (such as *Hamlet*) render them ethereal (274). Although Punter (2002) acknowledges the difficulties of defining spectral criticism at the outset, he still attempts to do so,

> Therefore, spectral criticism is not a program or goal to be completed, but rather a substrate of all textual work, an indeterminate ground on which reading happens, and a reinvocation of a terrifying but wanted communion with the dead. (p. 260)

The connection with Blanchot's argument becomes apparent with this statement. A few other approaches that Punter puts forward in spectral reading are the "law of orphan" and "text instead". In the formulation of the concept of the "law of orphan", Punter traces out the paradoxical nature of a text's connection to the past. For him, although a text has an inevitable connection with the past, the voice is not authoritative. So, when a text is read, it appears to be unparented or with an absence of originary point (p. 261). It seeks to understand whether a text can be read as a metaphor for something else that is not written but haunts the whole text (Punter, 2007, p. 60).

The concept of absence and the possibility of return remains one of the major concerns of spectral criticism. Drawing from Derrida's *Specters of Marx*, Punter shows the impossibility of erasing the past. Past according to Punter, "takes the form of a series of apparitions that can neither be addressed nor be banned". It remains in the unconscious and returns as a revenant to the subconscious level of our mind. This inevitably connects the concern of spectral criticism with the psychoanalytical theory of Freud, Lacan, Nicolas Abraham, Maria Torok, and so on (Punter, 2002, p. 262-264).

For the formulation of spectral criticism, David Punter presents four possibilities. It hinges on the "law of the orphan," which states that if the parentage of a text cannot be determined, the quest for the origin of the text will quickly lead us to the dark domain that lies behind the word. Its model would be Gothic, with its return to a transformed past, a past devoid of historical precision. Its primary metaphor would be the eerie, the inability to

differentiate between the familiar and the unknown. It would be characterized by an ambiguous message that seems unintelligible and is thus susceptible to a reading of a "text instead" that relates to a ghostly modification of the material's previous condition (Punter, 2002, p. 267).

This paper bases its argument based on spectral criticism and thus looks to trace the enigmatic nature of Addie's representation in the novel *As I Lay Dying* and seeks to illustrate the uncanny nature of reading that the novel establishes.

2.2.2 The Uncanny

Freud (1973) explored the notion of the uncanny. His essay defines and elaborates on the notion of the uncanny in both literature and the real world but considers the literary sphere to be better equipped for the use and analysis of the uncanny. The essay shows the uncanny nature of reading literature. Although Freud accepts the undefinable nature of the term, he generally defines it at the beginning to be something, "that belongs to the realm of the frightening, of what evokes fear and dread" (p. 204). Semantically it can be connected to the word *unheimlich* (unhomely). To elaborate further, he considers *heimlich* (homely) and *unheimlich* (unhomely) together along with their meanings. For him, *unheimlich* has the potential to become uncanny, but not all the unfamiliar is frightening, and therefore something more needs to be added to make it uncanny. Freud also quotes E. Jentsch who defines uncanny to be an "intellectual uncertainty" (p. 206).

After giving an elaborate example of the dictionary references about *heimlich* and *unheimlich*, he prefers Schelling's remark about the meaning of *unheimlich* which is closer to Freud's way of thinking about the uncanny. Schelling's notion of *unheimlich* applies to things that are "intended to remain secret, hidden away but come into the open". Freud's search for meaning ultimately reveals the ambivalent nature of the word *heimlich* and shows how it can easily merge with its antonym *unheimlich* (p. 207 -216). In chapter II of the essay, Freud offers us an exploration of the elements that are associated with the arousal of uncanny feelings (pp. 217-236). This is later elaborately discussed by Bennet and Royle (2004) with ten specific points (p. 35-38).

Freud (1973) suggests that "the uncanny is something familiar that has been repressed and then reappears" (p. 237). Freud however acknowledges that the arousal of uncanny feelings has something to do with the psychological condition of a person too. He also contends that although uncanny in real life has fewer determinants, it is in the sphere of literature where uncanny experiences flourish as "in literature, there are many opportunities to achieve uncanny effects that are absent in real life" (238-241).

Bennet and Royle (2004) in their entry on "The Uncanny" in *Introduction to Literature, Criticism, and Theory* suggest that literature is "the discourse of uncanny" as it evokes experiences, thoughts, and uncanny feelings (p. 35). For them,

> Uncanny refers to a feeling of strangeness, mystery, or unease. Specifically, it relates to a sensation of unfamiliarity that arises at the core of the familiar, or a sense of familiarity that appears at the core of the unfamiliar. The eerie is not just a question of the strange or scary, but rather has to do with a disruption of the familiar. (p. 34)

Following Freud, they find out the paradoxes of the word "familiar" which has an etymological connection to Latin *familia* which can be connected to the idea of 'keeping things in the family' thus making it at once familiar and potentially secretive and strange (p. 34).
Bennet and Royle consider uncanny to be relevant to the study of literature as in literature the "literary" and the "real" often merge. They connect literary theories like Viktor Shklovsky's defamiliarization to this notion of the uncanny (p. 35). Bennet and Royle (2004) suggest a few forms that the uncanny takes. They are the repetition of a feeling, situation or event, or character; odd coincidences like divine interventions, and the idea of fate; anthropomorphism or situation where something that is not a human being is given the attributes of a human being; fear of being buried alive that can be considered in a broader sense to confinement and claustrophobic feelings; silence; telepathy, and death. Bennet and Royle (2004) also exemplify how putting only a quotation mark in a familiar word can make it strange or spooky. They consider the uncanny to be an experience. It is not a theme or

technique that the writer possesses rather it has to do with how a reader reads or interprets a text. So, the uncanny has a close connection with the "effects of reading" and "the experience of the reader" (pp. 35-41).

This paper, in its reading of the spectral representation of Addie, will cash in on the concepts of uncanny in understanding the reading experience.

2.2.3 Deconstruction

Cuddon (1999) describes deconstruction as "a certain sort of reading practice and, thus, a technique of critique and a style of analytical inquiry." To exemplify the phrase further, he cites Barbara Johnson:

> Deconstruction is not synonymous with destruction. It is significantly closer to the term 'analysis', which etymologically implies 'to undo' - a synonym for deconstruction. The deconstruction of a book is not accomplished via random doubt or haphazard subversion, but rather through the painstaking elucidation of conflicting forces of meaning within the text itself. If something is destroyed during a deconstructive reading, it is not the text itself, but rather the claim to the absolute dominance of one form of signification over another. Deconstructive reading is the analysis of a text's critical divergence from itself (as cited in Cuddon, 1999, pp. 209-211).

One of the basic understandings about deconstructive reading is that no text can have one particular meaning. Jacques Derrida is considered the major philosopher associated with the philosophy of deconstruction. His chief contribution to language was to show how language is slippery and often self-contradictory and therefore no word can have a final meaning rather meaning is produced temporarily. This is why deconstructive reading looks to rebel against the "authoritarian meaning" in a text (Nayar, 2012, p. 39).

Another basic notion of deconstructive reading is that it destabilizes the proposed hierarchies or ideologies that a text presents. It looks to bring out the binary oppositions a text proposes and destabilizes its hierarchy by looking into evidence of how the text contradicts the hierarchy (Selden et al., 1997, p.173). Deconstructive reading thus is aware of the fact that incomplete deconstruction causes the creation of a new hierarchy. So, it is self-conscious while reading a text.

In *As I Lay Dying* thus the spectre is represented as an entity between life and death. As death becomes more emancipatory for her to resist the hierarchies that society put on her. It also shows the cryptic nature of her monologue.

## 3. Spectral Reading of Addie Bundren

This chapter isolates and examines how different extracts from *As I Lay Dying* represent the spectre of Addie Bundren. It looks to understand the reason behind her spectral return and looks to trace any possibility of continuity of the spectre even after the burial.

### *3.1 Representation of Addie*

Addie dies during the 12th monologue of the novel *As I Lay Dying* (Faulkner, 1930, pp. 42-47). But her presence is felt all the time when one reads the text. The uncanny nature of Addie's representation is established here. Addie's death is not described from the perspective of any character that is beside her, but rather is described by Darl Bundren who is on the way back home. However, the character Addie develops as a spectre after her death. So, death is in a sense the beginning of the development of this character. The few instances that we find her before her death are in the monologue of Cora Tull, where she describes her in her dying moments as "lonely with her pride" (p. 18), or in the monologue of other characters like Darl, Anse, Jewel, Vernon Tull, and Dewey Dell. It is as if she has no voice of her own. Readers find her bedridden with little movement. One specific movement is emphasized when she sits down and calls Cash with rage before her death (p. 41). It is after her death that she becomes a (non)being of interest. As this paper focus on the spectral representation of Addie, the following part will focus on her spectral representation.

3.1.1 Addie as a Spectre

After the death, Addie becomes the center of the world of the novel. Her presence is always felt diversely with characters like Vardaman mourning or making disjointed claims like "My mother is a fish" and during the journey with the smell or the presence of "buzzards". It is as if Addie "lives despite physical death" as M. Landon says (as cited in Roy, 2015, p. 102). As Roy (2015) asserts, Addie's presence subverts the authoritative power of life over death. The journey blurs the line between the living body and the dead body. Addie asserts her existence in a tyrannical way by dictating what is to be done after her death and thus urges to *be* even after her death (Faulkner 1930, pp. 101 -102). It is as if death becomes a source of power, her unvoiced self too is replaced by a voiced one with her monologue (pp. 157-168). Even before her monologue, in the contemplation of Cora, a reader finds her prophesizing the events that are about to happen as she says, "[Jewel] is my cross my cross and he will be my salvation. He will save me from water and fire. Even though I laid down my life, he will save me" (Faulkner, 1930, p. 156). This goes with Derrida's conceptualization of the specter. For him, a specter is always both revenant (invoking what was) and arrivant (announcing what will come). A spectre causes a temporal disturbance by appearing when it is least expected (Blanco &Peeren, 2013, p. 13). Addie then does the same. As the earlier quotation is taken from Cora Tull's contemplation on Addie, these assertions were made by her even before her death. But her prophecy disturbs the general sense of time.

If death is generally considered to be the end of life and thus the end of growth, then Addie completely destabilizes this. As Irving Howe says,

> Addie's dominance endures and expands; in fact, Addie's power is never stronger than at the moment after her death, when the Bundrens understand how tenaciously the past's tyrants linger on. (as cited in Tredell, 1999, p. 68)

Addie Bundren's monologue is really important in understanding her spectral representation. She remembers how she used to beat her students to make them aware of her presence (Faulkner, 1930, p. 157). It can be stretched to consider that she is now taking revenge against her family members by asserting her "(non)presence". She questions the relevance of the word and thinks it to be a "shape to fill a lack" (160). Her monologue becomes an illustration of how Anse has violated her body and made her virgin body a blank spot. Addie's monologue is a revelation of how patriarchal society reduces her to a womb and does not even give her proper respect for it. The monologue reveals her resistance to it too. She resists by not breastfeeding Cash and Darl. She also does this through her adulterous relationship with Reverend Whitfield. Deborah Clarke's comment seems relevant here,

> *As I Lay Dying* resounds with the contradictory strength of women's corporeal absence and presence, of women's silence and voice... Addie is trapped in a civilization that, although eradicating women's bodies, has strong control over the physical and metaphorical, bodies and words. (as cited in Tredell, 1999, p.147)

The hierarchy of language over silence, presence over absence, semiotic over symbolic, and womb over the word are thus reversed by the specter of Addie.

Another major concern of spectral criticism is how a literary work uncannily deals with the concealment and disclosure of secrets. As already suggested in the earlier section how the word "secret" is necessarily ambivalent as it is both unconcealed and undisclosed. The spectre of Addie tells and does not tell the secret at the same time. Addie's adulterous relationship is already hinted at by Darl in his monologue as he says,

> That night, I discovered her sitting in the dark next to his sleeping bed. She sobbed uncontrollably, maybe because she had to grieve so quietly, or perhaps because she felt the same way about tears as she did about dishonesty, loathing herself for committing the falsehood and him because she had to. Then I realized that I knew I knew. That day, I understood it as well as I knew about Dewey Dell. (Faulkner, 1930, p. 123)

Although the author keeps it vague, a reader who concentrates can understands Addie's adulterous relationship connecting to the indication of Dewey Dell's pregnancy for adulterous relationship and Darl's intuitive nature of looking through people's secret. So, when Addie tells us of her adulterous relationship, it is already partly known to the reader. Her message on revenge also remains cryptic as it seems all the characters, apart from Darl, have their particular reasons to go to Jefferson. A deeper contemplation on revenge by Kartiganer (2007) reflects that

Addie does not care about the marriage that Anse is looking for rather it is by making Lazy Anse move she takes revenge (pp. 429-44).

In *As I Lay Dying* thus the spectre is represented as an entity between life and death. As death becomes more emancipatory for her to resist the hierarchies that society put on her. It also shows the cryptic nature of her monologue.

3.1.2 Addie's Spectre as a Conceptual Metaphor

Blanco and Peeren (2013) suggest that a spectre can be read as a conceptual metaphor too for implementing it in several other theoretical sectors (p. 1). Addie's spectre can be considered as one too. She can be considered as a metaphor for mother, wife, womb, or even woman in general. According to them, to understand the nature of the spectre closer attention needs to be given to "who haunts and who is being targeted?". Spectral criticism explores the marginal gender, sexuality, and race as non-normative positions and tries to show that the specific social position settled for them is why they haunt the "Other". They even exemplify how being haunted by one's mother is not the same thing as being haunted by one's father or a stranger (310).

In *As I Lay Dying*, Addie is a woman who is marginalized by the patriarchal social construction. Spectral presence of Addie is used as a mode to reveal the suffering of the woman in the patriarchal society and her resistance against the suffering. As Blanco and Pereen (2013) suggest the boundary between normative and non-normative subject positions although bound heavily by social orders, creates a sense of anxiety. This anxiety is not often perceptible and thus becomes spectral (310). Addie's haunting presence or vengeance, therefore, is against her husband Anse or even her children who marginalize her for being a woman. In the case of the anxiety between Darl and Jewel, the spectral tension of normative and non-normative positions can be brought forward too. As Darl is a legitimate and normative child, he taunts the non-normative, illegitimate child Jewel. Thus, the concept of conceptual metaphor and spectral subjectivity becomes another way of looking at *As I Lay Dying*.

*3.2 Notes on Spectral Continuity*

Addie's spectre subverts the notion of the finality of death. Death in *As I Lay Dying*, is not something that ends rather it begins the establishment of the spectre. Death actually cannot be the end for Addie as Darl asserts, "And Jewel is, So Addie Bundren must be" (Faulkner, 1930, p. 74). As already suggested in the last chapter Addie can be read as a conceptual metaphor for mother, in it too the spectral continuity occurs.

Dewey Dell's failure to get an abortion signals a continuation of motherhood and the social taboo of adultery. Deborah Clarke suggests that "the mother's body cannot be vanquished" (as cited in Tredell, 1999, 154). Anse's marriage brings a new Mrs. Bundren to the family it too can be considered as a spectral continuity. The novel destabilizes the notion of death as the finality. The novel brings forward the notion of spectral continuity as the text itself does not end in an end rather it ends in a beginning. The title of the novel is taken from Odyssey (Book 11) where Agamemnon describes Clytemnestra, "As I Lay dying the woman with the dog's eyes would not close my eyes for me as I descended into the Hades" (Towner, 2008, p. 27). If Addie is the *I* in the title of the novel, Faulkner maybe then evoke us to read Addie with connection to Clytemnestra. In this sense, Addie herself is a continuity of Clytemnestra. This textual haunting can be further drawn. *As I Lay Dying* is later connected to several other texts. According to Cohn (2007),

> *As I Lay Dying* established the fundamental template for a genre of books in which numerous views centered on a dying or deceased character present a kaleidoscope vision of his or her life, family, and societal order. The works of Mara Luisa Bombal's *The Shrouded Woman* (1938, English translation: 1948), Rulfo's Pedro *Páramo* (1955, English translation: 1959), Gabriel Garcia Márquez's *Leaf Storm* (1955, English translation: 1972) and *The Autumn of the Patriarch* (1975, English translation: 1976), and Carlos Fuentes' *The Death of Artemio Cruz* (1962, English translation: 1964) all have roots in Faulkner. While *The Shrouded Lady* follows in the footsteps of *As I Lay Dying* by focusing on the experience of a woman and her family, its scope is more limited (p. 511).

Is it then the canonical nature of *As I Lay Dying* too that resists the plane of time and keeps on coming back like a "ventriloquists' puppet" as an echo that David Punter talks about when he attempts a spectral criticism of Hamlet (Punter, 2002, p. 272)? If it is so then the presence of Addie too becomes an echo for all the female characters that suffer at the hand of patriarchy. The spectre of Addie, in these ways, keeps on coming back and resists the finality of her death all the time.

## 4. Spectre, the Uncanny, the Text and Reading

An earlier section on spectral criticism already suggests that the Uncanny is the fundamental trope of spectral criticism. This chapter focuses on identifying how Addie's presence after death creates an uncanny situation in the textual world and how it makes the reading of *As I Lay Dying* an uncanny experience.

### *4.1 The Uncanny and the Textual World*

William Faulkner's textual world itself is uncannily different. His fictional Yoknapatawpha cycle brings on characters from different novels and short stories in interaction. Thus, he creates a fictional world within which most of his novels and short stories from 1929 to 1959 are written. *As I Lay Dying* is one of the novels of the Yoknapatawpha cycle. Yoknapatawpha itself is a Gothicized southern village. According to Punter and Byron (2004),

> Faulkner depicts a Gothicized image of the American South, exploring lunacy, decay, and despair, as well as the ongoing strains of the past on the present, notably with regard to the lost aspirations of a dispossessed Southern aristocracy and the continuation of racial animosity. (p. 116-117)

*As I Lay Dying* however is completely a familial novel surrounding Addie's death and the journey of the Bundren family. The journey becomes uncanny as it seems as if the Bundrens are enchanted by the spectre to go through with the journey even after multiple obstructions and temptations (p. 103). As Bennet and Royle (2004) suggest, death is one of the ten forms of uncanny feeling. The realm of the novel becomes filled with uncanny feelings with the death of Addie.

Smell becomes another element that creates an uncanny situation in the textual world. The sensation of odor brings the resident to feel an uncanny presence of Addie even when she is not there. As in Moseley's monologue, he says he could still smell the dead body on the next day of their departure (Faulkner, 1930, p. 195). The smell is a sensation connected to the feeling of uncanny. In his book, *The Uncanny*, Nicholas Royle writes,

> Fragrance has an eerie duplicity; it may transport us in an instant from the familiarity of the present to the strange, terrible and/or joyful and/or impossible land of the past; and yet a smell resists being remembered, even for a time, in reality (as cited in Colella, 2009, p. 85).

So, the smell is another element that creates an uncanny sensation within the textual world.

Another uncanny sensation is felt by Vardaman as he once gets trapped in a crib (Faulkner, 1930, p. 59). This kind of feeling of claustrophobia is one of the forms that the uncanny can take. Vardaman's feeling of claustrophobia makes him feel that his mother too would feel claustrophobic in her coffin and therefore he bores two holes above her face on his mother's coffin when everyone is sleeping (p. 66). Faulkner thus evokes an uncanny situation.
So, it can be seen that the feeling of Uncanny persists in the textual world and the spectre of Addie is most of the time at the center of it.

### *4.2 The Uncanny and Reading*

All creative writers have the liberty of creating their fictional world as he wishes. He can conform to reality or celebrate his creation of fantasy. But in both cases, a reader has to accept his choice. This makes reading an uncanny affair. This feeling of uncanny is person specific and connected to other outside factors as said in the theoretical definition. The feeling of uncanny can be evoked by using some specific tropes as suggested by Bennet and Royle (2004, pp. 35-38). In this section, the paper will look to analyze how *As I Lay Dying* evokes the feeling of uncanny and how much of it is caused by the spectre of Addie Bundren.

4.2.1 Repetition

Repetition is used by William Faulkner (1930) several times in *As I Lay Dying.* Be it Vardaman's disjointed assertion of "My mother is a fish" or Darl's insane repetition of "yes" towards the end, repetition makes *As I Lay Dying* an uncanny reading. Even for adopting the stream consciousness technique, two subsequent chapters often repeat the same thing. For example, the chapter before Addie's death is described in Peabody's monologue, one can read Addie's harsh voice calling cash (p. 41), The same thing repeats in the next chapter in Darl's monologue (p. 42). Both these repetitions are connected to the character Addie and create an uncanny reading.

4.2.2 Odd Coincidence

Odd coincidence is another trope that makes the familiar environment unfamiliar. It refers to the situation that seems "too good to be true", the feeling that something is making things happen, divine intervention, or fatalism. (Bennet & Royle, 2004, p.36). In *As I Lay Dying*, it always seems that Addie is the voice from the coffin that is dictating the whole event. The feeling of uncanny is also evoked in reading when Cora's contemplation on Addie reveals how she said that she would be saved as a dead body by Jewel from trials of fire and water (Faulkner, 1930, p. 156). It becomes uncanny when exactly what she says happens in actuality in the later part of the novel.

4.2.3 Death and Anthropomorphism

Death as Bennet and Royle (2004) say is something that is always at once familiar and unfamiliar. Anthropomorphism refers to a situation where something that is not human acts like a human (p. 36-37). Death of Addie makes the reading uncanny and her voice given to a dead body or a dead entity makes the reading uncanny. Reading Addie's posthumous representation becomes uncanny in two-fold nature. If a reader considers the disturbance it brings to the natural situation it creates an uncanny reading. On the other hand, if a reader considers her representation as a normal thing then he is making the *unheimlich* (unhomely) affair a Heimlich (homely) one. Thus, either way, the reading becomes an uncanny affair.

4.2.4 Telepathy

Telepathy disturbs the normal sense of communication and thus creates an uncanny sensation. In *As I Lay Dying*, William Faulkner (1930) uses Darl to describe the death of Addie Bundren although he is not present at that place (p. 42-47). Telepathy occurs among Darl and the other three siblings Dewey Dell, Jewel, and Cash. Telepathy creates an uncanny sensation as it makes one feel one has no control over hiding their thought too. An example of telepathic communication can be:

> And so it was, since I had no choice. I then saw Darl, and he was aware of the situation. He said he knew without the words, like he did when he informed me that my mother was going to die without words, and I knew he knew because if he had said he knew with the words, I would not have believed he was there and saw us. But he acknowledged he did know, so I said, "Are you going to inform your father? Are you going to murder him?" without the words, to which he replied, "Why?" And this is why I can converse with him despite my hatred: he is aware. He stands at the entrance, staring at her (p. 23).

This word 'without the word' is the perversion of communion that creates the uncanny nature of reading.

4.2.5 Stylistic Elements

William Faulkner uses several stylistic elements in his novel which makes the reading uncanny too. Addie's monologue itself is a disturbance of the familiar as a dead cannot speak. The writer uses some more stylistic techniques which make the reading even more uncanny. For example, in Addie's monologue, Faulkner (1930) uses a blank space (p. 161). As Bennet and Royle (2007) suggest, familiar language becomes uncanny with a slight disruption. Faulkner uses italics, and even his use of italics is not always for the same reason. This too destabilizes the notion of reading and makes it uncanny.

**5. The Uncanny Potential of the Spectre**

> Why such relentless pursuit [*achamement*]? Why this hunt for ghosts? (Derrida, 2006, p. 174)

The analysis of the spectre of Addie Bundren and the uncanny or haunting situation created by this spectral representation has been done in earlier chapters. This chapter attempts to establish the fact that a specter, by creating a haunting environment, becomes the entity that has the potential to subvert hierarchy or even make deconstruction possible.

*5.1 Addie and Deconstruction*

In his essay "Spectrographies", Derrida gives an idea about the potential of a spectre.

> A specter is both visible and unseen, phenomenal and non-phenomenal; it is a trace that marks the present with its disappearance in the future. De facto, the spectral logic is deconstructive logic. Deconstruction finds its most friendly environment in the components of haunting, in the center of the living present, in the fastest pulse of the philosophical. (as cited in Lippit, 2008, p. 1)

In the earlier portion of the paper, the idea of spectre is elaborated on and shown that it is not only a "ghost" in a general sense. It is anything that destabilizes our socially constructed concepts of normalcy. Even Addie's spectre can be considered a conceptual metaphor for mother, wife, or womb. As the above-given quotation suggests, spectre has the potential of creating a suitable environment for deconstruction. The spectre itself is the deconstructed phenomena that blur the line between any hierarchy like visible and invisible, presence and absence. The spectre of Addie is the same thing. As a conceptual metaphor, if Addie is a woman then when she raises her voice against the patriarchal domination, she haunts the patriarch. This haunting situation is what becomes potentially suitable for deconstruction. As a spectre, Addie herself blurs the line between presence and absence, life and death. She in a sense becomes the force that causes deconstruction.

Deconstruction theory was inaugurated by Jacques Derrida in the late 1960s. The two major things about deconstruction are, first, it contests the western logocentric notion and reveals the slippery nature of language and second, it begins by finding out the binary and the hierarchy in its approaches to reverse it and then stops itself from creating a new hierarchy and finds a place between the two polar positions. Addie's character does the same. The major concept that Addie's monologue provides is that "words are no good" (Faulkner, 1930, p.159). Further analysis of Addie's character in the earlier part has already shown how the spectre of Addie subverts the hierarchy like word over womb, mother over father, man over woman, life over death, and absence over presence. It would be too radical to suggest (with this little discussion) with this little discussion that within Addie spectrally remained the seed of deconstruction theory as an arrivant but an uncanny connection can be established between the two.

**6. Conclusion**

The enterprise of the present paper was to show that a spectral reading of Addie is necessary for an in-depth understanding of *As I Lay Dying*. It analyzed the representation of Addie Bundren's spectre both as a ghostly presence and a conceptual metaphor that goes against the dominant mode of comprehension. It also analyzed how reading becomes an uncanny affair in presence of Addie's spectre and how Addie's spectre creates a suitable situation for deconstructive reading. A spectre always waits for chances to assert its presence and thus creates uncanny or haunting feelings in the mind of the dominant. Spectral criticism opens up a new perspective not only on the "ghosts" of the text but also on the "ghosts" of the world, the non-normative or marginalized people at the bottom of the hierarchy, who waits for a voice of their own. Addie's representation presents the plurality of perspectives that creates a connection of it with the lens of deconstruction. Addie's spectre destabilizes the social hierarchy and reveals the slippery nature of words. Addie gains potential power after her death that she never had during her lifetime. Addie's revenge although cryptic keeps the plurality of interpretation open. The uncanny and haunting aspects of the spectre destabilize normative power positions and create the option of deconstruction. This paper initiates several issues that have the potential to be explored. For example, as spectral criticism has connected itself to trauma studies, the trauma of the characters like Dewey Dell and Darl Bundren can be read from this perspective. An investigation into the spectral nature of the roads of the novel seems another interesting scope for further studies.

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# Legal Analysis of Smoothness Handover of Rokan Block from Chevron Pacific Indonesia to Pertamina Company

Syafrinaldi[1], Thamrin S[2], Admiral[3], Surizki Febrianto[4], Rendi Prayuda[4], Rahdiansyah[5]

[1] Professor and Lecturer, Department of Law, Post Graduate Program, Universitas Islam Riau.
Email: syafrinaldi@law.uir.ac.id
[2] Professor and Lecturer, Department of Law, Post Graduate Program, Universitas Islam Riau.
Email: thamrins@law.uir.ac.id
[3] Lecturer, Department of Law, Post Graduate Program, Universitas Islam Riau.
Email: surizkifebrianto@alaw.uir.ac.id
[4] Lecturer, Department of International Relation, Faculty of Social and Political Science. Universitas Islam Riau.
Email: rendiprayuda@soc.uir.ac.id
[5] Professor and Lecturer, Department of law, Faculty of Law. Universitas Islam Riau.
Email: rahdiansyah@law.uir.ac.id

**Abstract**
Indonesia is a country enriched with natural resources. One of the sources is oil and natural gas. The spirit to manage and explore these resources emerged after Indonesia's independence through the 1945 Constitution of the Republic of Indonesia which was specifically stated in Article 33 (3) of the 1945 Constitution. Article 33 Paragraph (3) of the 1945 Constitution stipulates that "Earth and water and the natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people". From the provisions of Article 33 Paragraph (3) of the 1945 Constitution, it can be explained that the management of natural resources in the form of exploration and exploitation of natural resources within the Indonesian jurisdiction including oil and natural gas is the authority of the state. Mining commodities such as oil and natural gas, gold, silver, bronze, coal, and so on are non-renewable resources. As unrenewable natural resources, oil and gas are businesses with very high demand in Indonesia. It is one of the biggest income promises for Indonesia. In addition, the oil and gas business is capital and technology intensive. The objectives of the study on handover of Rokan Block from Chevron Pacific Indonesia to Pertamina Company are as follows: To analyze the legal smoothness of handover of Rokan Block from Chevron Pacific Indonesia to PT. Pertamina; and to analyze the the Implementation of the transfer of technology with the handover of the Rokan Block from Chevron Pacific Indonesia to Pertamina. The research methodology used in this study is normative one where all legal materials and the published documents are thoroughly analysed. The results of the study show that the handover of Rokan Block from Chevron Pacific Indonesia to Pertamina Company was running well according to law applicable eventhough the regional government in Riau was angry to the central government due to the ignorance of the interests of the local communities. Besides, more than fifty years the operation of Rokan Block by Chevron Pacific Indonesia the transfer of technology remained in theory and cannot be implemented at all. The failure is due to the absence of strict law in Indonesia.

**Keywords:** Handover, Rokan Block and Oil and Gas

## 1. Introduction

Indonesia is a country enriched with natural resources. One of the sources is oil and natural gas. The spirit to manage and explore these resources emerged after Indonesia's independence through the 1945 Constitution of the Republic of Indonesia ("UUD 1945") which was specifically stated in Article 33 (3) of the 1945 Constitution. Article 33 Paragraph (3) of the 1945 Constitution stipulates that "Earth and water and the natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people". The increasing need for energy causes oil and gas to become one of Indonesia's main commodities which contributes the most to state revenue. Just energy sovereignty has become Indonesia's ideal to run the community's economy by realizing upstream to downstream business activities. Economic relations that occur in upstream business activities, namely carrying out exploration activities (activities to find and prove the existence of underground oil and gas reserves) and exploitation (activities to produce oil and natural gas from a predetermined working area by carrying out various kinds of activities, which consist of drilling and completion of wells, construction of transportation, storage and processing facilities for separating and refining oil and natural gas in the field and other supporting activities), while downstream activities include processing, transportation and marketing activities.

The management of upstream oil and gas business activities is carried out through a cooperation contract. A cooperation contract is a production sharing contract or other form of cooperation contract in exploration and exploitation activities that are more profitable for the state and the results will be used for the greatest prosperity of the people.[1] This cooperation contract is executed based on a Production Sharing Contract (PSC). The period of time for a cooperation contract (KKS) has been regulated under Article 14 paragraph (1) of Law Number 22 Year 2001 concerning Oil and Gas that is implemented no later than 30 (thirty) years later in paragraph (2) it is declared a business entity or a permanent establishment may apply for an extension of the cooperation contract period of not more than 20 (twenty) years.

The ministerial regulation issued in 2018, namely Regulation of the Minister of Energy and Mineral Resources (ESDM) Number 23 of 2018 in lieu of Regulation of the Minister of Energy and Mineral Resources Number 15 of 2015 concerning Management of Oil and Gas Work Areas where the Cooperation Contract will end, in Article 2 states that it is clear that the government is providing a way for existing contractors to continue managing a working area (WK) whose cooperation contract is about to expire. There is a chance that the blocks that are about to expire can be re-auctioned and extended by the existing contractor.[2]

The upstream oil and gas sector in Indonesia has contributed very significantly to state revenues. In 2005, government revenue from the upstream oil and gas sector reached 33% of the State Revenue and Expenditure Budget (APBN). In 2015 it fell to 20.6% and in 2016 it only reached 7.7%. The decline in this percentage was caused by various factors, including the high and low price of oil which was influenced by the dynamics of the global oil and gas industry, and the recent downward trend in production or lifting. In addition, the increase in revenues from non-oil and gas sectors has increased APBN revenues which have a percentage impact on the total APBN (Lubiantara, 2017).

One of the biggest upstream oil and gas sector in Indonesia is the Rokan Block managed by PT Chevron Pacific Indonesia, the United States based company. Request for extension of the cooperation contract to the Minister of Energy and Mineral Resources, as was done by the old contractor and the new contractor. The application for a cooperation contract extension is regulated in the Minister of Energy and Mineral Resources Regulation Number 23 of 2018 concerning the Management of the Oil and Gas Work Area where the Cooperation Contract will end, for the previous contractor in carrying out a contract extension as referred to in Article 3 paragraph (1) is submitted no later than 10 years. and no later than 2 years prior to the end of the cooperation contract by fulfilling the requirements for a cooperation contract extension application and this is the same for the

[1] See the consideration of Law No. 22 of 2001 on Oil and Natural Gas. This law came into force on 23 November 2001; State Gazette of 2001 Number 136.
[2] Article 13 Regulation of the Minister of Energy and Mineral Resources Number 23 of 2018 concerning Management of Oil and Gas Work Areas where the Cooperation Contract will end.

application by PT Pertamina. The Minister decided for the management of the Rokan Block to PT Pertamina before the contract ended, therefore from 2018 on, government is keen on preventing a decline in oil production in the Rokan Block, the government issued a transition period so that there would be no losses to this old block.

After 50 years of being managed PT Chevron Pacific Indonesia, the management of the Rokan Block in Riau has finally returned to the bosom of the motherland. Starting in 2021, the Indonesian government will appoint PT Pertamina (Persero) to manage the block, which has an area of 6,220 kilometers. It is recorded that since its operation in 1971 to December 31, 2017, oil production in the Rokan Block has reached 11.5 billion barrels. The Rokan Block itself currently has oil reserves of up to 500 million to 1.5 billion barrels of oil equivalent without using Enhance Oil Recovery or EOR[3].

Arcandra Tahar, who at that time served as deputy minister of Energy and Mineral Resources (ESDM), revealed that there were four reasons the government appointed Pertamina to manage the Rokan block. The four reasons are as follows:[4]

1. Pertamina in its proposal has submitted a signature bonus of US $ 784 million or around Rp. 11.3 trillion. This signature bonus will later go to the state treasury.
2. The value of the firm work commitment for investment provided by Pertamina during the initial 5 years is worth 500 million US dollars or around Rp 7.2 trillion.
3. The increased potential for state revenue during the 20 years of the country after obtaining a potential income of 57 billion US dollars or around Rp 825 trillion rupiah.
4. Discretion of the Minister of Energy and Mineral Resources. This discretionary decision is based on a change in the fiscal system from Cost Recovery [5] to *Gross Split*.[6]

Through these business considerations, the government decided to entrust the management of the Rokan Block to Pertamina after comparing it with the proposal submitted by Chevron. The Rokan Block production has decreased very significantly until the contract ended in 2021. That was due to the fact that PT CPI did not show good faith during the transition period by not opening up space for the management transition period and not investing through drilling activities. In fact, drilling is one of the requirements for the continuity of oil production in the Rokan Block. In the transition process there were obstacles for the reason that the production sharing contract scheme used in the Rokan Block contract was to use a cost recovery scheme or a net profit-sharing scheme. After the cooperation contract is continued with Pertamina, the gross split contract scheme is used. Under the gross profit-sharing scheme on oil, the government obtains 43% and the contractor obtains 57%, of the share while the government gets 52% of the share and 48% goes to the contractor for the gas share. However, there is still chance that the contractor's profit sharing could increase depending on the conditions of the oil and gas field.

The implementation of oil and gas block contracts with the gross split scheme is considered to have not provided legal certainty. Under the Minister of Energy and Mineral Resources Regulation Number 52 of 2017 concerning Amendments to the Regulation of the Minister of Energy and Mineral Resources Number 8 of 2017 concerning Production Sharing Contracts, precisely Article 7 provides flexibility for the government to increase the percentage of profit sharing imposed on oil and gas contractors without clear boundaries.

As a result, companies are given special financial incentives to invest, but must also be prepared to take risks if natural resources are not found. In line with this, the contract gives the company "sole and exclusive right" to

[3] EOR is a method or method used to increase oil reserves in a well. The trick is to raise the volume of oil that could not be produced before. This EOR method optimizes an oil well with thick, heavy, poor permeability and irregular faultlines so that it can be lifted to the surface.
[4] https://ekonomi.kompas.com/read/2018/08/02/063000826/penyerahan-blok-rokan-untungkan-pertamina-kecewakan-chevron?page=all
[5] Is the return of operating costs incurred by the oil and gas contractor as long as reserves have not been found until they are commercially produced.
[6] is a calculation scheme for the results of the management of the oil and gas working area (oil and gas) between the Government and the Oil and Gas Contractor calculated in advance. Through the gross split scheme, the State will get oil and gas revenue sharing and taxes from exploration and exploitation activities so that State revenues become more certain. The state will not lose control either, because the determination of the working area, production capacity and lifting, as well as profit sharing is still in the hands of the State. Therefore, the implementation of this scheme is believed to be better than the previous profit sharing scheme, namely the Production Sharing Contract (cost recovery scheme).

carry out Petroleum Operations under an agreement signed by the parties. This is intended to encourage companies to seek natural resources, which later on when these natural resources are found, it is possible for the company to recover costs that have been spent and then collect profits according to what has been agreed in the contract. However, if the company does not succeed in finding oil and gas resources as stated above, it will bear the loss (Likosky, 2009).

Apart from the technical aspects and the calculation of profits from exploitation that will be obtained by Pertamina Company in the future, as stated above, the legal aspects of the agreement or contract as well as the agreement on the handover of the Rokan Block are aspects that should be carefully considered, there are other things that need to be considered from the success of the Indonesian Government in taking over this management, the analysis is whether the Rokan Block submission from PT CPI to PT Pertamina has been done with due observance of proper legal regulations, this needs to be reviewed in order to avoid lawsuits that may occur due to legal flaws from the handover of the Rokan Block. In addition, this success is not merely about Indonesia's ability exploiting independently and obtaining a large income for the state, but how the economic aspects will be felt by the people of Riau Province and what technological advantages might affect the performance of PT Pertamina in the future. This writing will analyse two issues, namely the legal handover of Rokan Block from Chevron Pacific Indonesia to Pertamina Company and the implementation of transfer of technology from foreign skilled labor to Indonesian.

## 2. Result and Discussion

### *2.1. Smoothness Handover of Rokan Block and the Implementation of Transfer of Technology*

With the expiration of the contract that entitles the Rokan Block management by the Government to PT. Chevron Pacific Indonesia in July 2021 The Indonesian government has made the right decision by appointing Pertamina Company as a State-Owned Enterprise will be the successor in managing the Rokan Block for the next 20 years. The appointment of Pertamina Companyas the contractor that will manage the Rokan Block for the next 20 years will be carried out by the Government by considering many factors such as political, economic, human resources and technology factors.

From the contract law standpoint, the problem of time is one of the things that can lead to the termination of a bond between parties such as between the Indonesian Government and Chevron Pacific Indonesia in the management of the Rokan Block. On this basis, the Government finally appointed Pertamina Companyas a State-Owned Company as the new contractor for the Rokan Block.

It is quite interesting to study how the Government's strategy is to take over the management of the Rokan Block and then appoint Pertamina Companyas a new contractor, namely by issuing Regulation of the Minister of Energy and Mineral Resources (ESDM) RI No. 37 of 2016 concerning Provisions for Offer of 10% (Ten Percent) Participating Interest in Oil and Gas Working Areas[7]. Article 1 Number 4 of the 2016 Minister of Energy and Mineral Resources Regulation (PMESDM 2016) stipulated that 10% Participating Interest is a maximum amount of ten percent Participating Interest in a cooperation contract that must be offered by the contractor to Regional Owned Enterprises (BUMD) or State-Owned Enterprises (BUMN). Further, this provision is reaffirmed by Article 2 PMESDM 2016 that the intended 10% PI offer must be offered only to BUMD.

Mineral Ministry 2016 is one of the methods or weapons of the Central Government to reduce the desire of the regions through BUMD or other forms of business to obtain the management rights of the Rokan Block in Riau. As it is known that since 2002 PT. Bumi Siak Pusako is the first State Owned Enterprises in Indonesia that has won the trust of the Government to cooperate with Pertamina Company Hulu is managing the CPP Block due to the expiration of the Chevron Pacific Indonesia (CPI) contract.

[7] Stipulated on November 25, 2016.

The transition to the management of the Rokan Block as the second largest oil and gas producer in Indonesia from PT. Chevron Pacific Indonesia to Pertamina Company Hulu Rokan, whose contract expires on August 8, 2021, is an extraordinary policy breakthrough from the Indonesian government. However, even though this policy is one thing that should be highly appreciated by all groups. In his opinion, it is necessary to understand that the transfer and management that will later be handed over to the Indonesian State through State-Owned Enterprises (BUMN), namely PT PHR, seems to have a legal framework or rules of the game that are important to pay attention to.

Given, with this transition on the one hand. On the other hand, it seems that it has several things that must be considered legally in addition to smoothing the transition of management of the block to PT PHR, but it is also aimed at calculating indications of legal problems that can arise from this transition so that projections can be given later to avoid lawsuits. that occurs and can hinder and detrimental from the delivery in the future. So, with the considerations as stated above. In the formulation of this problem, in general we will discuss several main things including: First, the analysis of the handover of the Rokan block from PT CPI to PT PHR based on legal regulations governing oil and gas in Indonesia. Second, the analysis of the handover of rokan blocks from PT CPI to PT PHR is based on the review of the existing contracts between PT CPI. Third, there are several indications of legal problems as well as projected solutions in the procedure of handing over the Rokan block from PT CPI to PT PHR. In general, the three main points will be explained as follows.

Indonesia is very dependent on Oil and Natural Gas. This thesis is an undeniable reality that Indonesia is very dependent on Oil and Gas Natural Resources. Through this thesis, it is thought that the basis for why the Indonesian Government seeks to independently extract and manage the Oil and Gas Resources contained in the Rokan Block. As an initial illustration, it can be seen through the diagram below to explain how much influence the management of oil and natural gas has on Indonesia. As is the case, that almost all over the world, including Indonesia, it seems that it is understood that the management of Oil and Gas Resources is not carried out or happens just like that or mutatis mutandis. In fact, presumably there are rules that needs to be studied and considered in order to avoid things that could indicate a loss in the management of Oil and Gas Resources, both from the existing regulatory aspects, as well as the implementation mechanism of these regulations, including the parties who play a role (Negara, 2017).

The regulation as the rules and regulations of the implementation mechanism includes the parties who took part in the transition of the Rokan Block as referred to above. Consequently, Author will review several provisions that oversee and regulate the matter, consisting of Law Number 22 of 2001 concerning Oil and Gas (hereinafter referred to as the Oil and Gas Law), Law Number 11 of 2020 concerning Job Creation specifically in the Energy and Resources cluster. Mineral Resources (ESDM) (hereinafter referred to as the Job Creation Law), as well as several Constitutional Court Decisions (MK Decisions) related to material that will be reviewed in this study, Presidential Regulation Number 9 of 2013 concerning the Implementation of Management of Upstream Oil and Gas Business Activities Juncto Presidential Regulation Number 36 of 2018 concerning Amendments to Presidential Regulation Number 9 of 2013 concerning Implementation of Management of Upstream Oil and Gas Business Activities (hereinafter referred to as Perpres PPKH Migas), and Regulation of the Minister of Energy and Mineral Resources Number 23 of 2018 concerning Management of Work Areas Oil and Gas Cooperation Contracts with the Expiration of the Contract (hereinafter d is called Permen ESDM 23/2018). In order to systematize the discussion, further explanation of each of these regulations can be described as follows.

*2.2. Analysis of Rokan Block Handover Base on Law Number 22 of 2001 on Oil Gas*

For nearly 15 years since it was promulgated on November 23, 2001, the Oil and Gas Law has undergone 4 trials in the Constitutional Court because there are articles that are deemed contrary to the Indonesian constitution (UUD 1945), especially those related to Article 33 paragraph (2) and paragraph ( 3) The 1945 Constitution, although there was also one case which was declared unacceptable due to the issue of legal standing (Negara, 2017). Apart from that, during its journey to date. The Oil and Gas Law is related to the content regulated in it, in fact, there have been several changes regulated in the Job Creation Law as new content replaces some of the old material contained in the Oil and Gas Law itself.

This is why it is necessary to first emphasize in order to provide an explanation in the sub-chapter of this study which in the discussion is related to the handover of the Rokan Block from PT CPI to PT PHR with an analysis of the Oil and Gas Law later, will release some amended provisions or articles., nor repealed it. However, this does not mean that these provisions are not at all used as material for discussion. Rather, this will be discussed in the next sub-study in the formulation of this problem. Some of the articles referred to above, as a whole consist of Article 1, Article 4, Article 5, Article 23, Article 25, Article 52, Article 53, and Article 55, as well as the addition of one Article namely Article 23 A which is regulated in the Law. Job creation. Meanwhile, the amended provisions through the Constitutional Court Decision consist of Article 28 paragraph (2) and paragraph (3), Article 12 paragraph (3), and Article 22 paragraph (1) in the Constitutional Court Decision No. 002 / PUU-1/2003. Article 11 paragraph (2) as amended by the Constitutional Court Decision No. 20 / PUU.V / 2007. As well, the elimination of the authority and institutions of the Upstream Oil and Gas Regulatory Body (BP MIGAS) in the Constitutional Court Decision No. 36 / PUU.X / 2012.

Entering into the discussion regarding the Oil and Gas Law which consists of 14 chapters and 67 articles, it is necessary to explain that the provisions of the uu a quo contain 9 (nine) main points which are used as the main flow of thought for oil and gas management, including (Quarbani, 2014):

**First,** oil and gas as a source of natural wealth contained in the Indonesian mining jurisdiction is controlled by the state and maintained by the government as the holder of the Mining Authority. Mining Authority remains in the hands of the government so that the government can regulate, maintain and use this national wealth for the greatest welfare of the people. Subsequently, the government formed an Implementing Body.

**Second,** eliminating monopolistic businesses in both the upstream and downstream sectors. In the upstream business sector, which consists of exploration and exploitation, which are activities related to the extraction of natural resources in the form of oil and gas mining materials, the private sector can only carry out oil and gas business activities indirectly, namely as a contractor through cooperation with the Implementing Body. In the downstream business sector, which consists of processing, transportation, storage, and trading businesses, companies can carry out business based on business permits issued by the government.

**Third,** creating and guaranteeing a more real central and regional revenues from production, so that state revenues from the oil and gas sector can be enjoyed directly by the people in the regions concerned. For this purpose, the company or permanent establishment is obliged to surrender the state's share, state levies, pay bonuses, taxes, local taxes and levies, as well as applicable customs obligations. On state levies, state shares and bonuses are earmarked as central and regional revenues.

**Fourth,** growing national oil and gas companies at home and abroad and being able to accommodate the development of future oil and gas business activities. As well as providing greater appreciation for the use of goods and services, domestic engineering and design capabilities.

**Fifth,** to provide clearer provisions regarding guarantees for the continuity of supply and service of BBM as well as regulations related to the fuel subsidy mechanism.

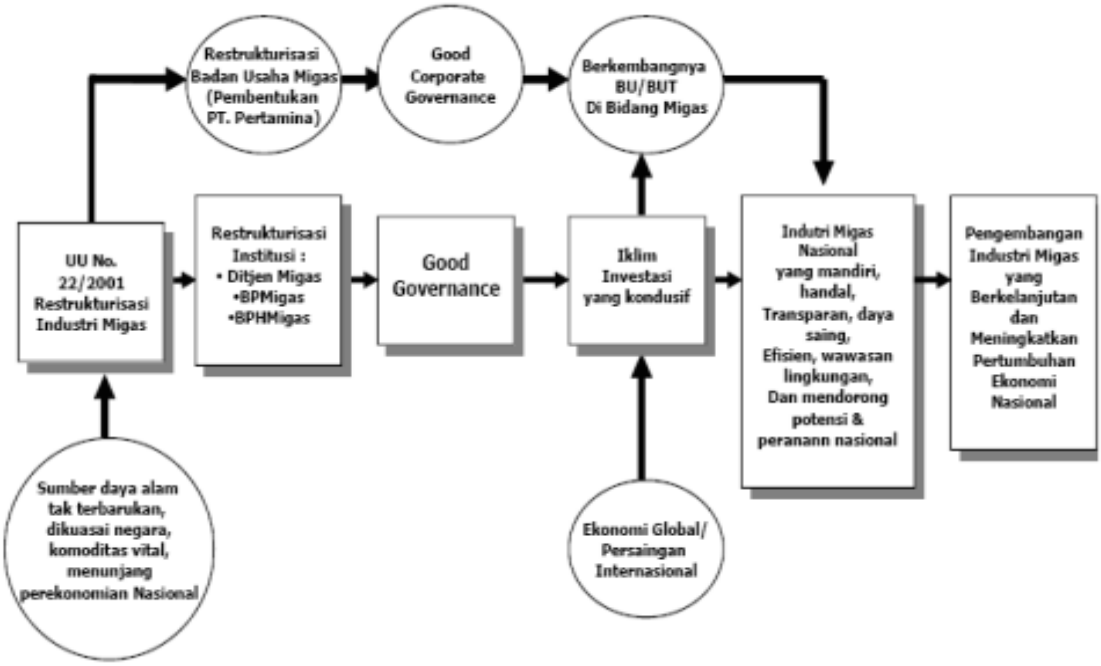
**Sixth,** ensuring adequate data provision, professional workforce, enhancing research and development functions and encouraging investment by creating a conducive investment climate.

**Seventh,** the existence of a work area management arrangement by the government that will be undertaken by a company or permanent business entity and for the provision of land to support the determination of the working area, the government can carry out a general survey in an effort to increase the value of the land offered to interested people.

**Eighth,** there is a guarantee of legal certainty, which is more stable (simple, firm and consistent arrangements) and eliminates excessive government interference, so that the business climate is expected to be healthier and more competitive.

**Ninth,** the realization of the anticipation of the prevention and handling of the increase in criminal acts in oil and gas business activities both in quantity through the appointment of Civil Servant investigators.

Furthermore, of the 9 (nine) main points of view are outlined in the mindset for the development of the national oil and gas industry as in the chart below.




*Source: Flowchart of Development of the National Oil and Gas Industry*

Of the 9 (nine) main lines of thought as mentioned above, this is what is further outlined in the construction of articles and the body of the Oil and Gas Law in Indonesia. However, if the nine main lines of thought as mentioned above are linked to the main question in the formulation of this first problem. So, in fact, out of the nine main lines of thought, there will only be 6 (six) points (1st to 6th line of thought points) which will be related and have direct relevance to the process of transitioning the Rokan Block from PT CPI to PT PHR. Bearing in mind, several other points (the 7th, 8th, and 9th main line of thought points) apart from not being directly related, this is actually the authority given to the executive and legislative bodies, both central and regional. improvement in the management of Oil and Gas (MIGAS) in general and not specifically for the transfer of the Rokan Block.

Therefore, with the brief explanation above, what will be examined in this sub-chapter specifically are legal questions related to whether the Rokan Block submission is in accordance with the 6 main points of thought as described earlier? Of course, to answer this question, it is necessary to analyze the points of the 6 lines of thought which are directly related to the process of handing over the management of the Rokan Block from PT CPI to PT PHR. Which later, if this is in line (between the process of handing over the Rokan Block and the 6 main points of thought) then it can be concluded without having to review the body and articles in the Oil and Gas Law. In view of this, the entire existing article is actually an embodiment of the nine main lines of thought. So, if the relevance can be explained, then mutatis mutandis the handover of the rokan block is in accordance with the construction in the Oil and Gas Law.

The analysis of the 6 main points of thought in relation to the process of handing over the Rokan Block to the Indonesian Government can be described as follows. ***First***, the analysis of the handover of the Rokan Block

from PT CPI to PT PHR is related to the main line of thought which states that Oil and Gas as a source of natural wealth contained in the Indonesian mining jurisdiction is controlled by the state and held by the government as the holder of the Mining Authority. Mining Authority remains in the hands of the government so that the government can regulate, maintain and use this national wealth for the greatest welfare of the people. Subsequently, the government formed an Implementing Body.

The analysis in the first point is related to the handover of the Rokan Block from PT CPI to PT PHR, presumably this can be confirmed as one of the government's actions aimed at fulfilling the first point of thought. Given, the main thing that is emphasized in the line of thought of this first point is by stating that oil and gas as a source of natural wealth contained in the Indonesian mining jurisdiction is controlled by the state and managed by the government. Of course, with the management that was initially taken over by foreign companies and switched to state-owned companies, it is one of the concrete forms of how the state, through its own companies, seeks to independently manage oil and natural gas as a source of natural wealth whose output will come from managing oil and gas independently. is intended for the greatest prosperity of the people.

Thus, the handover of the Rokan Block from PT CPI, which in fact is a foreign company, is managed independently by PT PHR, which is a state-owned company, is actually a concrete form of the implementation of the mandate in the first point of thought on the management of oil and natural gas in Indonesia. Finally, with this explanation, it can be concluded that the handover of the Rokan Block from PT CPI to PT PHR fulfills or matches the line of thought of the first point.

***Second***, the analysis of the handover of the Rokan Block from PT CPI to PT PHR is related to the main line of thought which states that eliminating monopolistic businesses in both the upstream and downstream sectors. In the upstream business sector, which consists of exploration and exploitation, which are activities related to the extraction of natural resources in the form of oil and gas mining materials, the private sector can only carry out oil and gas business activities indirectly, namely as a contractor through cooperation with the Implementing Body. In the downstream business sector, which consists of processing, transportation, storage, and trading businesses, companies can carry out business based on business permits issued by the government.

The analysis in the second point is related to the handover of the Rokan Block from PT CPI to PT PHR, presumably not only in accordance with the line of thought of this point. Rather, the transition process further strengthens Indonesia's position from the existence of a monopoly in the management of oil and natural gas itself.

This can be seen from the previous monopoly that the Indonesian government tried to suppress in managing oil and natural gas only in the downstream business sector which consisted of processing, transportation, storage and trading businesses that could be carried out by companies based on business permits issued by the government. With the transfer of management and placing PT PHR as the manager of the Rokan Block, it will also eliminate the form of monopoly which can be interpreted as the absolute elimination of monopoly, which is not only in the downstream oil and gas sector but in the upstream oil and gas sector which consists of the exploration and exploitation process which is an activity. related to the draining of natural resources in the form of oil and gas minerals, previously the Rokan Block was managed by a private party (PT CPI) as a contractor in cooperation with the Implementing Body. So, with the management shift that will be carried out independently by Indonesia through PT PHR, ultimately the form of monopoly can be pressed into three fields at once, namely in the upstream sector, downstream sector, to the commercial sector in managing oil and gas (oil and gas) in Indonesia.

Through the explanation above, it can be reaffirmed that the handover of the Rokan Block from PT CPI, which in fact is a foreign company, is managed independently by PT PHR, which is a state-owned company, is actually a concrete form of implementing the mandate in the second point of mind on an effort to suppress monopoly that occurred in the field of oil and natural gas management in Indonesia. Finally, with this explanation it can be concluded that the handover of the Rokan Block from PT CPI to PT PHR has fulfilled or is in accordance with the second point of thought.

***Third***, the analysis of the handover of the Rokan Block from PT CPI to PT PHR is related to the main point of the line of thought which states that creating and guaranteeing more real central and regional revenues from production results, so that state revenues from the oil and gas sector can be enjoyed directly by the people in the regions. concerned. For this purpose, the company or permanent establishment is obliged to surrender the state's share, state levies, pay bonuses, taxes, local taxes and levies, as well as applicable customs obligations. On state levies, state shares and bonuses are earmarked as central and regional revenues.

The analysis in the third point is related to the handover of the Rokan Block from PT CPI to PT PHR, presumably not only has a positive impact in terms of independent management as has been touched on in the previous points of thought flow. However, with the transfer of Rokan Block management to PT PHR, it can have a more real impact on central and regional revenues both from production and tax returns, considering that this previously seemed less effective because it involved foreign companies (PT CPI).

In other words, revenue sharing is related to central and regional revenues after the transfer of Rokan Block management independently by the state through PT PHR. This, in turn, can make it easier and give a more effective impact where the revenue regulation can later be regulated separately in cooperation with both the central and regional governments. Therefore, based on the above analysis, the submission of the Rokan Block from PT CPI, it can be concluded that this is a form of implementation of the third point of thought on the management of oil and natural gas in Indonesia.

***Fourth***, the analysis of the handover of the Rokan Block from PT CPI to PT PHR is related to the main line of thoughts which states that growing and developing national oil and gas companies at home and abroad and can accommodate the development of future oil and gas business activities. As well as providing greater appreciation for the use of goods and services, domestic engineering and design capabilities. The analysis in the fourth point is related to the handover of the Rokan Block from PT CPI to PT PHR, this can be confirmed at the outset. Whereas by using a state-owned company to take over and independently manage the Rokan Block as one of the largest oil and gas producers in Indonesia, it is actually intended to make the most of the people's welfare based on economic matters. On the other hand, the transfer of management independently is also aimed at growing and developing national oil and gas companies at home and in the country before finally being able to compete with foreign companies both in managing oil and natural gas (oil and gas) in Indonesia as well as competing in the management of oil and gas. found abroad.

Finally, with the maximum and independent utilization of this, domestic oil companies to manage oil and natural gas (oil and gas) in Indonesia. This, presumably will also have an impact as a series with a greater appreciation of the use of goods and services, domestic engineering and design capabilities as part of the transfer of technology which will be discussed further in the study of the next problem formulation. So that the handover of the Rokan Block from PT CPI to PT PHR as explained above. In fact, this is a concrete form of the implementation of the mandate in the fourth point of mind on the management of oil and gas in Indonesia. Finally, with this explanation, it can be concluded that the handover of the Rokan Block from PT CPI to PT PHR fulfills or matches the line of thought of the fourth point.

***Fifth***, the analysis of the handover of the Rokan Block from PT CPI to PT PHR is related to the main line of thought which states that it provides clearer provisions regarding the guarantee of the continuity of the supply and service of BBM as well as the arrangements related to the fuel subsidy mechanism. The analysis in the fifth point is related to the handover of the Rokan Block from PT CPI to PT PHR, presumably this does not directly overlap with the handover process. Given that, in this fifth point, the emphasis is on providing clearer provisions and guaranteeing the continuity of the provision of BBM services as well as regulating the fuel subsidy mechanism, which is the authority of the executive branch together with the legislative bodies both central and regional in general.

However, if it is lowered to the level of clarity of rules, including those relating to contracts. In fact, the explanation regarding this matter will be analyzed in the next sub-study on the formulation of this problem

which specifically examines the problem of the Rokan Block management contract that will be carried out by PT PHR. So, from the analysis of the fifth point which is the main line of thought in relation to the handover of the Rokan Block from PT PCI to PT PHR, this will later be emphasized in the discussion point regarding the contract that will be carried out by PT PHR and the Government of Indonesia.

***Sixth***, the analysis of the handover of the Rokan Block from PT CPI to PT PHR is related to the main point of the line of thought which states that ensuring adequate data provision, professional workforce, enhancing research and development functions and encouraging investment through creating a conducive investment climate. The analysis in the sixth point is related to the handover of the Rokan Block from PT CPI to PT PHR, it can be explained that one of the enthusiasm brought about by the desire to take over the management of the Rokan Block is primarily aimed at increasing inventory by placing state-owned companies as the main managers so that In the future, the application of this desire is expected to be able to create a more conducive investment climate, considering that the company implementing oil and gas management is a state-owned company.

In addition, the handover of the Rokan Block itself to date is related to the provision of data that has been provided from PT CPI as the company that previously managed the block up to 90%, including those related to the technical implementation of the oil and gas industry in the Rokan Block. So, with the data that has been received, it is hoped that it will be able to help PT PHR in creating a professional workforce, increasing research and development functions which will ultimately lead to the creation of a conducive investment climate and an increase in investment. So that the handover of the Rokan Block from PT CPI to PT PHR, can again be emphasized that this is actually a form of the implementation of the mandate in the sixth point of mind on the management of oil and natural gas in Indonesia. Finally, with this explanation, it can be concluded that the handover of the Rokan Block from PT CPI to PT PHR fulfills or conforms to the sixth point of thought.

1. Analysis of the Rokan Block Handover Based on Law No. 11 of 2020 on Job Creation at the Energy and Mineral Resources cluster

The analysis of the Rokan Block handover in the discussion of this sub-chapter which refers to Law Number 11 of 2020 concerning Job Creation specifically in the Energy and Mineral Resources (ESDM) cluster (hereinafter referred to as the Job Creation Law), is actually a complement to the discussion in the previous point. Given that under this Job Creation Law, there are only few changes to articles that were previously regulated under the material content of the Oil and Gas Law. These articles include Article 1, Article 4, Article 5, Article 23, Article 25, Article 52, Article 53, and Article 55, as well as the addition of one Article, namely Article 23 A which is regulated under the Job Creation Law.

2. Analysis of the Handover of the Rokan Block Based on Law Number 11 of 2020 concerning Job Creation specifically in the Energy and Mineral Resources (ESDM) cluster

The analysis of the submission of the Rokan Block in the discussion of this sub-chapter which refers to Law Number 11 of 2020 concerning Job Creation specifically in the Energy and Mineral Resources (ESDM) cluster (hereinafter referred to as the Job Creation Law), is actually a complement to the discussion in the previous point. Given that under this Job Creation Law, there are only a few changes of articles that were previously regulated in the material content of the Oil and Gas Law. These articles include Article 1, Article 4, Article 5, Article 23, Article 25, Article 52, Article 53, and Article 55, as well as the addition of one Article, namely Article 23 A which is regulated in the Job Creation Law.

| Changed Articles | Law Number 22 of 2001 on Oil and Gas | Law Number 11 of 2020 on Job Creation |
|---|---|---|
| **Article 1 point 21** | Central Government, hereinafter called Government, is an instrument of the Unified States of the Republic of Indonesia consisting of the President and the Ministers. | Central Government is the President of the Republic of Indonesia who holds the governmental power of the Republic of Indonesia assisted by the Vice President and ministers as referred to in the 1945 Constitution of the Republic of Indonesia. |

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| **Article 1 point 22** | Regional Administration is the Head of the Region together with the other instruments of the Autonomous Region as the Regional Executive Body. | Regional Government is the head of the region as an element of the Regional Government who leads the implementation of government affairs which fall under the authority of the autonomous region. |
| **Article 1 point 23** | Minister is the Minister whose field of duty and responsibility covers the Oil and Natural Gas business activities. | **Article 1 point 23 was removed** |
| **Article 4 paragraph (1), paragraph (2), and paragraph (3).** | (1) Oil and Gas as strategic non-renewable natural resources contained in the Indonesian Legal Mining Territory are national assets controlled by the state.<br>(2) The control by the state as referred to in paragraph (1) shall be carried out by the Government as the holder of the Mining Authority.<br>(3) The Government as the holder of the Mining Authority establishes an Implementing Body as referred to in Article 1 point 23. | (1) Oil and Gas as strategic non-renewable natural resources contained in the Indonesian Legal Mining Territory are national assets controlled by the state.<br>(2) The control by the state as referred to in paragraph (1) shall be exercised by the Central Government through Oil and Gas business activities.<br>(3) Oil and Gas business activities as referred to in paragraph (2) consist of Upstream Business Activities and Downstream Business Activities. |
| **Article 5** | Oil and gas business activities consist of:<br>(1) Upstream Business Activities covering:<br>a. Exploration<br>b. Exploitation<br>(2) Downstream business activities covering:<br>a. Processing;<br>b. Transportation;<br>c. Storage;<br>d. Trade. | (1) Oil and Gas business activities are carried out based on Business Licensing from the Central Government.<br>(2) Oil and Gas business activities consist of: a. Upstream Business Activities; and b. Downstream Business Activities. (redundant dg Article 4 paragraph (3))<br>(3) Upstream Business Activities as referred to in paragraph (2) letter a consist of:<br>a. Exploration; and<br>b. b. Exploitation.<br>(4) Downstream Business Activities as referred to in paragraph (2) letter b consist of:<br>a. Processing;<br>b. Transportation;<br>c. Storage; and<br>d. Commerce. |
| **Article 23** | (1) The Downstream Business Activities as referred to in Article 4 figure 2, may be carried out by the Business Entity after obtaining a Business License from the Government.<br>(2) The Business License required for the Oil business activities and Natural Gas business activities as referred to | (1) Downstream Business Activities as referred to in Article 5 paragraph (2) letter b, may be implemented by a Business Entity after fulfilling the Business License from the Central Government.<br>(2) Business entities that fulfill |

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| | in sub section (1) is differentiated into:<br>a. Business License for processing;<br>b. Business License for Transportation;<br>c. Business License for Storage;<br>d. Business License for Trading.<br>(3) Each Business Entity may be given more than 1 (one) Business License as long as it is not in contradiction with the legislative regulations in force. | the Business License as referred to in paragraph (1) can carry out business activities:<br>a. Processing;<br>b. Reinforcement;<br>c. Storage; and / or<br>d. Commerce.<br>(3) The Business Licensing that has been granted as referred to in paragraph (1) may only be used in accordance with the designation of the business activity.<br>(4) Application for Business Licensing as referred to in paragraph (1) must be made using the Business Licensing system electronically managed by the Central Government. |
| **Article 25** | (1) The Government may issue a written reprimand, suspend the activities, freeze the activities, or revoke the Business License as referred to in Article 24 based on:<br>a. the violation of one of the conditions mentioned in the Business License;<br>b. a repetition of the violation on the conditions of the Business License;<br>c. failure to fulfil the conditions laid down based on this Act.<br>(2) Before the revocation of the Business License as referred to in sub section **(l)** the Government will give an opportunity to the Business Entity during a certain period within which to remedy the violation which has been committed or the fulfilment of the conditions which have been laid down. | (1) The Central Government can impose administrative sanctions on:<br>a. violation of one of the requirements stated in the Business Licensing; and / or<br>b. the non-compliance of the requirements stipulated under this Law.<br>(2) Further provisions regarding the procedures for the imposition of administrative sanctions as referred to in paragraph (1) are regulated in a Government Regulation. |
| **Article 52** | Whoever carries out an Exploration and 01 Exploitatiatr without being in possession of a Cooperation Contract as referred to in Article 11 sub section **(l),** shall be subject to imprisonment of at the most 6 (six) years and a fine of at the mast Rp 60,000,000,000.00 (sixty billion rupiah). | Anyone who carries out Exploration and / or Exploitation without having a Business License or Cooperation Contract shall be sentenced to imprisonment for a maximum of 6 (six) years and a maximum fine of Rp. 60,000,000,000.00 (sixty billion rupiah). |
| **Article 53** | Whoever carries out:<br>a. Processing as referred to in Article 2 without a Processing Business 1-icence, shall be subject to | If the action as referred to in Article 23A results in a victim / damage to health, safety, and / or the environment, the perpetrator will be |

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| | imprisonment of at the most 5 (five) years and a fine of at the most Rp 50,000,000,000.06 (fifty billion rupiah);<br>b. The transportation as referred to in Article 23 without a transportation business License, shall be subject to imprisonment of at the most 4 (four) years and a fine of at the most Rp 40,000,000,000.00 (farty billion rupiah);<br>c. The storage as referred to in Article 23 without a Storage Business License, shall be subject to imprisonment of at the most 3 (three) years and a fine of at the most Hp 30,000,000,000.00 (thirty billion rupiah);<br>d. Trade as referred to in Article 23 without a Trading Business License, shall be subject to imprisonment of at the most 3 (three) years and **a** fine of at the most Rp 30,000,000,000.00 (thirty billion rupiah). | punished with imprisonment for a maximum of 5 (five) years or a maximum fine of Rp.50,000,000,000.00 (fifty billion rupiahs. ). |
| **Article 55** | Whoever intentionally carries out the transportation and or trade? in Fuel Oil which is subsidized by the Government outside the Indonesian legal ***territory shall*** be subject to imprisonment of at the most 6 (six) years and a fine of at the must **Rp** 60,000,000,000.00 (sixty billion rupiah). | Anyone who misuses the Transportation and / or Trading of Fuel Oil, gas fuel, and / or liquefied petroleum gas which is subsidized by the Government will be sentenced to imprisonment for a maximum of 6 (six) years and a maximum fine of Rp.60,000,000,000.00 (six). tens of billion rupiah). |

*2.3. The Implementation of Transfer of Technology of the Handover of Rokan Block by PT Chevron Pacific Indonesia to PT Pertamina*

Matters of transfer of technology is something that is easy to stipulate in the rule of law but very difficult to implement. PT. Chevron Pacific Indonesia (CHEVRON PACIFIC INDONESIA) as a foreign company that has been operating oil and gas in Indonesia for a very long time has a very capable technology capability to do this oil and gas business. This US company started the oil and gas business in Indonesia. As it is known, the oil and gas business are a capital and technology intensive business. Technology itself is created by innovative and creative human resources. CPI was first established in Indonesia in early 1924[8]. Standard Oil Company of California (Socal) and Texas Oil Company (Texaco) formed a joint venture company in Sumatra, named N.V. Nederlandsche Pacific Petroleum Maatschappij or NPPM. The company found a non-productive oil well which was eventually closed. In 1944, NPPM geologists, Richard H. Hopper and Toru and his team discovered the largest oil well in Southeast Asia, in the Minas area, Riau. This well was originally named Minas No. 1. Minas is famous for its Sumatra Light Crude (SLC) oil which is good and has a low Sulphur content.

In the early 1950s, NPPM changed its name to Caltex Pacific Oil Company (CPOC), and started exporting oil from Minas, via Perawang. New oil wells were also found in the Duri Bengkalis and Petapahan areas. The name Caltex was changed back in the early 1960s to the Caltex Pacific Company (CPC). As more oil wells were discovered in the Caltex operating area, a regional map of the natural resources of oil and gas was created. This

[8] See https://id.wikipedia.org/wiki/Chevron_Pacific_Indonesia, accessed on 24 January 2021.

map of the area of operation is commonly called the Kangaroo Block, because of its kangaroo-like shape. Apart from the Kangaroo Block, Caltex (which in the 1970s changed its name back to PT Caltex Pacific Indonesia) at that time also operated the Coastal Plains Pekanbaru Block (CPP Block) and Mount Front Kuantan Block (MFK Block).

In 1980, after seeing the enormous potential for oil and gas content in Minas, CPI felt that it needed a breakthrough to increase oil production in the Duri oil field. In 1980, the largest Steam Injection System project in the world was built, namely the Duri Steam Flood, which was inaugurated by President Soeharto in the mid-1980s. Finally in 2005, Caltex, as a subsidiary of Chevron and Texaco Inc. was acquired by Chevron together with Texaco and Unocal, so since then the name PT Caltex Pacific Indonesia officially changed to PT Chevron Pacific Indonesia. The issue of transfer of technology has long been regulated in various laws and regulations in Indonesia.

*2.4. Transfer of Technology Based on the Indonesian Regulations*

a. Law No. 1 of 1967 on Foreign Investment

In considering the consideration of the 1967 PMA Law, it is clearly recognized that Indonesia's inability to manage its natural resources such as natural gas and gas. This is because Indonesia as a country which has only been independent for 22 years still has many shortcomings such as capital, technology and reliable human resources. The abundant natural resources available in Indonesia have not yet been touched and then have economic value which can be used to develop the economy in order to provide prosperity to all Indonesian people.

Article 12 of the PMA Law regulates technology transfer in polite language that the use of foreign workers must be slowly replaced by Indonesian workers which can be done through training and education of workers at home and abroad. The provisions of Article 12 of the PMA Law are what is meant by the provisions on technology transfer that could never be implemented until the PMA 1967 Law was repealed and replaced by Law No. 25 of 2007 concerning Investment. It can be said that since Indonesia's independence until the end of the 1967 PMA Law, the story of technology transfer has only existed on paper. It only exists in legal and economic theory.

b. Law No. 25 of 2007 on Capital Investment (Capital Investment Law)

Investment is all forms of investment activities, both by domestic investors and foreign investors to carry out business in the territory of the Republic of Indonesia[9]. So the 2007 PM Law combines 2 previous laws, namely Law no. 1 of 1967 concerning Foreign Investment and Law no. 6 of 1968 concerning Domestic Investment. The provisions in Law Number 25 of 2007 concerning Investment which regulate technology transfer are only briefly regulated in Article 10 Paragraph (4) which states that investment companies employing foreign workers are required to organize training and transfer technology to Indonesian workers. . The word obligatory here does not have any implications because this provision is not accompanied by a sanction. Even though it has been 62 years after Indonesia's independence, the 2007 PMA Law was made to replace the PMA Law of 1967, in terms of substance related to the aspect of technology transfer, there has not been any change, namely coercion from the state so that foreign capital companies are required to transfer technology to national companies that become national companies. partners within a certain period of time. It has become a legal feature that a provision will be effective to comply with if there is coercion which is indicated by the existence of sanctions by the state for the offender.

*2.5. Legislations on the field of Intellectual Property Rights*

Intellectual property includes the fields of arts, culture, science and technology. On the one hand, if there are regulations that regulate and oblige the transfer of technology on behalf of foreign capital companies to domestic capital companies, then the intellectual property regime such as patents, for example, where the state gives full

[9] See Article 1 Point (1) UUPM 2007.

exclusive rights to the inventor to enjoy his patent rights both morally and the economy. Patents can be either a product or a process. So, if it is related between patents which are actually technology and technology transfer, it is very difficult to combine these things. Patents are rights granted to inventors for their inventions that meet the criteria of novelty, inventive step and applicable in the industry. Meanwhile, transfer of technology can only be understood as a relationship between individuals or workers and technology. How a new technology that has just been marketed and used in the industrial world certainly requires special knowledge to be able to run it and then has the ability to create even newer technology which is an improvement from previous technology. According to Wikipedia Technology transfer, also called transfer of technology (TOT)[10], is *the process of transferring (disseminating) technology from the person or organization that owns or holds it to another person or organization. These transfers may occur between universities, business (of any size, ranging from small, medium to large, governments, across geopolitical borders, both formally and informally, and both openly and secretly. Often it occurs by concerted effort to share skill, knowledge, technologies, manufacturing methods, samples, and facilities among the participants. to ensure that scientific and technological developments are accessible to a wider range of users who can then further develop and exploit the technology into new products, processes, applications, materials, or services. It is closely related to (and may arguably be considered a subset of) knowledge. Horizontal transfer is the movement of technologies from one area to another.*

Technology transfer can also be interpreted as the share of knowledge from one person to another or from one organization to another. At the conceptual level, technology transfer is very easy to manage, but in its implementation, it is very difficult to realize. The supremacy of the monopoly rights over patents is a factor that is hard to beat. Mastery of economic potential in totality to reap profits is the dominant thing for inventors and the industrial world.

### *2.6. Challenge of the Technology Transfer Process*

The objectives of the transfer of technology is to facilitate the spread of technology from one country to another, Indonesian Mining Law and other relevant laws do not regulate this clearly in its articles. Whereas technology transfer is a strategic means in increasing the mastery and utilization of science and technology. So it stands to reason that current technology transfer in Indonesia has not taken place smoothly, either because there are no common perceptions and conceptions about technology transfer or for reasons of developed countries economic politics that are hesitant in helping developing countries to master and utilize technology from developed countries. Lack of regulations on transfer of technology also adds to the failure and obstacles of the technology transfer. This lack of sanctions gives investor the chance to slack off on their promises to transfer the technology thus causing disadvantage to Indonesia while still benefiting them. There are two ways of transfer technology under the Law No. 14 of 2001, those are through a license contract regulated Articles 69 - 87, and the implementation of patents by the government (government use principle) related to the interests of defence and security, as well a very urgent need for the benefit of the regulated society (Irawan, 2019). However, these two ways of technology transfer does not really help with the mastery of advanced technology by the Indonesian people. The causes include (Rahmah, 2019):

First, the license contract is carried out privately between the private sector with private (B to B) and subject to private law (civil law) which is based on freedom of contract, consensualism and pacta sun servanda. PSA is clearly stronger in terms of contract making license compared to PSA / BUMN / BUMD, so the contents of the contract are more protect the interests of PSA, especially related to protection against the technology (IPR) it has. Likewise happened to compulsory license. So far there has not been much of a role accelerate mastery of advanced technology (latest technology) by PSA / BUMN / BUMD, so that Indonesia is still very dependent on it foreign products without being able to make substitute products in domestic. Mas Rahmah's research results in 2006 showed that the effectiveness of the compulsory license for the acceleration of the technology transfer process still lacking. This is because the type of license is mandatory it is seldom chosen in an effort to master and develop technology.

[10] See https://en.wikipedia.org/wiki/Technology_transfer accessed on 24 January 2021.

Second, so far the principle of implementation by the Government (government use) is only used for short-term interests related to urgent community needs. For example, a disease outbreak certain drugs that require the availability of drugs at the same price affordable. There are no technology transfer activities in it. The meaning is juridically, there is no specific technology transfer arrangement in the system Indonesian economic law.

The first challenge that awaits Indonesia is the lack of skilled human resources. Indonesia's education does not emphasize adequate training for the students and does accommodate students with necessary skills in the fields, which is required for every industry. The vocational institution graduates are not equipped with the required industrial skills. Which in turn leads to industry importing the human resources from another place, those include foreign workers who are already equipped with necessary skills. Often time, those vocational institution graduates ended up working the menial job. The oil and gas industry involves exploration, exploitation and drilling, development, storage and transportation. The oil and gas are unrenewable resources. To perform such tasks, experts in the oil and gas mining are necessary so that there won't be any unnecessary problems. Moreover, there are also demands for skilled resources in the digital fields to operate data, software engineers, machine learners, technical engineers, as well as security experts. These jobs required strong analytical skills to manage all these data.

The second is cultural. The oil and gas industry require several soft skills attributes, those include orderly and proper planning, punctuality, accuracy as well as compliance. However, the culture is not known for these attributes. Many of the people in the society rarely practice any of these said attribute. Those in turn could affect the industry in a bad way. A slight inaccuracies and/or incompliance could affect the industry. Therefore, changes in this cultural aspect or habitual aspect needed to be changed for the technology transfer to succeed. Another cultural aspect that could be an obstacle is language barrier. Most Indonesians are not known to be fluent in English, however, most sources of the technology are from overseas. Therefore, all the manuals, documentations, license etc. are in English. The worker needs to master English language in order to master these technologies. This in turn will require another expert who not only skilled in mastering the machinery, but also skilled in English language. Some might opt for a foreign worker which in turn will give Indonesia a slight disadvantage.

The third challenge is fund. An additional problem that has impeded technology transfer has been the high cost of the technology transfer. The implication of the high cost of transferring technology are four. First, it is evident that technology is not a free commodity; if available, it as available only as a cost. Second, it is equally evident that this cost is largely a contractual cost and is separate from the production cost necessary for the utilization of the technology. Once required, the technology must still be supplemented by the application of capital, labour and raw material inputs to the production of the final product. Third, it is not evident but nonetheless true that if the latter inputs are packaged with the technology transfer, then the form of the packaging determines whether the average production cost of the final product is in fact the minimum attainable average cost; if there is an insufficient regard for factor proportions an efficiency cost is added in the transfer of technology. Finally, in view of the high contractual cost and the likely efficiency cost, it is not evident that technology transfer is an attractive form of technological improvement; alternative forms may be less costly (Hamdani & Mahmood, 1976).

Funds have been one of the biggest obstacles in technology transfer especially for the developing countries. Lack of funds might cause the process of technology to come to a standstill. In order to avoid a standstill, there needs to be an adequate planning on the budget so that the process would run as expected.

Another challenge is technology itself. Many times the technology would require a small technology part as a supporting industry. One technology might require another part to be assembled. Moreover, in case that the machine broke out and in need of a material that is not available in Indonesia, it might also cause some problems in the future. If the domestic industry does not have these necessary part, often times, the choice would be to import these part or materials, which again, not very beneficial for Indonesia.

## 3. Conclusions

The analysis of the handover of the Rokan Block with a touchstone against Law Number 22 of 2001 concerning Oil and Gas (Migas), as well as an analysis of the handover process and policies to independently manage the Rokan Block through PT PHR and six points in the line of thought as described above. It can be concluded that the process of handing over the management of the Rokan Block from PT CPI to PT PHR has met the criteria in Law Number 22 Year 2001 concerning Oil and Natural Gas (Oil and Gas Law). This shows that the process of the technology did not always run very smoothly. The private sector solely desires to gain from the country. However, they are keen on keeping the technology to themselves. The fact that the contract is carried out through the pacta sunt servanda principle could also cause several problems if either party is not being careful while another party is deemed to have bad faith.

Matters on technology transfer is a problem that has always been faced by developing countries since industrial sector became the very backbone on helping to develop the country thus strengthen the economy. However, to carry out this development, most developing countries including Indonesia face several main obstacles in technology transfer, namely: skilled human resources, culture, funds, the technology itself, and lack of governmental oversight.

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EOR is a method or method used to increase oil reserves in a well. The trick is to raise the volume of oil that could not be produced before. This EOR method optimizes an oil well with thick, heavy, poor permeability and irregular faultlines so that it can be lifted to the surface.

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# Tibet in European Eyes: How European Orientalists Shaped Representations of Tibet during the 19th Century and Beginning of the 20th

Fabienne Le Houérou[1]

[1]Research Director at CNRS
IREMAM (Institut d'Etudes et de Recherches sur les Mondes Arabes et Musulmans)
ICM (Institut Convergences Migrations)

**Abstract**
This article is historically recalling how Europeans portrayed Tibet during the middle of the 19th century. It introduces the problematic of a "pure" Tibet invented by Europeans travelers. The French orientalist will be studied as the main promoters of such caricatured narratives.

**Keywords:** Pure, Virgin, Orientalism, Colonial, Alexandra David Néel, Father Huc

## 1. The "virgin Tibet" paradigm

There are a plethora of narratives related to Tibet during the 19th century and after during the first decades of the twentieth. Each portrayed Tibet as an idealized untouched land "the roof of the world", symbol of snow and purity. The widespread references can be classified as "orientalists" and "colonials". Edward Said (1979) depicts the ways people from the West represented the East characterized by otherness that could be defined as relying on stereotypes as a lens of a dominant civilization and condescending representations to reinforce otherness.

In his introduction to *Orientalism*, Said defines his theory of a European invention of the Orient. He writes: "*The Orient was almost a European invention, and had been since antiquity a place of romance, exotic beings, haunting memories and landscapes, remarkable experiences*" (Said, 1979, p. 1). The European idealization of Tibet, as a romanticized space, meets Said's conception of an invented oriental world. A non-existing Tibet, a land depicted, by French writer Alexandra David Neel, who fashioned herself as the first woman in Lhasa. Her depictions offer the readers a paradigmatically orientalist view of the "roof of the world" by representing the space as exotic. Her books were sold as documents but were almost novels. She stressed the mystical side of an unknown land and invented a mysterious otherness that gave her a large following in France. She used to focus on her extraordinary experiences when travelling to Tibet, alone with a young monk that she adopted (but was used as a translator), disguised as a Tibetan beggar.

Figure1: Alexandra David Néel

To travel disguised as locals is paradigmatic to the orientalist approach. It emphasizes the exotic other and the position of the European observer as a cultural spy by hiding who she is for getting more information. On my view, this dissimulation is a paradigmatic status of a colonial view. The postcolonial approach is totally contrary to this disguised and hidden agenda. No academic, after the sixties, would ever take this position, but we must recall that she travelled in Tibet during the first decades of the twentieth century. She arrived in Lhasa in 1924. It is important to underline this historical dimension. It is obvious that she is situated in the logical continuity of the tales and stories given by the French Missionaries in 1846. Even the ways she disguised herself can be inspired by the stories of travels of Huc and Gabet. They also dressed up as Tibetan Lamas when travelling to China, Mongolia and Tibet. These authors recall in their book the urge to change clothes. There are continuities between Huc and Gabet (1) and Alexandra David Neel's *Voyage d'une Parisienne à Lhassa*, published in Paris, London and New York in 1927.

Let us recall the story of Evariste Huc (translated in English):

> *The missionaries who reside in China, all, without exception, wear the secular dress of the people, and are in no way distinguishable from them; they bear no outward sign of their religious character. It is a great pity that they should be thus obliged to wear the secular costume, for it is an obstacle in the way of their preaching the gospel.*
>
> *Among the Tartars, a black man—so they discriminate the laity, as wearing their hair, from the clergy, who have their heads close shaved—who should talk about religion would be laughed at, as impertinently meddling with things, the special province of the Lamas, and in no way concerning him. The reasons which appear to have introduced and maintained the custom of wearing the secular habit on the part of the missionaries in China, no longer applying to us, we resolved at length to appear in an ecclesiastical exterior becoming our sacred mission. The views of our vicar apostolic on the subject, as explained in his written instructions, being conformable with our wish, we did not hesitate. We resolved to adopt the secular dress of the Thibetian Lamas; that is to say, the dress which they wear when not actually performing their idolatrous ministry in the Pagodas. The costume of the Thibetian Lamas suggested itself to our preference as being in unison with that worn by our young neophyte, Samdadchiemba.*
>
> *We announced to the Christians of the inn that we were resolved no longer to look like Chinese merchants; that we were about to cut off our long tails, and to shave our heads. This intimation created great agitation: some of our disciples even wept; all sought by their eloquence to divert us from a resolution which seemed to them fraught with danger; but their pathetic remonstrances were of no avail; one touch of a razor, in the hands of Samdadchiemba to sever the long tail of hair, which, to accommodate Chinese fashions, we had so carefully cultivated ever since our departure from*

*France. We put on a long yellow robe, fastened at the right side with five gilt buttons, and round the waist by a long red sash; over this was a red jacket, with a collar of purple velvet; a yellow cap, surmounted by a red tuft, completed our new costume. Breakfast followed this decisive operation, but it was silent and sad. When the Comptroller of the Chest brought in some glasses and an urn, wherein smoked the hot wine drunk by the Chinese, we told him that having changed our habit of dress, we should change also our habit of living. "Take away," said we, "that wine and that chafing dish; henceforth we renounce drinking and smoking. You know," added we, laughing, "that good Lamas abstain from wine and tobacco." The Chinese Christians who surrounded us did not join in the laugh; they looked at us without speaking and with deep commiseration, fully persuaded that we should inevitably perish of privation and misery in the deserts of Tartary"*[i]


LE R. P. HUC EN COSTUME CHINOIS

*Extrait de la nouvelle édition des " Souvenirs du P. Huc ",* annotée et illustrée par J.-M. Planchet, missionnaire lazariste (Pékin, 1924.)

Figure II: Father Huc in Chinese costume.

*Source. R.P Huc, Souvenir d'un voyage au Thibet et en Chine, Plon, 1926, Paris.*

Alexandra David Néel, The well known woman feminist traveler, like the French missionaries during the 19th century, would adopt a similar approach in 1924, when she would don local clothes. In fact, she cites the missionaries in her edition at the beginning of her story, noting that Huc and Gabet were the only travelers who reached Lhasa in 1846 (Néel, 1927, p. 9).

> *La question posée par cette femme me laissa très préoccupée. Ainsi, en dépit de la peine que j'avais prise de me poudrer avec du cacao mélange de braise pile, malgré mes jolies nattes en crin de yak, je ne ressemblais pas suffisamment à une Tibétaine. Que pouvais-je inventer de mieux?*
> "The question asked by this woman left me very worried. Thus, in spite of the effort I had taken to put cocoa powder mixed with piled ash, despite my lovely mats in yak hair, I did not look sufficiently Tibetan. What else could I invent?" (Néel, 1927, p. 71)

She used cocoa powder as makeup to look Tibetan and furthermore, she explains that her *accoutrement* is rather useful to resemble a modest Tibetan in order to misguide humble Tibetans to represent her as "one of them" (Néel, 1927, p. 138). Néel is also very cautious to hide any golden item to dissimulate her wealth (Néel, 1927, p. 147)

It is obvious that Néel was inspired by the stories told by Huc a half of century before her travels. Huc describes that honorable Tibetan women coat their face with a sort of black jam in order to look hideous and repulsive to men when they get out of their houses (Huc, 1926, p. 141)

As the reader may see in the reference section, Néel produced a number of publications. Not only are these publications widespread, but also inspired many biographers and tales showing the fascination and impact she still has on the French public. The latest book published about her Tibetan epic in Tibet was released in 2018.

The romantic impact of her prose should not be underestimated in the way Tibet still appears in European imagination.

> *J'ai vécu plusieurs années, au pied des neiges éternelles, comme dans les solitudes herbeuses de la région des grands lacs, la vie étrange et merveilleuse des anachorètes tibétains (.)*
> I lived many years at the bottom of eternal snow, like in herbal solitudes from the great lakes region, the strange and wonderful life of Tibetan anchorite (Néel, 1927, p. 47).

In her publication "Voyage of a Parisian in Lhasa" (1927), Alexandra David Néel presents herself as having directly experienced the "eternal snow" of a "strange and wonderful life of a hermit". These expressions are paradigmatic of orientalist self-fashioning. Everything is pictured as gorgeous, magic and mysterious. Her chocolate makeup trying to hide her white carnation did not protect her enough, and she was eventually unmasked by the governor of Lhasa and was forced to leave Tibet.

Her return to France on May 10th, 1925 generated a lot of public interest that granted her fame and prestige. Magazines detailed exploits of her adventure. Her romanticized representation of Tibet meets the public expectations of a Far Eastand the fact that she is a female also played into public intrigue of her travels. I do not want here to minimize her courage (travelling alone in 1924 was not something common or easy) or her talent as a writer, but I think it is representative of the pervasiveness of orientalist representations in the early twentieth century. Her narratives are the fruit of a historical moment that show the typical ways the West is looking at the Orient. Today we look at it as stereotyped elements, but they were very originally perceived during that time. Few women were that intrepid, audacious, or daring. The French magazines were enthusiastic to relate her adventurous travels and she became an important icon of female freedom.

Copying her style from the French missionaries, she can be seen as an emblematic orientalist as a landmark of a specific style to portray a virgin Tibet still circulating in representations today in Europe, despite the fact that this Tibet has never existed.

I could directly measure the impact of this traditional orientalism at my university on 17th October 2014, when I participated to a Tibetan Film Festival at Aix-Marseille Université.(2) A documentary with ethnographic intention was projected at Aix-Marseille-University during a cultural festival organized by a professor of Tibetan

language. The documentary tells the story of a Tibetan refugee woman in exile living at the edge of the Tibetan colony in Delhi. The film was portraying a sick mother living at the margins with an African partner. The film is freely available on Dailymotion (https://www.dailymotion.com/video/x2g236p).

It was shot in 2013, issued in 2014 and screened at Harvard University in May 2016. This documentary explored gender roles and the violence against women in exile through an original life-story of a Tibetan woman on the edge, in India, who was living with an African partner. The film was also questioning the reality of an accepted mix breeding and the limits of cultural amalgamation in our postcolonial world. The Tibetan colony condemned the Afro-Tibetan couple and few Tibetan refugees in the film expressed racism related to the color of the "half cast" baby, who was deemed too black by the Tibetan refugees in New Delhi.

Clearly the film explores the margins of the Tibetan colony in exile in India. The tensions in the film tell us much more about rejection, marginality, racial disregard, and community scornful judgment on the African partner of Angie, who was disparaged as a "violent beast". Contemptuously seen as evil, the colony told me different horror stories about him.

The film was not advertising for a magical compassionate Tibet or a pure land and thus the audience was amazed and offended by the new migratory reality this documentary was presenting. They reacted very violently to the images and accused the author of filming "the worst of humanity" and to exhibit the most "horrible" side of the Tibetan community, ignoring the magnificent Tibetan culture. Their confrontational reaction was expressed in a campaign against the filmmaker. Other Tibetan filmmakers presented at the show tried to defend my point of view, arguing that I have filmed "the truth about today's exile in India". I realized that I was criticized for facing a contemporary Tibetan exile they refused to admit or perhaps, did not want to confront. This depiction contradicted the European imagination about a magical culture and an untouched land full of philosophical compassion. The audience was in majority studying Tibetan language at Aix-Marseille-University and despite the beginning of defense from the Tibetan artists (present that day), this reality remained unheard, unspoken. This refugee situation was opposed to their imagined representations of a past Tibet, and thus, had to be negated.

This narration illustrates the impact of French orientalism on the ways the public still portrays the "Orient" in Europe. This anecdotic account highlights how the Orient was an intellectual invention (Said, 1979, p. 1) and a current lively construction still very strong in the European imaginary. This representation of course influenced the way that Tibetan Muslims were invisible, unconsidered and were denied as object of scientific interest and research. Tibetans refused to protect an idealized Tibetan dream of purity, whereas Europeans clung to such representations

[1] Evariste Regis Huc, Travels in Tartary, Thibet, and China, 1844-5-6.

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# Fulfilling a Religious Duty: Emigration of *Hausa* Salafists of Ghana to Saudi Arabia

Mohammed Salisu[1]

[1] PhD Candidate, Center for Gulf Studies, College of Arts and Sciences, Qatar University, P. O. Box 2713, Doha, Qatar. Email: sm1704933@student.qu.edu.qa

**Abstract**
Literature on West African migrants to the Gulf Arab States have over the years been enmeshed in what has come to be known as 'Pull-Push' factors, the socio-economic forces influencing movements of people. Despite enduring link between religion and migration of West Africans to the Gulf Arab sub-region, the subject is yet to receive the needed academic attention. This article fills the vacuum by illuminating a connection between secular education and the emigration of *Hausa* Salafists of Ghana to Saudi Arabia. It reveals how the coming into force of the *Free Compulsory Universal Basic Education* (FCUBE) policy in 1995 spurred the *Hausa* Salafists on to settle in the Gulf Kingdom. Thus, the article argues that unlike the traditional Ghanaian migrants in Saudi Arabia, the *Hausa* Salafists do not intend to ever return to homeland Ghana.

**Keywords:** Ghana, Saudi Arabia, Gulf Kingdom, Hausa Salafists, Secular Education, Emigration

## 1. Introduction

Movement of Ghanaian migrants to Saudi Arabia is not a recent phenomenon. Available job opportunities for highly skilled labors lured 100s of Ghanaian technocrats to the kingdom, although such is not the case of the 1000s of menial workers there. As a rentier states,[1] benefiting from abundant oil reserves, Saudi Arabia has been experiencing structural changes and social developments with tremendous returns on its energy export. Thus, from human assets perspective the kingdom has generated huge demand of workforce especially unskilled workers for immediate employment in their structural development**:** construction of roads, skyscrapers, expansion of the transport sector, provision of security and domestic works. The labor shortage in Saudi Arabia has become an important issue employing Ghanaian migrant workers to do largely menial and domestic jobs that are the most viable short-term solution. Ghanaian workers in Saudi Arabia are, therefore, largely economic migrants.

[1] For theoretical perspective on rentier states, see Beblawi, The Rentier State in the Arab World (1987).

Many years before Saudi Arabia began exploring oil in the early 1930s; however, religion has influenced the movements of Ghanaians to the Gulf kingdom. The desire of capable Ghanaian Muslims to perform the annual *hajj* and the *umrah*[2] at least once in their lifetimes made them thronged Saudi Arabia. Unlike the economic migrants who stay a long while, the annual religious migrants, in theory, leave the Gulf kingdom immediately after completing the required rituals. Yet, whiles literature abounds on the classical 'Pull-Push' factors influencing the movements of Ghanaians to Saudi Arabia, movements of the religious migrants to the Gulf Kingdom has received no academic attention. In the same vein, literature discusses Salafi immigrants in Saudi Arabia, yet far less is known of *Hausa* Salafists of Ghana (hereinafter, *Hausa* Salafists) in the Gulf Kingdom. The available academic discourse closer to this usually stresses economic migrants portraying the larger *Hausa* communities as a population seeking greener pastures in the kingdom. Two lines of thought have been analyzed to support this view. On one hand, some authors have emphasis high poverty rate and lack of job opportunities in Northern Nigeria as a legitimate case for *Hausas* absconding in the Gulf kingdom after completing the *hajj* and *umrah* rituals (Ikuteyijo, 2020; Afolayan, 1998; O'Brien, 1999). Others have proposed [un]conscious replication of the phenomenon of *almājiri*s,[3] in an environment abound with philanthropists ready to dish out goodies (Salisu, 2011). In stressing the 'Pull-Push' factors, both views employed 'economics' as the main factor. I argue in this article that not all *Hausa* settlers in Saudi Arabia are economic migrants. My argument hinges on the emigration of *Hausa* Salafists to Saudi Arabia to escape the imposition of secular education on their children. Hence, the objective of this article: to reveal a direct connection between secular education and the emigration of the *Hausa* Salafists to Saudi Arabia. The article argues that the implementation of the *Free Compulsory Universal Basic Education* (FCUBE) policy goaded their movements. Further, given the growing concern of the activities of the *Ahl al-Sunna Li al-Da'wati Wa al-Jihād* (a.k.a. *Boko Haram)*[4] and their inveterate hostility to secular education, the article brings to the fore the possible existence of like-minded groups in other West African countries, albeit they may not be militants in posture as the former. The optics of the article will be twofold: individual members and the group as an entity. The article begins by outlining trends in the development of global Salafi movements. The second part examines the structure and ideology of the *Hausa* Salafists. The processes and procedures that characterized their emigration constitute the third part. The prenuptial part discusses their fundamental antipathy towards secular education and the reason for fleeing to Saudi Arabia. The article concludes with descriptive analysis of the social life and status of the group in Saudi Arabia.

The article employs a qualitative set data to elicit information about the group. It consists of interviewing thirty-five members of the group living in *Jabal Umar* in Mecca, *al-Nakhīl* neighborhood in Medina, and *al-Salāmah* in Jeddah. Further, I had a focus-group discussion with ten (male and female) members of the group in each of the three cities. My trip to Saudi Arabia in 2018 to observe the last ten days midnight Ramadan prayers (*Salāt al-Tahajjud*) and my subsequent two weeks stay after the *Eid al Fitr*[5] festival accorded me the opportunity to undertake the fieldwork. Prior to this though, I met with two (nonagenarian and centenarian) members of the group at *Sabon Zongo*[6] in Accra who are among the few lefts behind due to desiccating old age and putrefying health state. They gave me contact addresses of the leading members of the group and their families in Saudi Arabia. These persons granted me stupendous interviews about their life and activities in the kingdom. The interview covered wide range of questions encompassing: the year of leaving Ghana and reaching Saudi Arabia; reason(s) for leaving; the means of leaving; economic activities of the religious emigrants in the kingdom; and the possibilities of returning to homeland, Ghana.

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[2]. *Hajj* is a mandatory Islamic pilgrimage undertaken by capable a Muslim at least once in his or her lifetime in Saudi Arabia. In contrast, the *Umrah* is a voluntary Islamic pilgrimage that under-taken by a Muslim in Mecca within specific dates in accordance with the Islamic lunar calendar.

[3]. *Almājiri* is a corruption of the Arabic word, *almuhājir* (a migrant), denoting children sent to live and study with a traditional Islamic scholar. These children go a-begging on streets to raise funds for the cleric and to fend for themselves. This phenomenon has caught the attention of almost all governors of northern Nigerian states with the current governor of Kano state leading the crusade to outlaw it.

[4]. On all occasions voice of the Boko Haram leader, Abubakar Shaykawa, was played on the electronic media in Nigeria, this is the name he called his group (*Sunna Fraternity for Islamic Proselytization and Jihad)*. Nonetheless, the group is rarely addressed with this name because the Nigerian media and the larger Muslim community of the country have refused to recognize it as such.

[5]. *Eid al Fitr* is an Islamic festival celebrated by Muslims across the globe to mark the end of the month-long dawn-to-Sunset Ramadan fasting.

[6]. For more about the community called *Sabon Zongo* see Owusu, Social Effects of Poor Sanitation and Waste Management on Poor Urban Communities:

## 2. Salafism In Global Context

Because the *Hausa* Salafists are an aspect of global Salafi movement, an overview of trends in the development of global Salafism is crucial for grounding the subject of this article. The concept of *Salafiyya* and those it designates remain ill-defined and often misunderstood in the literature on the movement and studies on Islamism in general. The term derives from the Arabic root word, *al-Salaf* that means 'the past'. It signifies the pious ancestors (*al-Salaf al-Sālih)* who represented the golden age of Islam, which made up the period of the four rightly guided caliphs (*al-Khulafā al-Rāshidūn*) whose rule spanned the years 632 to 661. Salafists argue that the corruption of the original teaching of Islam is the primary reason for metastasizing jāhiliyya[7] and decline of Muslim societies across the globe (Ayoob, 2008). It behooves on all Muslims, therefore, to strive to practice the religion as was done in the nascent age. "[B]y asserting that Muslims must look back to their earliest history to discover the principles of their faith, they encouraged others to reexamine traditional institutions of government and law as they had presumably existed in the great days of the *Rashidun* [the righteously guided] and to explain in what respects they had become corrupted". Although global Salafi movements share a common creed (*aqīda*), they differ on the methods of 'purifying' Islam (Saeed, 2006). Thus, whereas Sunni *Sufis*[8] advocate for asceticism, contentment, and self-cleansing to protecting and defending Muslim societies from deviant behaviors, Wahhabis are of the view that straight-forward and un-figurative explanation of the Qur'an and the Sunna[9] is the only way to liberating Muslim societies from its social cancers.

A Sunni reform movement, "Salafism originated from the teachings of Taqī al-Dīn Ahmad Ibn Taymiyya (d. 1328) and gained momentum in the course of the eighteenth century when Muhammad Abdul Wahhab (d.1791), the founder of Wahhabism who was highly inspired by the former preached against the perceived moral decline and extensive corruption of the Islamic faith with innovations (*bid'a)".* In the nineteenth and twentieth centuries, however, the concept of Salafism geared up across the globe due to the concomitant spillovers of colonial rules in Muslim majority countries. Consequently, the idea of returning to the pristine Islam of the earliest centuries gained momentum through jurists like Jamāl al-Dīn al-Afghānī (d. 1839) and Muhammad Rashid Rida (d. 1865). Modernists such as Muhammad Abduh (d. 1905) and Muhammad Iqbāl (d.1938) gave a different interpretation of the idea in their bid to matching the religion with the realities of modern times. These group of scholars who were opposed to traditionalists accepted modernity as a development tool but rejected modernism as a westernization boom. Thus, contextualization of global Salafism must take into consideration the convergences, divergences, and fragmentations of the concept (Sounaye, 2017).

Wiktorowicz (2005) categorized global Salafi movements into purists, politicos, and jihadists. The purists, he explains, emphasis on propagating and practicing the faith in a way that combat social deviance, polytheism, human desire, and philosophical syllogism. This is because, "until the religion is purified, any political action will likely lead to corruption and injustice because society does not yet understand the tenets of faith". Whilst purists denounce violent and armed struggle - unless perhaps when they are pushed to -, they are [in]famous for their virulent campaign against western ideas, values, and their philosophy in discussing religion (Wiktorowicz, 2005). Organizations such as the Muslim Brotherhood and the *al-Sahwa* of Saudi Arabia started on this tangent. Elaborating on their activities, Blecher (2006) states, the Muslim Brotherhood "operate[d] peacefully within national boundaries and attempt to influence and transform their societies and polities largely through constitutional means, even when the constitutional and political cards are stacked against them". They adopted 'bottom-up' approach by providing free education and healthcare facilities, constructed boreholes in deprived communities, maintained 100s of orphanages, paid monthly stipends to the sick, the needy, widows, and engaged the masses through their media networks (Blecher, 2006). With this, they were able to convince many people to join them (Ibd.).

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[7]. *Jāhiliyya* (i.e., the era of ignorant) is an Islamic concept denoting the period before Islam in Arabian Peninsula characterized by incessant tribal rancor, felony, homicide, assassination, and the likes. In contemporary usage, leading Salafi scholars like Sayyid Qutb and Abu al 'Ala Maududi viewed modernity as a new or modern *Jāhiliyya.* Radical Islamist groups such as ISIS, al Qaeda, and Boko Haram have justified armed struggle against [Muslim] governments for promoting the phenomenon.

[8]. *Sufis* are Islamic mystics who live and propagate values, contempt, and asceticism as a tool to self-cleansing and social control method. Examples of famous Sunni *Sufis* are Muhyidīn ibn Arabi, Abdul Hamid Al Gazhāli, Jalāl al Dīn al-Rūmi, etc.

[9]. The tradition *(Sunna)* of the Prophet is divided into *Qawliyya (*what he said), *Fi'liyya* (what he did) and *Taqrīriyya* (events he consented to).

Nonetheless, the authority of the senior members of the purists was challenged by their younger followers who felt more sophisticated to applying the Salafi creed to the complexity of contemporary world (Hegghammer, 2010). Due to their political inclination and perception of [inter]national politics as an organic part of Islam, members of this [new] faction became known as politicos (Ibid.). The methodological fallout between purists and politicos led to the emergence of the Jihadi faction of Salafism (Wiktorowicz, 2005). The Jihadi Salafists accused senior purists as scholars of power (*ulamā al-sulta),* a term connoting negativity and denoting surreptitious relationship with regimes and political establishments that undermines their independence and affect their interpretations of the sacred texts (Wiktorowicz, 2005). Al-Qaeda, the Islamic State of Iraq and the Shām (ISIS) and *Boko Haram* fall within this categorization. They adopt a top-down approach,[10] and consider ousting 'unjust' rulers from power a *primus gradus* to achieving all other objectives. It is in relation to this Hegghammer (2010) offers five rationales upon which Salafists act: "state-oriented, nation-oriented, *umma*-oriented, morality-oriented, and sectarian". The two manifestations of these rationales are non-violent and violent in form. For instance, Hegghammer puts the Muslim Brothers and the Saudi *al-Sahwa* in one category as non-violent manifestations of 'state-oriented' Salafists. Its violent manifestations are, for example, al Qaeda, ISIS, Islamic Group of Algeria, and Boko Haram.

### 3. The *Hausa* Salafists: Structure and Ideology

*Hausa* Salafists denote Muslims of native *Hausa* who, until 1996, were settlers in Ghana. Known as the Gold Coast before independence, Ghana is located north of the Gulf of Guinea in West Africa bordering the Atlantic Ocean to the South, Côte d'Ivoire to the West, Togo to the East and Burkina Faso to the North. It has a geographical area of 238,537 square kilometers (or roughly 93,000 square miles). Per the last population and housing census (2020), Ghana has a population of 32 million and 17.5 % of this is Muslims.


Figure 1: 2020 Ghana Map displaying the geographical location of the country on world atlas and indicating countries it borders with.

*Source: Website of the Ministry of Information, Ghana.*

The issue of *Hausa* Salafists' settlement in Ghana raises questions concerning how they migrated from Northern Nigeria, exactly when they arrived in Ghana, and their links with relatives back in Nigeria and other West African countries.[11] Whiles these questions could be relevant in reconstructing their broader itineraries in condominium

[10]. See for example Moghadam, Top-Down and Bottom-Up Innovations in Terrorism:
[11]. For an overview on different perspectives dealing with these issues see Aremu, Exploring the Role of Trade and Migrations in Nigeria – Ghana Relations in the Pre – Colonial and Colonial Periods (2014); Pellow, The Power of Space in the Evolution of an Accra Zongo (1991):

archives, it is not the focus of this paper. A splinter faction of the global Salafi Movements,[12] who emerged mainly as associates, families and relatives gravitating to blur the message of the Islamic faith and engage in trade. *Hausa* Salafists is a misguided blanket term when one considers the complex identities within Salafi movements in Ghana and the West African context. The Oxford Dictionary (1989) defines it as "a language spoken by the *Hausa* people of Africa, now used in Nigeria and Niger, and other parts of West Africa as a language of communication between different peoples". Given a definition like this, it may appear absurd for me to seek to describe the group in such a toponymal manner. Thus, the generic use of the word '*Hausa*' for the group may be imprecise; but as ideological juggernauts, I use the term to describe their ethnic uniqueness. So, unlike other Salafists in and outside Ghana, *Hausa* Salafists comprise of only native *Hausa*[13] tribes. Literature has it that they arrived in Ghana in a humongous number and all tribes joined and aligned themselves as one ideological group.[14]

Traditionally, most *Hausas* with Islamic belief belong to some form of denominational and/or sectarian organization. Salafism among *Hausas* is, in fact, a concentration of various sectarian expressions which, characteristically, appear homogenous. Although ideological affinity among them caused such a resemblance of a character in their activities, it did not give rise to the obliteration of the various *Hausa* Salafi groups nor was the originality of each trounced. While, within the *Hausa* tradition, most describe their organization as *Yan Salafiyya* (i.e., adherents of Salafism) it is imperative to differentiate between the very different sort of Salafi organizations that exist, from progressive, regressive, and transgressive. At the risk of sounding like a clichė, I would make the argument that the regressive *Hausa* Salafists are less malignant to secular education than the transgressive groups. It is not as if the former seeks to outrightly prohibit the learning experiment of secular schools as being done by the latter, although they have found the structures in West Africa as not favorable to Muslim students. In the scripted world of pro secular sciences, the progressive Salafists are cast as the heel for much of its development among the ethnic group.

Like the etymology of the word '*Hausa*', the history of Islam in Ghana is very eclectic. Because of its geographic location, Ghana was a desirable destination for trade for Northern Nigerians (Aremu, 2014; Wilks, 2000). The *Hausa* Salafists are generally thought to have taken after or were part of the *Jamā'at Izālat al-Bid'a Wa Iqāmat al-Sunna* (a.k.a. The Izalah Movement)[15] of Nigeria known for violent-plagued history, an anachronism that has survived the passing years. If such was the case, I argue that the two groups have long parted way based on axiomatic that those early days the agreement in doctrinal values between the two groups depended on the prevailing *Hausa* traditional values in pre-colonial Nigeria. However, such agreement of their historical moments remained freight with weight of inherited doctrinal meanings and contemporary polemical context.

The vertical structure of the *Hausa* Salafists almost parallels other Islamist groups across the globe. At the top is a leader who wields religious and political powers, sets goals, and doles out orders. The second most important layer of power is the legislative council comprising learned elders of the group who assist the leader in the day-to-day administration. Below the council are well-defined functionary portfolios that make up the support and operations of the group. The established portfolios comprise multiple assisting personnel excluding females; except for teaching/counselling portfolios as only women teach and counsel their female members. Under the hierarchy of the group, each defined functionary unit undertakes compartmentalized tasks and the leader reports to the council. An important functionary unit of the group is the portfolio focusing on supporting the aged, the sick, distressed families, people of disabilities, orphans, and widows. The different functionary units dependently operate with intra and inter meetings frequently held. Maintenance of membership is through a lifetime commitment and is re-enforced with identification such as the way of dressing and determination to undertaking Islamic teachings and proselytization.

[12]. The other major Salafi group in Ghana is "The *Ahl al-Sunna Wa al-Jamā'a"* which is an offspring of Wahhabism and whose adherents are of different ethnic background. For more on this, see Kobo, Shifting Trajectories of Salafi/Ahl-Sunna Reformism in Ghana (2015);
[13]. There is not record of a known member of the group from an ethnic group other than *Hausa*.
[14]. They comprise of two main *Hausa* tribes: *Bahre* and *Gobiri,* although there are minorities from other tribes.
[15]. Although the *Izālah* movement was officially established by Sheikh Ismail Idris in 1978 in Jos, Plateau State, Nigeria, the idea, and the *modus operandi* of the group began in pre – colonial Nigeria. For a better understanding of the history, activities, and divisions within the *Izālah* movements of Nigeria, see Amara, The Izalah Movements in Nigeria (2011).

Two fundamental elements distinguish the group from other major Salafi organizations. In addition to prohibiting secular education in all dimension, members of the *Hausa* Salafists have the character of cladding in the Gulf Arab apparels of (preferably white) *Jalbāb* for the males and black *Abāya* and *Niqāb* for the females.[16] These dresses are inseparable component of their daily lives and a significant value in the manner they exhibit faith.[17] Their canonical interpretation of the sacred texts pigeons them among those describes by Abdullah Saeed (2006) as legalistic traditionalists who consider any view contrary to that of the classical Muslim scholars, heretical. They regard these crop of scholars as *'the men'* (*Hum al-Rijāl*) whose exercise of critical thinking and discretionary judgment (*ijtihād*) is not in dispute (Ibid.). Teaching and/or learning of art, music, sports, philosophy, Jewish and Christian religious studies, and singing of the national anthem are sacrilege. They remain impervious to their doctrine and no amount of threats and intimidation could dissuade them. Thus, holding on to their doctrinal teachings, they spurn the idea of sending their wards to secular schools. In fact, learning of only Islamic sciences is the *raison d'etre* of the lives of the *Hausa* Salafists. They resist any usage of western values and behaviors in practicing Islam and exhibit incessant bravados towards rivalry Muslim sects. They are unable to stop portraying themselves as paragons of virtue and everyone who disagrees with them as a metaphorical if not actual devil. Although not gratuitously aggressive, they are highly intractable and really troubled the mainstream Ghanaian Muslims before emigrating.

**4. Antipathy Towards Secular Education**

Recognizing the need to raise the literacy rate of the country, the 1992 Fourth Republican constitution of Ghana made provision for the first 9 years of basic education to be free and compulsory for all children. "By requiring that all children in Ghana receive nine years of free schooling, the government wished to ensure that all products of the basic education system were prepared for further education. The government was under constitutional obligation to implement the 'Free Compulsory Universal Basic Education within a ten-year period spanning 1996 to 2005 (Ekuandayo, 2018). Article 38(2) of the 1992 constitution state that "The Government shall […] draw up the program for implementation within the following ten years for the provision of Free Universal Basic Education". Thus, although the idea of the free basic education policy has been there since independence, emphasis on compulsory and stricter implementation became the new themes (Ekuandayo, 2018). The compulsory indicates the determination to put pressure on parents to ensure the enrollment of their wards in secular schools. Consequently, parents caught on the wrong side of the law shall pay hefty fines as restitution the government to ensure there is no recidivism (Ibid.). The constitution also contains a provision specifically for children's rights with Article 28 (1) placing an obligation on parliament to enact laws that will ensure that parents do not abdicate their responsibility to care and maintain children they have brought into the world (Ekundayo, 2018). The development led to a launch of a vigorous civic education projecting the importance of secular education for all children. The state constituted a task force to enforce the policy and arrest parents and religious groups delivering tirades against secular education.[18] In the midst of this, the task force frequented the *Hausa* Salafists' mosque at *Sabon Zongo* in Accra, *Aboab*o in Kumasi, and *Atebubu Zongo* in the Bono East region, imploring them to heed the national policy.

Thus, whiles the National Commission for Civic Education made a concerted effort to lay off the sneering and contemptuous ideology of the group, the task force overshadowed them with cascading threats of prosecution. Teetering on the edge of abyss, the *Hausa* Salafists considered the incessant visits to their mosques an attempt to circumvent their way of worship and pit their wits against the will of *Allāh.* Further, they regarded the repeated threats of prosecution the last bastions of their ideology and escaping the dragnet of the state as the only panacea. High-spirited members relished the opportunity of settling in Saudi Arabia, albeit many were beset by financial and logistic challenges ahead. Nonetheless, as people who demonstrate tenacious loyalty to their doctrine, they galvanized their members into action and left to Saudi Arabia.

[16]. *Jalbāb* is a long baggy dress that covers all parts of the body from shoulder to toe. *Abāya* is mostly black, and it is a loose-fitting dress covering every part of the female's body. *Niqāb* is a light black scarf used to cover the face.
[17]. It is imperative to state, that not all men and women clad in these Arabian dresses belonged to membership of the *Hausa* Salafists of Ghana. Until date there are some Ghanaian Muslims who dress this way, although not as staunchly as the former do.
[18]. Members of the *Spoken Word Church* who live and worship in a deepest forest and openly preach against secular education were also pursued by the task force. For more on this see myjoyonline.com, "Mother wants Oyibi Forest 'Fake Pastor' Arrested for Brainwashing her Daughter", 24 February 2014.

**5. Emigration to Saudi Arabia**

The *Hausa* Salafists are far from the only group upended by the state's explosive compulsory education policy. The issue of secular education in postcolonial Ghana has simmered for years and boiled over as some Salafists in the country have consistently and insistently call for the submission of all knowledge to Qur'anic teachings (Kobo, 2015; Sounaye, 2017). Even in most recent times, a vociferous Ghanaian *Hausa* cleric of Nigerian descent, Mallam Bashir Yandu, delivered series of harangue against secular education indicating "[T]he system is not viable because it destroys our youth and promote *turanci* (i.e., western values)". I argue, however, that the affirmed resolve of the *Hausa* Salafists to learning just the Islamic sciences has nothing to do with perceived corruptibility and adulterating tendencies of the system. Suffice to say they consider it bogus *hoc detour* insinuations of ethics and morality associated with their stance. Their excoriation of the system is completely ideological gleaned from the Qur'an and the tradition that sanctioned classical Islamic sciences as the only knowledge to seek. The classical Islamic sciences, they argue, draws Muslims closer to *Allāh,* softens their understanding of the Islamic faith, and guard against wrong philosophical thoughts to traducing the creator. Subjects other than Islamic sciences are evil and incur the wrath of *Allāh*. In my discussion with him, Abdullah intimated,

> Those who wanted to impose their shortsighted bible-Nazi dogma on us must know that. we will not relent in dealing with anything that obstruct us from carrying out our religious duty. Those pressure and threats mounted on us is a residual sentiment of inferiority left behind by colonialism and the reason classical Islamic sciences are treated as second fiddles in the dispensation of education in Ghana. Nonetheless, we have demonstrated beyond any doubt the capability of charting our ideological path and we can never be whipped to pander to the whim of nihilists.

The sense of embroiling in similar circumstances in neighboring West African countries influenced the choice of Saudi Arabia. They have absolutely no desire to have secular education foisted on them. Such is like carting away their identity and dignity, or put succinctly, severing their umbilical cord. Thus, as the government of Ghana led the rope of prosecution into their dark abyss and the pressure got to it apogee, they whipped themselves up into a fantastic rage to avoid living with a lurking fear of exposure as recalcitrant. They ramped-up their efforts, had a knack of warping preparation and solicitously inched away from Ghana. So, just as "large numbers of Egyptian Muslim Brothers found refuge in Saudi Arabia (in the 80s) from persecution by the secular regime in their home country," the *Hausa* Salafist of Ghana sought sanctuary in same from ideological persecution.

The flight of the *Hausa* Salafists from Ghana is full of recondite information. The movement had no spotlight because witnesses considered it transitory trips in the religious lives of the group. They are known to organizing periodic camping in remote landscapes for multitude of religious festivities. Lack of media pluralism at the time could also explain why their movements triggered less attention in Ghana. As a result, there are no written records chronicling the events barring oral explanations from my informants.

Such an adventure, however, requires planning and most importantly, money. It was a bit up hill, yet the desire to settle in Saudi Arabia was too tempting. Aside from the steep cost in renting the buses, they required money to fix temporal shelters on an entirely different country. Majority of the members who made the trip were poor, mostly women and children who had little or no money to invest in such adventure. Besides, there was apprehension about fatigue associated with the trip and nonagenarian members decided to stay behind. In addition to selling their personal belongings, there were logistic and financial supports from their bankrollers. Only about 800 succeeded in travelling from Ghana to Saudi Arabia in 1996 with *hajj* and *umrah* visas they obtained. Other members packed up movable belongings in rented buses and flocked to mainly Togo, Benin, and Burkina Faso where they spent furtive periods as a stopgap to Saudi Arabia. Some of these distressed members succeeded in flying directly to Saudi Arabia whiles others labored through Sudan and Egypt, boarded ships, and sailed across the ocean to the destination. In Saudi Arabia, they surreptitiously absconded into mainly Jeddah, Mecca, and Medina with the assistance of families, relatives, and friends.

Among the many convictions that have shaped the course of the *Hausa* Salafists, one stands out as particularly crucial – prohibition of secular education. Thus, any starting point for discussing of the life of *Hausa* Salafists in Saudi Arabia must commence with consideration of a crucial ideological conduit – learning of only Islamic

sciences. A threat of which goaded their flight to the Gulf kingdom. In Saudi Arabia, their clerics operate segregated *madrasas*[19] in different houses where children between the ages of 7 and 18 clad in white *Jalbābs* and black *Abāya* are subjected to the rigor of Qur'anic memorization (*Tahfīz*) and the rubrics of reciting it (*Tajwīd*). From Sunday to Thursday, the *madrasas* are teeming with 100s of children reciting in laud voices from memory. After mid-day prayers, the children troop to other centers for further studies in the sciences of the Qur'an and *Hadith*. The centers were established as an organized system of learning, starting with understanding basic Arabic alphabets to covering subjects in Arabic Grammar, Syntax, theology, Jurisprudence, etc. Some children of the *Hausa* Salafists have successfully obtained *Ijāza* (equivalent of a first degree) from these centers authorizing them to teach and transmit classical Islamic sciences.

**6. Social Life, Status, and Fulfilment**

The last two and half decades of the 20th century marks a significant milestone in the group life of the *Hausa* Salafists. Settling in mainly Mecca, Medina and Jeddah has facilitated frequent interaction in their day-to-day lives with social contacts ranging deep into the group. Among the well-noticed continuity within the group is intra-marriage among members with its dowerless feature, as the ability of the bridegroom to recite parts of the Qur'an and Hadīth from memory can trade that requirement. The knock-on effects of the trend in the marriage are high child marriage and polygamy that has ensured the monolithic state of the group. Further, it has helped in maintaining the group's identity and protected their ideological boundaries. Existing literature shows how intra-marriage as a long-standing sociological theme is a major indicator to protecting the homogeneity of a group (Simon & Pettigrew, 1990). Their attitude towards women's rights is equally elastic. They perceive such rights simply as a Trojan horse for westernizing the Muslim *Ummah.* Whiles recognizing a vast success of the *Hausa* Salafists to this effect, there are few exceptions where male members had gone on to marry other native *Hausa* women in the kingdom.

An intriguing aspect of the group is a generational similarity in family patterns. When religion becomes an important cultural capital of staunched adherents, the cultural capital remains with them even if they lose all their possession as migrants in a foreign land (Dupré, 2008).

My observations reveal millennials exhibit most traits consistent with the older generation. To the extent that these millennials were born in the Gulf Kingdom, one would have expected to see some form of attitudinal shift to social orientation and ideological disposition. One of the most significant continuities is the growing repugnance of the millennials at listening to music and singing national anthem. They have been trained to abjure any kind of music as they portend vulgarity. The continuity in cultural homogeneity between the old and the new generation are also due in part to the rare contacts the group maintains with other migrant communities in Saudi Arabia. Their ideological background means they tend to nerd out a bit on 'others'. Members of the *Hausa* Salafists identify more with the indigenous *Hausas* from West Africa than seems to broadly be the case with non-*Hausa* Ghanaian migrants. It is difficult to navigate their identity as they barely can speak any of the local Ghanaian languages, bar pockets of isolated *Ga*[20] and *Twi*[21] words.

So, much of the culture of the group in Saudi Arabia is about navigating gains, contemplating the good price of assimilating, and attempting to magnify identities they feel they must uphold. Consequently, they have come to realize the continuity process as the most central aspect of their identity. They have found an environment of ideological landmine in Saudi Arabia and an effort to convert them is a fraught endeavor.

The status of the *Hausa* Salafists in Saudi Arabia is a mixed bag, with indications of some success, decline and stagnation. Few members are making progress in socioeconomic gains, having successfully profited from trading

[19]. Although coeducation is prohibited in Saudi Arabia, it has been an ideological culture of the *Hausa* Salafists to operate different *Madrasas* for their male and female wards.

[20]. "*Ga* is a *Kwa* language spoken in Ghana, in and around the capital, Accra" (Dakubu, 2008).
[21]. "*Twi* is a language spoken by the indigenous people inhabiting Southern parts of Ghana who form part of the Akan ethnic group" (The New Penguin English Dictionary, 1986).

activities. Others languish in abject poverty, seemingly trapped in slum communities largely isolated from opportunities abound in the Kingdom. While few members of the group are living a dignified life having successfully obtained resident visas from Saudi authorities, many of them barely eke out a living. They live a pathetic life in unhygienic areas in Mecca, Medina, and Jeddah. These include agile men and women, elderly and children who engage in all sorts of menial jobs to earn a living. In comparison to other West African communities in the Kingdom, the *Hausa* Salafists have unreasonable standards of shelter, healthcare, electricity, and water. Life for many of them is very difficult as members engage in petty trades including operating local eateries, providing car washing services, grocery shops, and selling traditional herbal medicines. It is common to see female members and children briskly trading in petty stuffs by the roadside, with others sending their children between the ages of eight and sixteen a-begging on the streets. Such petty trades by women and children provides a sustained source of supplementary incomes the family requires for survival in the Gulf Kingdom. There is an enduring assumption of generosity in religion within the group such that members with no income-generated activity are catered for.

The experience of the male members relative to their lives in the Gulf Kingdom converges across board. Similar experience of settling in Saudi Arabia extends to both young and older members of the group. Although some of them had performed *hajj* and *umrah* prior to fleeing Ghana, they had little insights in the contemporary Saudi social setting. They perceived the kingdom as a hub for learning only Islamic sciences with music and arts vehemently prohibited. Coming to terms with the reality has, however, neither deterred nor dented their enthusiasm. Members of the group never succumb to ennui and despair because their thoughts were engrossed in the realm of fantasies. They created a utopian environment in their minds that help them overcome administrative and social challenges they are faced with in the kingdom.

Female members are particularly committed to life in the Gulf Kingdom as it provides an Islamic context for raising children. The obligations of rearing children constitute an important motivation for Amina who, despite the icky situation she finds herself is happy "she and her husband succeeded in fleeing Ghana to the holy land to escape the ravage of satanic education designed for their children. Amina's justification resonates with the female members of the group who seem happy with the Qur'anic memorization and classical Islamic education their children are receiving in various mosques in the kingdom. Rabiyatu Abubakar first migrated to Saudi Arabia in 1996 and now living with her nuclear family in Mecca. Her eyes brimmed with tears as she posits a perfectible religious life of the group in the kingdom. "We are enjoying a peaceful life in Mecca, [a] much more pro-children environment, being able to observe daily prayers in the *Ka'ba,* we love it". Awarded an *Ijāza* from a learning center in Mecca, Rabiyatu serves as a teacher/counselor to female members of the *Hausa* Salafists who seek further understanding of the Islamic faith. Elated and beaming with joy, Fatimatu explains her "family's palpable sense of relief for successfully scurried away our children from a system of education animated by evil forces". She considered it a figment of imagination for anyone to think of imposing such a sacrilege act on them. Her impenetrable eyes and inscrutable countenance during our discussion gave little away. A frail looking Salimatu who trades in talismans by the roadside in Jeddah sulked a little but perked up explaining, "I had completely repressed the idea my children would be taught subjects sacrilege to the *dīn* (Islamic faith)". She vented her spleen on the task force who poked their noses in the group's affair. Salimatu indicated an engrossing story of how something that started as an advice ended up as a memory-etching scary tale that sends shivers down their spines with every recollection. She blurted out how they snapped out of the anamorphic illusions of the state and exposed the kernel of the matter with her ideological elegance and felicity. Writing on such ideological reflexes, Anderson (2016) postulates, a search for a conducive context to observing and practicing one's ideology is another major causer for migration. This is because ideologies or doctrines tend to set the value-based goals of its adherents (Ibid). Since values determine individual's line of action, adherents of such ideology do not only commit to it, but they also pursue it (Wellman and Keyes, 2007; Stadler, 2002). Consequently, states that [un]consciously pursue policies injurious toward religious ideology may prompt a wave of adherents to flee the country (Anderson 2016).

It is, therefore, understandable as members of the *Hausa* Salafists are still basking in the favorable reviews of their lives in Saudi Arabia. The estrangement between the group and the Ghanaian state officials became stressful causing them emotional harm. In their conceptions, harm of such magnitude assumed much portentous dimensions that it seemed to overcloud their ideology and threaten their faith with ruin. Appraising the situation and perceiving the impossibility of eliminating the challenge that is causing them emotional harm, they thought of things they

could do to make coping easier, leaving the country. The emigration of the *Hausa* Salafists, more especially to Saudi Arabia, is probably the most efficient means of coping with the challenges they were faced with in Ghana. As many of them intimated to me, "we emigrated to fulfill a religious duty bestowed on us by *Allāh*.

## 7. Conclusion

The launch of the Free Compulsory Universal Basic Education policy in 1995 was a milestone in the educational history of Ghana. The state pursued such investments to boost the growth of the economy as evidence in leading Asian countries like Japan and South Korea. Embarking on such a relentless effort, the state focused attention on religious groups whose continuous fulmination on secular education threatens its development agenda. Among these groups is the *Hausa* Salafists. Inundated with incessant threats of prosecution, members began to have pent-up frustrations and the knock-on effects was graciously leaving the country in throngs. Despite living in a religious pluralistic country for almost a century, the esoteric interpretational debate of the *Hausa* Salafists remains implacable. Pith to abhorring secular education and fulminating at it, they reject all absolute ideas of it, a fortiori, dragnets the system go with. Secular subjects are incongruous with their doctrine.

As it sought to do, therefore, this article revealed a direct link between the implementation of the FCUBE policy and the emigration of *Hausa* Salafists to Saudi Arabia. The results of the fieldwork I conducted in 3 Saudi cities revealed members of the *Hausa* Salafists emigrated from Ghana to avoid imposition of secular education on their children. Despite the socio-economic challenges facing many of them, the group is clenching tightly on the bonnet of their religious conviction.

**Note**

In this article, secular education is a structural system that promote teaching and learning all subjects of immediate relevant to the mundane world.

Mainstream Ghanaian Muslims denote those who belong to all other [different] Islamic sects other than the *Hausa* Salafists.

All interviews and focus group discussions conducted in the *Hausa* language, then edited, condensed, and translated into English.

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