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The Role of Ombudsman in the Protection of Human Rights in the Kingdom of Bahrain

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Abstract
The evolution of the institution of Ombudsman in retrospect shows that changes in the western system of administration from time to time and the recognition of various new kinds of rights and interests by the States at the national and international levels called for the introduction of Ombudsman as an addendum to the system of administration of justice. Because of fundamental changes in the system of government Ombudsman came to perform distinct functions at different times such as investigation, mediation, dispute resolution etc. And this was done in relation to various sectors of society such as business, education, health, transport, and commercial undertakings. In major legal systems it has come to play a significant role in human rights. The Kingdom of Bahrain also has established in its administrative system the machinery of Ombudsman for the protection of the Human Rights of the individuals.

Keywords: Concept of Ombudsman, Evolution of the Institution of Ombudsman, Extension of the Jurisdiction of Ombudsman Introduced in Various Sectors, Paris Principles on the Formation of Human Rights Institutions, Role of Ombudsman in the Protection of Human Rights in Bahrain

1. Introduction

The institutions concerned with the administration of justice since time immemorial have been the courts and the tribunals functioning as separate and independent institutions which resolved the disputes arising between individuals and the Administration. Side by side with such a system there was the in-house procedure in certain countries to share the responsibility of administering justice to the persons affected by the actions of the government departments. The countries which had this kind of a tradition were a few of the Asian and the Islamic countries. This is how the disputes arising between private individuals and the Government officials were resolved. But from the 19th century the institution of Ombudsman appeared in a European country as a unique example of an institution to administer justice, which system in the twentieth century was adopted by several democratic countries of the world.

This article has the object of tracing the evolution of the institution of Ombudsman in various sectors pointing out the changes in the system of administration and focusing on its work in Human Rights in the Kingdom of Bahrain.

In dealing with this topic the methodology adopted by me has been to present the discussion in an analytical way in two sections.

Section 1 gives the general features of the concept of Ombudsman; there is the meaning and definition of the term 'Ombudsman' and a brief description of the basic attributes of Ombudsman. Then the discussion covers the evolution of the institution of Ombudsman at the national and international levels. ***Section 2*** contains the discussion on the nature and scope of the institution of ombudsman as it has been established in the Kingdom of Bahrain.

2. The Concept of Ombudsman

2.1. Meaning and Definition of the Term 'Ombudsman'

The institution of Ombudsman in various countries is known by various names and has the responsibility of performing variegated functions in relation to the system of government. While in some countries Ombudsman deals with the grievances of the people against the administration, in some others it performs the function of investigating into the causes of the wrongful acts of authorities and in some others, it performs the function of 'mediating' in public conflicts to resolve the prevailing differences. The changing phenomena have been due to the changing nature and function of the administrative agencies and the problems arising regarding the rights and interests of the persons who meet the officials of the State.

The term 'Ombudsman' in the system of Administrative Law refers to 'a government official who hears and investigates complaints by private citizens against officials or government agencies. It also refers to a person who investigates and attempts to resolve complaints and problems as between employees and an employer or between students and the university officials.

Elaborating the above aspect of administrative law, the *British Dictionary* defines the term ombudsman as a commissioner who acts as an independent referee between individual citizens and their government or its administration. The term refers to an official, without owner of sanction or mechanism of appeal, who investigates complaints of maladministration by members of the public against national or local government or its servants. Formal names of an Ombudsman are the Commissioner for Local Administration, Health Service Commissioner, Parliamentary Commissioner etc. (Ombudsman, 2022).

The term 'Ombudsman' also refers to an official appointed by a government or other organization to investigate complaints against people in authority. This position is designed to give those with less power – the 'little people' a voice in the operation of large organizations (Hirsch, et al., 2005).

According to Collins English Dictionary an Ombudsman is an independent official who has been appointed to investigate complaints.

In almost identical terms, the Merriam-Webster Dictionary defines the word 'Ombudsman' as referring to a person (such as a government official or employee) who investigates complaints and tries to deal with problems fairly.

The Free Encyclopedia of Wikipedia dealing with the concept of Ombudsman says,

> An ombudsman or public advocate is an official who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or a violation of rights. The ombudsman is usually appointed by the government or by parliament, but with a significant degree of independence. In some countries an inspector general, citizen advocate or other official may have duties similar to those of a national ombudsman, and may also be appointed by a legislature. Below the national level an ombudsman may be appointed by a state, local or municipal government. Unofficial

> ombudsmen may be appointed by, or even work for, a corporation such as a utility supplier, newspaper, NGO, or professional regulatory body…. (Ombudsman, 2022).

In some jurisdictions an ombudsman charged with handling concerns about national government is more formally referred to as the "Parliamentary Commissioner" (e.g., the United Kingdom Parliamentary Commissioner for Administration, and the Western Australian state Ombudsman). In many countries where the ombudsman's responsibility includes protecting human rights, the ombudsman is recognized as the national human rights institution. The post of ombudsman had by the end of the 20th century been instituted by most governments and by some intergovernmental organizations such as the European Union.

At the international level, the definition of 'ombudsman' with reference to the international phenomena may be described as follows:

> an office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official, who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees, or who acts on [his] own motion and who has the power to investigate, recommend corrective action and issue reports.

A perusal of the definitions given in the official instruments reveals the following characteristics of the institution:

First, it is set up by a country's constitution or by a law or by-law of the legislative body, to ensure its permanence, neutrality and independence from the administrative organization being complained against.

Second, it receives and investigates complaints from the public against any part of the whole administration at the level of government concerned, though in many schemes it can also start investigations of alleged maladministration on its own initiative; **Third**, it is an appeal body in the sense that usually it will investigate a complaint only after the complaint has been made to the agency concerned and the complainant is still dissatisfied; Fourth, when it finds a complaint to be justified, it recommends a remedy to the agency and if the recommendation is not accepted it makes its recommendation to the chief executive and in a published report to the legislature - but it does not make binding decisions and this is what distinguishes it from a court, or a tribunal or an arbitrator.

2.2. Origin and Evolution of the institution of Ombudsman

Under the procedures of 'in-house' dispute resolution prevailing in various countries the institution of Ombudsman has been a significant aspect of the system of Administration and has grown and developed in various forms for various purposes.

A prototype of Ombudsman flourished in China during the Qin Dynasty (221 BC) and in Korea during the Joseon Dynasty (Park, 2008). The position of secret royal inspector was unique to the Joseon Dynasty, where an undercover official directly appointed by the king was sent to local provinces to monitor government officials and look after the populace while travelling incognito. Another precursor to the Ombudsman was the Turkish Diwan-al-Mazalim which appears to go back to the second caliph (Umar 634-644) and the concept of Qadi al-Qudat) (Pickl, 1987). They were also attested in Siam, India, the Liao dynasty (Khitan Empire), Japan and China (Jenne, 2011).

In Swedish, Norwegian, and Danish systems the term 'Ombudsman' is used to mean 'an attorney or a representative,' that is someone who is authorized to act for someone else. This is the meaning still given to the term in Swedish language. The predecessor of the Swedish Parliamentary Ombudsman was the Office of Supreme Ombudsman, which was established by the Swedish King, Charles XII, in 1713. Charles XII was in exile in Turkey and needed a representative in Sweden to ensure that judges and civil servants acted in

accordance with the laws and with their duties. If they did not do so, the Supreme Ombudsman had the right to prosecute them for negligence. In 1719 the Swedish office of Supreme Ombudsman became the Chancellor of Justice (Howard, 2010).

The use of the term 'Ombudsman' began in Sweden, with the Swedish Parliamentary Ombudsman instituted by the Instrument of Government of 1809 to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch.

(a) The Swedish Ombudsman: The fundamental concept of the Swedish Ombudsman is that he is an officer of Parliament whose duty is to ensure that civil servants perform their administrative duties according to law and to institute proceedings if they fail to do so. If the Ombudsman were not charged with this duty, Parliament would have no means of doing so though Ministers as the civil servants are not subject to ministerial control. It is also important to note that there is no Parliamentary question procedure comparable to the United Kingdom procedure by which indirect control can be exercised over the administration (Wyatt, 1961).

(b) The Danish Ombudsman: During the discussion which took place after the war on the framing of a new constitution for Denmark, a great deal of consideration was given to the question of providing greater safeguards for the citizens against maladministration by public officials. Among the new proposals was a suggestion that an institution on the model of the Swedish Ombudsman should be set up. This view eventually prevailed, and provision was made in the new Constitution of 1953 and by the Ombudsman act of 1954 for setting up of a Danish Ombudsman who was to be elected by Parliament after each general election (Wyatt, 1961).

(c) The Norwegian Ombudsman: In 1945 the Norwegian Government appointed a Committee on Administrative Procedure. By its terms of reference this committee was required to report on the guarantees and safeguards which are observed where administrative authorities make decisions affecting the rights and interests of citizens and to recommend what measures were needed to strengthen the security of the citizens in his dealings with administrative authorities. The Committee under the chairmanship of the President of the Supreme Court made an extensive examination not only of Norwegian administrative law but also of British American and Continental administrative procedures and in 1958 made a report which recommended that a Norwegian Ombudsman should be set up on the lines of the Danish institution (Wyatt, 1961).

2.3. Extension of the Jurisdiction of Ombudsman to various other sectors

When the office of Ombudsman was first established in Sweden in 1908 the jurisdiction of Ombudsman was limited to investigating complaints about central government departments and organizations. In 1968, the Ombudsman's jurisdiction was extended to include education and hospital boards. In 1975, the legislation was consolidated in the Ombudsman Act 1975. Under this Act, the appointment of additional Ombudsman was permitted, and the Ombudsman's jurisdiction was significantly extended to include local government agencies.

As in Sweden, in several other countries of Europe and other parts of the world which had adopted the system of Ombudsman, extended the jurisdiction of Ombudsman extended to include Labour, Civil Service, Health, Education, Banking etc. They pursued the object of protecting the rights and interests of individuals against the arbitrary actions of the authorities in Public and Private Sectors.

2.4. The Institution of Ombudsman in the context of International Human Rights Law

In the context of International Human Rights Law, a reference has to be made to the growth of international legislation which ushered in the concept of Human Rights, and though it did not establish any institution of Ombudsman for Human Rights as such, it did have the effect of causing such an institution to come up under the aegis of the national law. The background to this development may be described as follows:

After the World War II when the causes and effects of the global War were studied, the victorious nations were convinced that one of the causes of the War in most of the cases was the abuse of Human Rights of the

individuals at the State level; so much so that there arose a resolve to avoid, for the future generations, the same type of ill treatment by the national governments which resulted in the unfortunate phenomenon of the World War. In June 1945, the idea of forming a United Nations arose out of the proposals of Great Britain, the U.S.A., Russia and China; the purposes of the United Nations so devised were divided into four groups—security, justice, welfare and human rights. The world leaders then adopted in December 1948, by a unanimous resolution a declaration called the 'Universal Declaration of Human Rights' (UNDHR).

The beginning of International Human Rights Law under the aegis of the United Nations therefore was from the 10th of December 1948 when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. This Declaration had aimed at securing the universal and effective recognition and observance of Human Rights.

The members of United Nations Organization felt that greater unity between members could be achieved by giving effect to the said Declaration. They considered that Fundamental Freedoms and Human Rights could help them achieve justice and peace in the world and contribute to establishing an effective political democracy.

Keeping the high ideals in view the United Nations adopted some more Declarations and Conventions to secure wider protection of Human Rights; it set up various institutions for the purpose of enforcing the human rights and urged upon the member States to follow suit. This is the context in which the concept of enforcement of Human Rights has to be studied.

The United Nations Commission of Human Rights (UNCHR) was established with the aim of seeking the incorporation of the main principles into specific international treaties and to see to their implementation by the signatories or participating states. It was in line with this spirit that the two major international treaties in this field, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) came to be adopted by the United Nations in 1966 and the accompanying Optional Protocol (on implementation by states) came to be adopted in 1976. The two Covenants which set out in more concrete terms the basic human rights and fundamental freedoms cited in the 1948 Declaration impose an obligation on all participating states to implement those rights by appropriate means.

There is no direct reference for Ombudsman to the objectives of the Universal Declaration of Human Rights, per se or for any necessary compliance with the two international Covenants. Ombudsmen are creatures of statute, identified as officers of Parliament, who serve to bring to account the actions of the domestic executive that is the public sector, in the name of the individual citizen. In other words, ombudsman actions are geared primarily towards the accountability of "the system" rather than towards upholding the rights of the single individual.

The member's states of the United Nations have taken the step of implementing the Declarations and Conventions laid down by the United Nations about Human Rights. A sizable number of States in Europe, America and Africa have implemented the Human Rights instruments by having suitable institutions for the purpose. They have adopted even Regional Conventions as a collective measure and have adopted necessary laws at the national level for the purpose of enforcing the Human Rights.

Thus, there are institutions at the international, regional, and national levels which have the responsibility of applying, interpreting and enforcing the Human Rights law. The importance of these institutions is that by adopting the method of providing remedies to the aggrieved persons, they have built a jurisprudence which is of considerable significance in the realm of Human Rights Law.

No Ombudsman was established by either of the instruments to attain the objectives of the Universal Declaration of Human Rights or the objectives of other instruments on Human Rights. There was however some advice to the Member States in almost every instrument to take effective steps for the implementation of the international instruments, which meant that the traditional system of judiciary had to be strengthened.

But as in the case of advices given to the Member States for the proper organization of the national judiciary, in the case of institutions established by the member states for the enforcement of the law, the United Nations Organization laid down certain basic principles which the Member States have to observe in the matter of establishing any institution or organization for the implementation of the law, which includes the Human Rights Law. These principles known as Paris Principles read as follows:

2.5. Paris Principles relating to the formation of National Institutions To promote and protect Human Rights:

The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7-9 October 1991. They were adopted by the United Nations Human Rights Commission in 1992 (UNCHR 1992) and by the UN General Assembly in 1993 (UNCHR 1996).

The principles list a number of responsibilities for national institutions, which fall under the following five headings:

First, the institution shall monitor any situation of violation of human rights which it decides to take up.

Second, the institution shall be able to advise the Government, the Parliament, and any other competent body on specific violations, on issues related to legislation and general compliance and implementation with international human rights instruments.

Third, the institution shall relate to regional and international organizations;
Fourth, the institution shall have a mandate to educate and inform in the field of human rights**;**
Fifth, some institutions are given a quasi-judicial competence.

The key elements of the composition of a national institution are its independence and pluralism and about these matters the only guidance is in the Paris Principles according to which the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act establishing the specific duration of the mandate, which may be renewable.

Compliance with the Paris Principles is the central requirement of the accreditation process that regulates NHRI access to the United Nations Human Rights Council and other bodies. This is a peer review system operated by a subcommittee of the Global Alliance of National Human Rights Institutions (GANHRI).

SECTION II - THE SYSTEM OF OMBUDSMAN IN THE KINGDOM OF BAHRAIN FOR THE PROTECTION OF HUMAN RIGHTS

Bahrain, officially known as the Kingdom of Bahrain, is a small Arab constitutional monarchy in the Persian Gulf. It is an island country consisting of a small archipelago centered around Bahrain Island, situated between the Qatar peninsula and the northeastern coast of Saudi Arabia.

The first thing that we find in Islam in this connection is that it lays down some rights for man as a human being. In other words, it means that every man whether he belongs to this country or that, whether he is a believer or unbeliever, whether he lives in some forest or is found in some desert, whatever be the case, he has some basic human rights simply because he is a human being, which should be recognized by every Muslim. In fact, it will be his duty to fulfill these obligations.

As a country practicing the tenets of Islam, Bahrain has been observing the tradition of humanity as propagated in the Islamic sources of law and has been showing its respect for the idea of Human Rights as advocated in the Islamic traditions. But it has been gradually assimilating the Western idea of Human Rights without prejudice to the traditions of Islamic religion; by now it has domesticated a large number of international conventions and covenants and has also taken the step of establishing the Human Rights institutions as advocated by the International Human Rights Law.

Before describing the features of these principles and institutions I consider it necessary to say a word about the importance of Human Rights in the system of State Administration borrowing the words of certain Western philosophers. For example, Dr. Sun Yat Sen emphasizing the concept of Human Rights in relation to State matters says, "The foundation of the government of a nation must be built upon the rights of the people but the administration must be entrusted to experts" (Yatsen, 2012). A similar idea was echoed by an American President, Thomas Jefferson, when he says, "A bill of rights is what the people are entitled to against every government on earth, general or particular and what no just government should refuse to rest on inference" (Bell, 2020).

With regard to the philosophical aspect of Human Rights adopted by the United Nations it is generally accepted that the concept did exist in some form or the other in various political documents of the nations too, but it was as a result of the bravest lessons that emerged from the tragedies of the World War II that the Western concept of Human Rights had become a dynamic aspect of International Law.

With the advent of the concept of Human Rights and the need for the promotion and protection of these rights the institution of Ombudsman has come to play its role in the administration of the Human Rights Law. On the advice of international organizations many Western countries have established as part of the State Administration the Human Rights Institutions. The Kingdom of Bahrain has followed suit.

This section analyses the nature and scope of the authority of Ombudsman and highlights the role of the system of Ombudsman in Bahrain as far as the protection of Human Rights is concerned.

3. Establishment of the Office of Ombudsman in the Kingdom of Bahrain

The Kingdom of Bahrain has attached immense importance to human rights and has sought, through local legislations and international agreements having force of local law, to maintenance and protection of these rights to ensure human dignity on the soil of the Kingdom of Bahrain and preserve human rights in all walks of life. The Kingdom of Bahrain not only issued legislations and acceded to international treaties but also assumed the responsibility, from its international and local position, to set up specialized human rights agencies among the government establishments, which were entrusted with the task of ensuring protection and maintenance of human rights relevant to the work of these agencies. These agencies were given under the charge of competent jurists, expert in the legal affairs. In this context, the royal approval was sanctioned to implement recommendations of the Bahrain Independent Commission of Inquiry, regarding the formation of the Office of the Inspector General (Ombudsman) at NSA (POMED, 2013). The office of Ombudsman was formed as per a Royal Decree (ILO, 2012) by which the Office of the Inspector General at NSA was constituted the office of Ombudsman so as to ensure formation of an independent human rights agency, competent to receive and examine complaints regarding maltreatment of persons by the NSA staff and their other violation of the international laws and agreements endorsed by the Kingdom of Bahrain, to conduct inquiries in those complaints whenever such violations are committed for any reason or at any occasion or while they are on duty or if the agency has a role therein. The Inspector General Office ensures its commitment to confidentiality and privacy to every complainant and will seek, according to the law, for realization of rights and establishment of justice, acting within the ambits of its powers.

3.1. About the Ombudsman's Office

Establishment of the office of the Inspector General at NSA is the fruition of the directives of His Majesty the King, Hamad Bin Isa Al Khalifa, the King of Bahrain regarding the commitment of Bahrain to execute recommendations of the Bahrain Independent Commission of Inquiry. It is the office which works towards protection of the dignity of people against any maltreatment by the NSA staff, and that is in accordance with an approach ensuring execution of powers delegated to the Inspector General with surety of complete impartiality and handling the job in strict confidence.

3.1.1. Mission

Protection of individual's rights, his personal freedoms and his right to physical safety against any maltreatment by NSA staff, in accordance with the constitution of the Kingdom of Bahrain and its valid laws, and in the light of standards and controls laid down in the international conventions endorsed by the Kingdom of Bahrain.

3.1.2. Vision

Disseminating culture of respect for human rights and preservation of individual's dignity and urging the NSA staff to respect human rights and assisting them in performance of their security duties according to international standards and controls for human rights.

3.1.3. Objective

Raising the performance of the office of the Inspector General at NSA, preserving its full independence, neutrality and impartiality, winning trust and confidence of the individual in the ability of the office of the Inspector General to protect him against what could compromise his freedom or physical safety or any of his constitutional rights as a result of any violation by the NSA staff, providing suitable and satisfactory environment to receive citizens' complaints which lie within the office jurisdiction, and taking all guarantees to preserve secrecy of statements, information and documents concerning the office work.

3.2. The Mandate to the office of Ombudsman

The mandate to the Office of Ombudsman comes from the following instruments adopted at the national and international levels:

1. National Action Charter
2. Constitution of the Kingdom of Bahrain
3. Penal Code, as amended
4. Code of Criminal Procedures, as amended
5. Law of Prisons1964
6. Law of Public Security Forces, as amended
7. Prison Systems 1964
8. Decree 35 / 2013 amending Decree 27 / 2012 on the Ombudsman at the Ministry of Interior
9. Universal Declaration of Human Rights
10. International Covenant on Civil and Political Rights
11. Convention against Torture and Other Cruel, Inhuman, or cruel, inhuman or degrading treatment
12. International Convention on the Elimination of All Forms of Racial Discrimination
13. Convention on the Elimination of All Forms of Discrimination against Women
14. United Nations Convention on the Rights of the Child
15. Convention on the Rights of Persons with Disabilities
16. Charter of the United Nations
17. Arab Charter of Human Rights
18. Basic Principles for the Treatment of Prisoners – United Nations General Assembly resolution
19. Standard Minimum Rules for the Treatment of Prisoners (adopted by the first United Nations Conference on the Prevention of Crime and the Treatment of Offenders
20. Standards of Her Majesty's Inspectorate of Prisons in the United Kingdom
21. The report of the Bahrain Independent Commission of Inquiry
22. Code of Conduct for Police Officers

3.3 Salient Features of the institution of Ombudsman in the Kingdom of Bahrain

According to the basic law governing the establishment of Ombudsman in Bahrain, "The Ombudsman is an independent secretariat, financially and administratively, in the Ministry of Interior established to ensure compliance with professional standards of policing set forth in the Code of Conduct for the Police, as well as in the administrative regulations governing the performance of civil servants. It operates within a general framework that includes respect for human rights and the consolidation of justice, the rule of law and the public confidence" (IOI, 2013).

3.4. The role of Ombudsman

The Ombudsman assumes its authority and mission in full independence with respect to the complaints it receives against any civilian or public security personnel in the Ministry of Interior for alleged criminal offense because of, during or as result of their scope of responsibilities.

In addition, the Ombudsman informs the competent authority in the Ministry of Interior to take disciplinary action against violators employed by the ministry. It also informs the public prosecutor in the cases that constitute criminal offenses. It updates both the complainant and the defendant about the steps taken to investigate the complaints and the conclusions of the investigations.

The specific matters addressed by the Ombudsman are the complaints against the law enforcement officials, the police officers, the prison offices and the investigating officers. The message of Human Rights law is that "no one shall be subjected to degrading treatment or punishment, and that no one shall be deprived of his property. There are cases arising in the civil service area in which the civil servants are ill-treated; they are denied the protection they deserve in service relations; there are cases arising about ill treatment of the civil servants and cases even about sexual harassment and denial of respect and decency. The dignity of persons is a casualty in most of the cases. There is delay in the disposal of cases and denial of justice by such methods. Injustice is done to family members where they deserve the care and attention of the elders. There is protection guaranteed regarding the health and well-being of the persons.

3.5. Nature of the Functions of Ombudsman

The nature of the functions of Ombudsman may be explained with reference to the Human Rights Law as follows:

3.5.1. Complaints regarding personal liberty and property:

Article 5 of the Universal Declaration of Human Rights says, "No one will be subjected to degrading treatment or punishment" and Article 17 says in part that "No one shall be arbitrarily deprived of his property"

3.5.2. Complaints regarding abuse of authority

If a person is removed from service arbitrarily or a pupil is expelled from the school without a just cause, then a complaint may be lodged to the Ombudsman against the arbitrary exercise of power. Such an unfair treatment may be called into question by relying upon Article 26 of the Universal Declaration of Human Rights which says in part that "everyone has the right to education".

3.5.3 Complaints regarding inadequate social service

The social welfare beneficiaries may bring complaints before the Ombudsman if there is no adequate service rendered to the beneficiaries by the officials of the government. Article 25 of the Universal Declaration of Human Rights says, "everyone has the right to a standard of living adequate for the health of himself and of his family social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

3.6. Complaint for official information

A person may file a complaint to obtain information held by the governmental agencies. A person has a right to be provided with information before he initiates criminal proceedings**.** Such a right stands alongside the right to a fair trial envisaged by Article 10 of the Universal Declaration of Human Rights. It can also be postulated on the ground that information to which an individual is entitled should not be withheld without good reason. This makes it difficult for any administration which is subject to a freedom of information regime to hide any abuse of human rights.

3.7. Persons entitled to make a complaint to the Ombudsman

Any citizen, expatriate, or visitor may file a complaint to the Directorate of Internal Investigations in the Ministry of Interior or the Ombudsman if they feel:

A –They have been the victim of misconduct in any form by a Ministry of the Interior employee because of, during or as result of their scope of responsibilities.

B- They have been negatively affected by the above-mentioned abuse. The negative effect could be in any form of loss or damage or exposure to risk. However, it does not include damages related to or resulting from watching the event on television or in a video footage or following it up in the media.

C- They have directly witnessed the event. Anyone who watches or hears or reads about the misconduct in the media cannot be considered a complainant in such a case.

D- Complaints may be made by an agent in any of the above-mentioned cases or by a member a civil society organization on behalf of those affected provided he or she obtains a written consent from the complainant.

The Ombudsman will provide the necessary facilities and services to deal with complaints filed by complainants with special needs or by non-Arabic speakers who need translations.

3.8. The Types of complaints that may be investigated by the Ombudsman

The Ombudsman investigates the complaints filed in the following cases:

A **-** If the complaint includes death or physical injury or serious ill-treatment that occurred during or after the exercise by an employee of the Ministry of Interior during or because of the responsibilities of his or her work.

B **-** Any misconduct by any of the employees of the Ministry of Interior that leads to a negative impact on public confidence in the ministry.

3.9. The types of complaints that are not accepted by the Ombudsman

The Ombudsman does not investigate complaints made against non-employees of the Ministry of Interior.

The Ombudsman does not consider or examine complaints related to decisions, directives, instructions, and orders issued by the Minister of Interior or the Head of Public Security to the personnel of the ministry.

In addition to the above, it must be noted that administrative decisions of either approval or rejection by any competent authority at the Minister of Interior cannot be a basis for a complaint that falls under the mandate of the Ombudsman. For example:

1) Rejection of a visa or a residency permit application by Directorate of Nationality, Passport, and Residence Affairs.

2) A rejection of an application for a position at, or a promotion by, the Ministry of Interior.

3) Appealing against the general Directorate of Traffic for an unsuccessful grade on the Driver's License Exam.

3.9.1. Procedure to file a complaint or a grievance to the Ombudsman

A complaint to the Ombudsman may be filed through one of the following procedures:

• Register a complaint with the representatives of the Directorate of Internal Investigations in the Ministry of Interior in the security directorate in the governorate (Five directorates), based on the residence address or the location of the incident.

• Send a complaint electronically to the website of the Ombudsman: www.ombudsman.bh

• Physical presence at the headquarters of the Ombudsman in the case of a complaint that is accepted directly by the Ombudsman

• Send a completed form by post to P.O. Box 23452, Kingdom of Bahrain.

3.9.2 The processing of a complaint at the office of Ombudsman

A. Registration:

Every complaint against an employee of the Ministry of Interior must be registered in the records of the ministry to be addressed formally.

B. The investigation of the complaint:

I – Investigations by the Directorate of Internal Investigations:

The Directorate of Internal Investigations in the Ministry of Interior receives and examines complaints against employees of the Public Security Forces. A representative of the Directorate at the Security Directorate conducts the investigation at the security directorate. The investigation directorate informs the complainant and the defendant without delay about the situation through a statement containing adequate and sufficient information as well as the measures taken to investigate the complaint and the outcome of the examination.

C - Investigations by the Ombudsman:

The Directorate of Internal Investigations in the Ministry of Interior refers complaints to the Ombudsman in the following cases:

A - If the complaint includes a case of death or physical injury or serious ill-treatment during or after action by an employee of the Interior Ministry for, during or because of the exercise of their responsibilities.

B - Any offensive misconduct by an employee of the Ministry of Interior that leads to a negative impact on public confidence in the Ministry of Interior.

C - The Ombudsman informs the complainant and the defendant without delay through a statement that details the measures taken to investigate the complaint and the findings.

D - Reaching a decision:

When the Ombudsman or the Directorate of Internal Investigations decides on a complaint submitted to either of them, the complainant and the defendant are notified about the details in a statement that includes ample information.

3.9.3. Right of the complainant if the outcome of the investigation is not satisfactory

Any complainant or defendant or an assigned agent has the right to appeal the decision to the Ombudsman against the decision by the Directorate of Internal Investigations in the Ministry of Interior within 60 days from the date of notification.

However, appeals against any decisions or recommendations or investigations by the Ombudsman cannot be submitted to the Ombudsman and are referred to the competent court.

3.10. Role of the Ombudsman in cases of reconciliations or civil settlements

The role of the Ombudsman and the Directorate of Internal Investigations in the Ministry of Interior in requests for reconciliation and civil settlement is confined to conveying an opinion to the parties involved in the complaint. Their opinion is not mandatory to either party.

3. Conclusion

In conclusion it may be stated that:

1. The concept of Human Rights is no stranger to the Kingdom of Bahrain as being an Islamic State it has the tradition of following the tenets of Islamic civilization and treating its people as belonging to human family and treating them with equality and dignity.

2. In keeping with the Islamic traditions, the Kingdom of Bahrain has taken a right decision in establishing the Institution of Human Rights and inducted a senior officer of the Police establishment as its Ombudsman; it has the feature of a Human Rights Institution.

3. In organizing this institution, the authorities of the Kingdom of Bahrain have followed the Paris Principles as far as their independence and autonomy are concerned. These Principles are laid down by the United Nations Organization which has the objective of strengthening the institutions established for the enforcement of Human Rights.

4. Thus, the policy formulated by the Kingdom of Bahrain and the institutional set up have the aim of strengthening the system of administration of justice.

5. A review of the work of the Ombudsman and the responsibilities thrust upon it show that the Ombudsman in Bahrain is a promotional and monitoring body as a national institution.

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Re-Actualization of the Community Economy Based on Mutualism and Brotherhood Post-Covid-19 in Digital Economic Transactions

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Abstract
Even though the Covid-19 outbreak caused anxiety, it must be interpreted as having brought positive things to economic life. One of them is the emergence of Micro, Small and Medium Enterprises (UKKM) whose business activities are facilitated by information technology. The business relationships that have been built are characterized by family values, mutual cooperation values, and efforts to deal with the epidemic period, as well as being forward-looking after the outbreak ends. This social phenomenon is to actualize the people's economy in digital economic transactions. This study assumes a people's economy paradigm based on mutualism and the principle of kinship in digital economic transactions. The paradigm of economic development based on the values of local wisdom and Indonesianness is a new hope for the people's economy in realizing the constitutional mandate that prioritizes the interests of the people. The role of technology in the economy during the Covid-19 era is very large, having an impact on efficiency and effectiveness in meeting the economic needs of the community. Based on this, it is necessary to conduct a legal study of the actualization of the people's economy based on mutualism and the principle of kinship as an economic recovery post-covid-19. The purpose of the research is to examine the legal basis for the People's Economy on community economic activities based on the post-covid-19 digital economy. The research method uses secondary data, in the form of legal documents on laws and regulations in the economic field, various research results from legal and economic experts and field data in the form of interviews and observations. The data were analyzed qualitatively juridically, through legal interpretation, harmonization and synchronization of laws. The results of the study show that, the concept of a populist economy is actualized in community economic transactions based on post-covid-19 digital economic technology; Mutualism and familial values can be used as a legal basis in the paradigm of constitutional national economic development.

Keywords: People's Economy, Mutualism, Kinship, Digital Economy, Post-Covid-19

1. Introduction

The development of the global economy, information technology has greatly influenced the nature and personality of the Indonesian nation. Especially in economic activities, the theory of market economy as a feature of capitalism has influenced business actors, as well as society. Before the onset of the COVID-19

pandemic, the economic structure of Indonesia's society had led to individualistic, materialistic, and consumptive characteristics. A populist economy based on the principles of mutualism and kinship as a constitutional mandate is increasingly marginalized. Even though it has been recognized by the Indonesian people that the principle of the Indonesian economy is economic democracy that supports the goals of the welfare state (Oman Sukmana, 2017) as mandated by the 1945 Constitution in the preamble, "to realize social justice for all Indonesian people." In its body, Article 33 of the 1945 Constitution can be found that, basically, the principle of mutualism and kinship has the spirit to prioritize the interests of the people.

Even though the Covid-19 outbreak caused anxiety, it must be interpreted as having brought positive things to economic life. One of them is the emergence of start-ups, Micro, Small and Medium Enterprises/MSMEs (Wan Laura Hardilawati, 2021) whose business activities are facilitated by information technology. In their economic activities in order to fulfill their daily needs, they have actualized the nature of kinship and mutual assistance. The business relationships that are built are characterized by family values, mutual cooperation values, and efforts to deal with the epidemic period, as well as being oriented towards the future after the outbreak ends. This social phenomenon can be assumed as the actualization of the people's economy in the transformation of the 4.0 era.

This research examines the paradigm of people's economy based on mutualism and kinship based on information technology. An economic development paradigm based on the values of local wisdom and Indonesianness as a new hope for the people's economy to realize the constitutional mandate.

The role of technology in economic activities during the COVID-19 period is very large, having an impact on efficiency and effectiveness in meeting the economic needs of the community. Based on the social phenomena above, it is necessary to conduct a legal study on the actualization of the application of the principles of mutualism and kinship in the context of post-covid-19 national economic recovery.

The research is based on the need for the actualization of a people's economy based on mutualism and kinship in facing economic challenges in the future and post-covid-19 pandemic. The state is being tested for the application of the concept of a welfare state as the implementation of the constitution. Meanwhile, the community must be active and creative, urged by the fulfillment of their economic needs, so they must have independence and care for each other.

This research is important as a study material to prove that;
a. Populist economic theory can be actualized in post-covid-19 information technology-based community economic activities;
b. The value of mutualism and kinship can be used as the basis for a constitutional national economic development paradigm;
c. The value of mutualism and kinship as the character of Indonesia's economic principles can be used as the basis for the formulation of a people's economic policy.

The specific purpose of the research is to examine the basic laws of populist economic theory on the economic activities of the post-covid-19 community. More specifically, the research objectives refer to the problems stated in the background of the research.

The problems raised in this study as study material are (1) Can the concept of people's economy be actualized in post-covid-19 information technology-based community economic activities; (2) Can the value of mutualism and kinship be used as the basis for a constitutional national economic development paradigm?

2. Method

The method used in this research is descriptive analytical, with a normative juridical approach (Soerjono Soekanto, et al., 1995). Research activities are carried out on primary, secondary and tertiary legal materials as the main research. A normative juridical approach is used in studying the application of populist economic

theory, and the principles of mutualism and kinship. Activities in secondary research include inventory of legal materials, classification, qualifications, and systematization of primary legal materials. Primary data research through observation and interviews. The data generated from secondary research and primary research are then analyzed qualitatively, namely the research results are processed, studied and analyzed systematically, holistically, and comprehensively, presented in a narrative manner to describe the application of legal norms, values that live in society as socio-cultural and socio-economic community. (Peter Mahmud, 2005). These values are not imposed from outside or from policies issued by the government, it is the people who then actualize this principle of mutualism and the principle of kinship, as values that grow and are needed in dealing with the post-covid-19 pandemic by utilizing digital economic information technology.

3. Results and Discussion

A. Start of the art (Murad Maulana, 2016) is based on a change in the meaning of the people's economy as mandated by the constitution. Currently, the substance of the laws and regulations governing the economic sector is more likely to apply the capitalism/individual principle. In the pattern of socio-economic and socio-cultural transformation, it is shown that there is a gap between:
(1) The value of togetherness or the principle of kinship with the principle of individual (individual liberty)
(2) The form of a cooperative business building deals with economic businesses that seek purely financial gain (for example the form of a Limited Liability Company (PT), Commanditer Vennootschap (CV), and/or Firm.
(3) The economic moral of cooperation-mutual cooperation, the value of utility, prioritizing the interests of the people in the face of the economic morals of competition, business profits, and individual maximum economic satisfaction.
(4) The Cooperative Law normalizes the principle of kinship and mutual cooperation in contrast to the Law which in substance normalizes the individualist-capitalist principle.

When the covid-19 pandemic occurred, the paradigm of family values, the value of mutual cooperation which had long been marginalized in practice began to be actualized again in the community economy. How the community members work together to meet economic needs. In times of a pandemic like this, people empathize with one another (Susanawati, 2020). The community empowers food security. The community has the opportunity to build their own food sovereignty and self-sufficiency. During a pandemic like this, people tend to be more creative and creative to outsmart the existing situation. This includes maintaining access to food. The community has the awareness to carry out independent planting at least to meet their own food needs. There are many ways to be independent, including urban farming, planting using the hydroponic method by utilizing existing land at home (Gatot Supangkat, 2020). During the COVID-19 pandemic, we were unwittingly witnessed the reappearance of the populist economy prevailing in the economic activities of the community in small and regional communities. The principle of gotong royong and the principle of kinship are actualized in new MSMEs that grow sporadically in the community. Community economic empowerment activities are directed at micro, small and medium enterprises (MSMEs) affected by COVID-19 (Lutfi Saksono, 2020). Apart from empowering the community's economy, even some companies operating in financial institutions have utilized family values, mutual cooperation values, and Islamic values to issue sharia products. Online business is a solution to meet community needs during the pandemic (Vania Rusli, 2021). Online business comes from the community, by the community, and for the community itself. Unlike the pattern in the initial concept, now the people's economy is supported by the digital transformation of information technology. A new hope where the people's economy should not be left behind in the industrial era 4.0. The main goal to be achieved is in the context of realizing the national economy for social welfare. Information technology facilities have been used by the community to support the availability of community economic needs. Therefore, this research is based on the novelty of the study on (1) Actualizing the People's Economy, (2) Fulfilling the economic needs of the community after the COVID-19 pandemic; (3) Application of the principle of mutualism and kinship in society during the pandemic, (4) Orientation of social life after the COVID-19 pandemic.

The interrelation between human needs for technology or the 4.0 industrial revolution is mapped as described in the 4.0 industrial revolution mapped as depicted in figure 1. (Bambang Ismanto, 2020). Bambang Ismanto in a Webinar with the topic "Revitalization of Cooperative Development Research in the Industrial Revolution 4.0

and Social Society 5.0", said that in the Dynamics of the Industrial Revolution 4.0 and Social Society 5.0, the management of cooperative structures was found in meeting community needs during the COVID-19 pandemic.

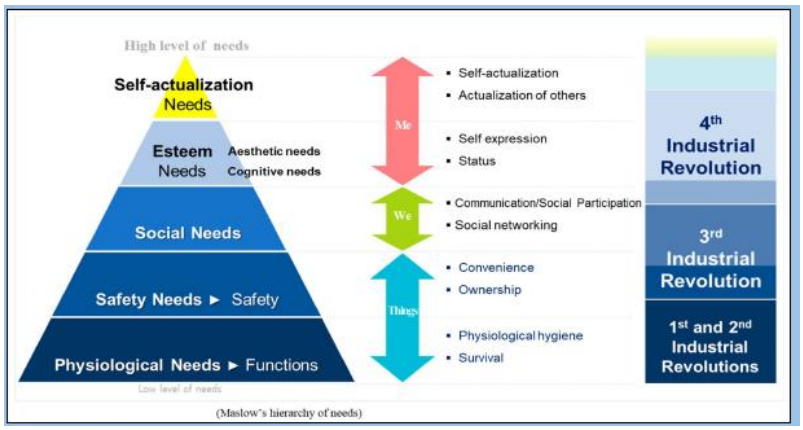

Figure 1: Interrelation between human needs & technology

The actualization of populist economic theory in post-covid-19 information technology-based community economic activities is based on two factors, namely (1) technological innovation and social civilization; (2) the interrelation between human needs for technology or the industrial revolution 4.0. These two factors are mapped in Figure 5 about technological innovation and Figure 6 about the Interrelation Between Human Needs for the Industrial Revolution 4.0 described below.

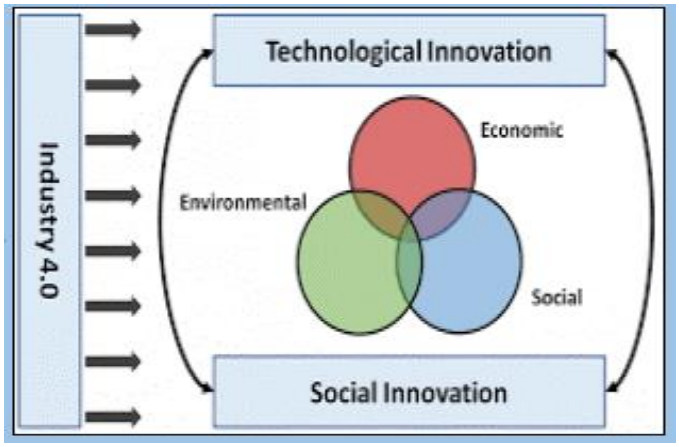

Figure 2: Technological Innovation and Social Civilization

In this time of the covid pandemic, technological innovations are utilized by the community, or even discovered, developed creatively to meet economic needs. How do people find and develop technological innovations through technological devices such as mobile phones and laptops with various application features.

Company markerplaces such as: Shopee, Bukalapak, Tokopedia, Lazada, Blili.com, Instagram, Twitter, Facebook, and so on become service providers (platforms) and turn their applications into online markets (market places). The market place on social media is a free market for business transactions or selling online. Heterogeneous economic activity actors become social media users, ranging from housewives, teenagers, start-ups, MSMEs, cooperatives, or other business entities. The use of social media makes social media no longer only a means of interaction, but also a place to earn income (Kevin Riza Pratama, 2020).

To examine the actualization of populist economic theory in post-covid-19 information technology-based community economic activities in this study, the purpose of strengthening the populist economy will be used as a guide (guildness) in presenting data or in discussing results. The objectives to be achieved from strengthening the people's economy are to carry out the constitutional mandate of the 1945 Constitution in particular regarding: (1) the realization of an economic system that is structured as a joint effort based on kinship that guarantees

justice and prosperity for all Indonesian people (Article 33 paragraph 1), (2) embodiment of the Trisakti concept "self-reliant in the economic field, sovereign in politics, and personality in the field of culture," (3) embodiment of production branches that are important to the state and which affect the livelihood of the people are mostly controlled by the state (Article 33 paragraph 2), and (4) the realization of the mandate that every citizen has the right to work and a decent living (Article 27 paragraph 2). The specific objectives to be achieved are to:

1. Building an Indonesia that is economically independent, politically sovereign, and has a cultured personality
2. Promote sustainable economic growth
3. Encouraging even distribution of people's income
4. Increase the efficiency of the national economy.

C. The value of mutualism and kinship as the basis for a constitutional national economic development paradigm based on a populist economy based on post-covid-19 information technology, can be seen in the following discussion:

There are many meanings for the occurrence of the Covid-19 pandemic, including being a lighter for the character of civilization in the 4.0 era. Learning (social education) with literacy integration, Strengthening character education values mutualism, caring and communalism. Learning that provides skills to the community towards the 4C Education model which includes: (1) Communication (2) Collaboration, (3) Critical Thinking and problem solving, and (4) Creative and Innovative (Iip Ichanuddin, 2021). Before the covid pandemic, it was shown in various awkward communication behaviors. For example, in a community, you can see them gathering, but communication with those who are close is not done, but by using their smartphone they communicate with the opposing party who is far away. With a smartphone that is far from being close, the negatives of physical communication with those who are close are ignored. Smartphones make people anti-social.

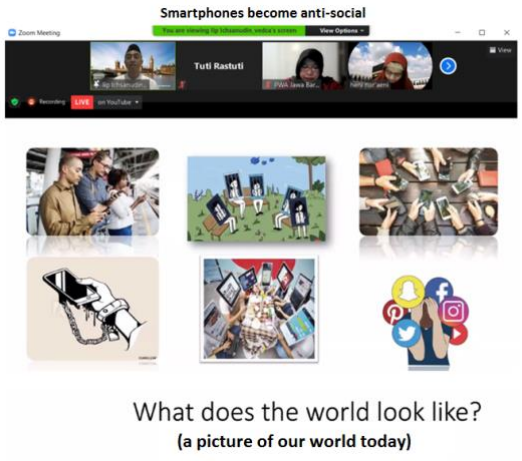

Figure 3: Smartphones as a means of communication

During the Pandemic, smartphones became a tool, but then digital literacy must be owned by humans, so humans must be smart people. The ability that the community needs to have is not only knowing and understanding, but also being able to apply and even further being required to evaluate and be able to create capital to meet needs in this pandemic period.

Communication		Nilai
Capacity delivery massage	Positive, fast and simple communication skills can be accepted by the communicant.	Collaboration is the key to civilization in the era of the pandemic.
Creativitas of application	With the ability to operate creatively through the application, people without working capital can earn income.	
Critical thinking	Reasoning ability thinking-genius. The ability of a person to send messages to the public in an easy to understand manner. Hoax, Gibah is a fact of inability to use communication	

In the current state of civilization, the capital or assets for character development that is friendly to social values are intellectual property, intelligence (smart power) and character (character) by opening a mindset, vision, passion, and paradigm. The fact that there are weaknesses that can be evaluated from the current condition is described below:

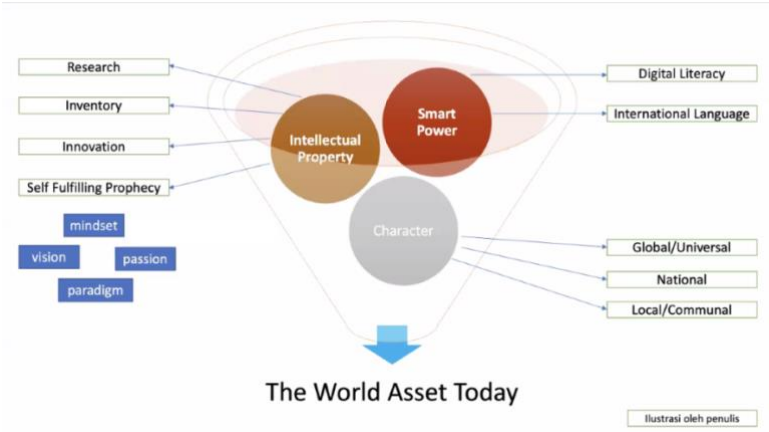

Figure 4: Assets Dominate Civilization Era 4.0

The weakness that exists in Indonesia's condition of intellectual property is the lack of a culture of researching, studying, and reading. Even though it is human nature, the main obligation is to read (in a broad sense). Reading is a power. For example, during a pandemic, there is research on vaccine discovery and manufacture, research on herb immunity, discovery of health oxygen, and so on. From this research culture will give birth to innovation.

The lighter character is morality. The basis for this character education is Law no. 20 of 2003 concerning National Education, in Article 3, mandates that "national education functions to develop capabilities and shape the character and civilization of a dignified nation in order to educate the nation's life. National education aims to develop the potential of students to become human beings who believe and fear God Almighty, have noble character, are healthy, knowledgeable, capable, creative, independent, and become democratic and responsible citizens.

The mandate of the law shows that the essence of national education is to shape the character of the nation's children who have personality and are civilized. National education aims to form Indonesian children who are intelligent, but also have character, so that later generations will be born who will grow and develop with characters that breathe the noble values of the nation and religion. The material presented was, among others, on the formation of global/universal character, including respecting parents in all religions (universal) or glorifying older people. The national character is re-understood the values of the 5 precepts of Pancasila as the strength of character and intelligence of the nation. Beginning with precept 1, continuing with the next precepts and arriving at the precepts of social justice as the goal of national development. Communal characters are conveyed about organizational rules, social rules of communal value and mutualism. The cooperative economic system (joint effort/mutualism) is an economic system based on Article 33 of the 1945 Constitution. The cooperative economic system (joint effort) is a model of democracy in the economic field and is the main pillar of the Indonesian economy. The view of the meaning of economic democracy in the Elucidation of the 1945 Constitution contains the notion of economic democracy, namely an economic structure that is based on the welfare of the people at large (Elli Ruslina, 2012). Economic development aims to promote the general welfare. This general welfare will be achieved through economic democracy which, according to Mohammad Hatta, is characterized by:

a. the ability of the community and nation to be independent;
b. growth of national income by increasing the prosperity of the people in a fair and equitable manner;
c. lack of domination or superpower in the economy;
d. development of people's purchasing power, especially in the most important goods for the necessities of life;
e. the role of the state in upholding the people's economic sovereignty by defending the interests of the people at large.

People-oriented economic development prevents gaps between national economic forces, let alone economic domination between one group and another. No big business wants to be separated from small businesses. Likewise, the rural economy is not excluded and exploited by the urban economy, or the agricultural sector is lagging behind the industrial sector.

Furthermore, the economy must reflect the politics of prosperity, which is based on the development of people's purchasing power. It can only be realized by increasing production which at the same time provides full employment. The development of purchasing power is prioritized for basic necessities of life, such as clothing, housing, food, health services and education. The government must intervene on behalf of the state, in order to monitor the functioning of the economic system that defends the people. The state oversees the economic market to ensure that there is no individual or group superpower, monopolism-ogipolism and conglomeration, injustice, and unfair free-fight competition. The role of the state also appears in planning and controlling the allocation of the resources of people's lives, so that they are useful for the greatest prosperity of the people. In an economic democracy there must be a defense by the state and on behalf of the state against the economic interests of the people at large above individuals or groups. The state plays a role in upholding justice in the economy so that there is no oppression of the people. Every citizen has the same right to obtain welfare from the sources of prosperity on earth, water and the natural resources contained therein based on the principle of kinship. Based on the values of mutualism and brotherhood supported by advances in digital technology, it is hoped that it will improve the economic life of the community in the context of social welfare as mandated by the constitution.

4. Conclusion

1. The role of technology in economic activities during the Covid-19 period is very large, having an impact on efficiency and effectiveness in meeting the economic needs of the community. Based on this, the concept of The Community Economy can be actualized in community economic activities based on post-covid-19 digital economic information.
2. The paradigm of economic development based on the values of wisdom and Indonesianness is a new hope for the community economy to realize the constitutional mandate. Based on this, values based on the principles of mutualism and brotherhood can be used as the basis for a constitutional national economic development paradigm.

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"Back to the Routes" – Kyrgyzstan's Renewal of the Nomadic Life Style

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Abstract
Central Asia is regaining the importance it used to have, due to individual collaborations between the ex-Soviet states, but above all due to the integration or special role as a bridge between Asia and Europe in the course of the Belt and Road Initiative. Not only is the transcontinental and transnational cooperation increasingly offered in the course of the Silk Road Initiative, but certain countries are rediscovering themselves, and reviving forms of life that were in part prohibited. The Soviet command economy has had its day in the period of the independent states' self-discovery, as well as during the structural crisis. The survivability of nomadism is particularly evident in the countryside, where it became important again after its prohibition. Nevertheless, adaptation to the new circumstances and economic opportunities, and challenges, is necessary. The Silk Road is a symbol that officially stands for a lively, functioning political, social and economic ecosystem – whether it works depends on everyone involved. The present text presents the historical and current economic and social situation of the individual Central Asian ex-Soviet republics and their path in the future.

Keywords: Bazaar, Central Asia, Eurasian Economic Union, Kyrgyzstan, Silk Road, Sitan Countries

1. Introduction – Global Economic Network

Global history, especially in the political-economic context, is booming in research today through sociological reflections. Additionally, globalization is often viewed as a modern development, with different definitions and framework conditions, be it after the dissolution of the Eastern Bloc, when Fukuyama (1992) generally speaks of the end of history, or the "clash of civilizations" (Huntington, 2011) about the ideological barriers in the world. However, the lines drawn are too simple. On the economic level one ignores long-term and long prevailing developments since 1750 – "the birth of the world" (Bayly, 2004), "transformation of the world" (Osterhammel, 2009) or the long 19th century with its "ingredients" revolutions, capital and empire (Hobsbawm, 1999, 18). With the European overseas expansion, be it into the world of the Atlantic, Indian or Pacific seas, a dimension of human life supposedly emerged which was built up and which supposedly has a new effect: capitalism.

According to Immanuel Wallerstein (1998-2012) or Eric Wolf (1997), capitalism arose in the 16th century and began to spread. One consequence was the development of a world economy, especially a historical system, with which capital was habitually invested with the primary intention of self-reproduction. In this system, what was

accumulated was used to accumulate more of the same (Wallerstein, 2011, p.13). In the course of time, various production processes were interlinked via product chains, and different markets came together on the production and distribution services on their long journey to becoming consumers. Over time, as a result of the European expansion efforts, economic areas were linked and interlocked with one another, and the modern world system emerged. In the long run it came to the "creation of a world economy through European capitalism and [to] the reorganization of economic relations in almost all parts of the world" (Eckert, 2009, p.26). These considerations, however, were and are Eurocentric.

The global long-distance trade of this type primarily satisfied two needs: on the one hand, that for luxury items and rarities (spices, ivory, tropical woods and the like), and on the other hand, that for capital that could be accumulated and reproduced – gold, for example, but primarily American silver, which secured the Iberian traders' entry into the flourishing Asian markets. The development of a capitalist world economy went hand in hand with diverse processes of differentiation between the world regions, which can be clearly outlined using the center-periphery model. Certain roles and tasks are assigned according to geographical conditions.

The pursuit of profit and increased productivity, expansion of the monetary and market economy, accumulation and investments in production and consumption cycles, economization and rationalization of more and more areas of life, commodity fetishism and reification up to the human commodity and human capital – some of the possibilities of this ideology and socialized formation mark. Its main historical processes include industrialization and mechanization, proletarianization and bourgeoisisation, nationalization and privatization, democratization and bureaucratization, whereby none followed a straight-line development, suffered progress and setbacks, and saw disputes and struggles, an action of the actors (Sonderegger, 2015, p.9). However, certain ideas were already realized in ancient times, albeit perhaps with different definitions and forms. The symbol par excellence for transcontinental trade with the involvement of many middlemen, so that producers and end consumers hardly had anything to do with each other, was and is the Silk Road, whose routes stretched from the northern Tianshan Mountains through the Asian parts of the former Soviet Union to the mouth of the Don on the Azov Sea and from there to Central Europe. The vast space between China and Europe resembled an ocean connecting other countries and communities. A similar picture was found everywhere, and the prosperity was clearly visible in the cityscape. The caravanserais and bazaars had an international flair, where people from different countries and regions cavorted. However, as history repeatedly shows, over the centuries that followed, this continental route, as well as its oases and cities, rose and fell again and again, not just through warlike events, but also by preferring other routes, especially the maritime routes. After the fall of Constantinople in 1453, the route via the old continental trade route for Europe was shifted, and new countries and other exotic goods were known. The Age of Discovery had left the classic Continental Silk Road, which for centuries had connected the Mediterranean and the Far East, forgotten.

States and regions – once at the center of the Silk Road and then forgotten, moved in the 20th century to the center due to new property and resources such as oil, gas and rare earth. They are partially surrounded by world political powers, which now belong to the "global players": China and Russia, partially India. China in particular is now propagating the Silk Road as a new opportunity for peaceful world trade. The text deals with a former Central Asian republic of the political Soviet Union.

2. Kyrgyzstan's historic heritage and its consequences

Kyrgyzstan is a poor country with great economic difficulties. These are due to its history on the one hand, but also to the difficult topography on the other. In Soviet times it had its place in the socialist economic structure and since independence has now had to try to develop its own economic and generally national profile (Umetbaeva, 2015). The framework conditions for agricultural production changed significantly after the establishment of the Soviet Union in the 1920s. The collectivization of agricultural holdings in the Soviet Union was first declared a political goal in 1927. Traditional power structures that prevented society from becoming soviet were to be dissolved. In a first step, nomadic family groups were forcibly settled and land owned by tribal leaders or clan heads was confiscated and redistributed. Many shepherds preferred to slaughter a large part of

their livestock rather than letting them fall into the hands of the state. In a second step, the forced settlements were converted into collective farms. The collectives were set up based on existing family clans, the naming continued to correspond to those of the communities of the pre-Soviet era. This was followed by the removal and expulsion of the clan heads. Among other things, they were relieved of their posts because of the failure to meet the specified target. Paradoxically, the sedentary lifestyle even led to a further strengthening of the clan structure, as families were now constantly together that had previously only seen each other in the winter months. In addition, the resulting kolkhozes of nomadic origin remained significantly smaller compared to those in conventional arable farming regions (for example Uzbekistan). Climate change is another factor (Jeenbaeva & Banerjee, 2022).

The individual Soviet republics specialized in certain tasks in the overall system of the Soviet Union; Kyrgyzstan served as a producer of meat, milk, wool and leather. The processing industry was therefore generally neglected by the central government in Kyrgyzstan. Before the independence of the Kyrgyz Republic, the land was owned by the state and was farmed by about 500 kolkhozes and sovkhozes. Marketing was organized centrally. Prices and delivery rates, production volume and number of animals were set by the state. After the independence of Kyrgyzstan in 1991, a land reform was carried out that enabled private individuals to claim land use rights for a period of 49 years. Land purchase and sale have been possible since September 2001; by 1999 about 52,000 new establishments had been officially registered. The state organizations that had previously coordinated trade between the Soviet republics as well as prices and subsidies ceased to exist after independence. A trading market collapsed. Kyrgyzstan now had to buy and sell on the world market. Large quantities of goods previously produced in the country were no longer needed. A change in production was therefore necessary.

3. Kyrgyzstan's economy since the 1990s

The collapse of the state economy and the old trade relations were also reflected in the figures: From 1990 to 1999, the per capita gross domestic product fell from 592 US dollars to 245 US dollars. It was not until 2007 that it topped the baseline at $ 740. Since then, things have been looking up. According to the World Factbook of the CIA, the gross domestic product is now 3700 US dollars. This corresponds to world ranking 184. The gross domestic product of Kyrgyzstan (in absolute figures) is 21 billion US dollars (2017) (https://www.cia.gov/library/publications/the-world-factbook/geos/kg.html), more up-to-date data are often difficult to acquire in these countries. This puts Kyrgyzstan in the 140th place in the world in terms of purchasing power parity according to estimates by the IMF in 2016, according to the IMF, the real GDP growth in 2020 amounts to -4%. Although Kyrgyzstan was an integral part of one of the largest economies in the world – the Soviet Union – these figures show a very weak economic position, with the north of the country being richer than the south. A third of the population of Kyrgyzstan live below the poverty line. The political and ethnic unrest in 2010 also weakened the economy of the already poor country (Ekmekçioğlu, 2012). The economic growth in 2013 was 10.5%, and in 2014, only 3.6% (Germany Trade & Invest, economic data compact). The gross monthly average wage in 2015 was 13,277 Kyrgyz Som, which corresponds to around € 173. The inflation rate is 6.9% and the unemployment rate 7.3% (2017 estimate). In 2016, roughly 18% of the gross domestic product came from agriculture, 26% from industry and almost 56% from the service sector. However, all of these data must be viewed with some caution. According to ex-minister of economics, Temir Saiyev, the shadow economy reaches around 39% of GDP. Other estimates even speak of up to 60%. In addition, the information varies considerably depending on the source and calculation method.

It turns out that Kyrgyzstan was facing an economic disaster after the collapse of the Soviet Union: Agriculture was cut off from its previous markets and industry almost completely collapsed. Tourism oriented towards Soviet needs also had to realign itself. The former planned economy was transformed into a market economy with international support. Except for a few strategically important sectors, such as electricity and water supply, the economy is now in private hands. Kyrgyzstan can or must benefit from the large amounts of money transferred by the up to 800,000 Kyrgyz guest workers, who mainly live in Russia and Kazakhstan. Money transfers have risen steadily over the past few years. In 2011, for example, according to the World Bank, the

transfer payments reached 1.7 billion US dollars or 29% of the gross domestic product. In early January 2013 the government adopted a new development strategy. This provides for the implementation of numerous projects in the fields of agriculture, energy, transport and communication infrastructure, logistics, industrial parks and mining in the period from 2013 to 2017. Since Kyrgyzstan itself hardly has the necessary investment funds, it is dependent on foreign aid. At a conference in July 2013, international donor organizations declared that they would provide around 2 billion US dollars for the implementation of the projects by 2017 (Aminjonov et al., 2019).

56.2% of the gross domestic product was generated in the service sector in 2016. Kyrgyzstan was the only country in Central Asia to be a member of the World Trade Organization until 2015. Therefore, it was able to establish itself as a regional trading center. Predominantly Chinese goods are now handled in Kyrgyzstan and exported to neighboring countries and Russia. The most important import partners are Russia with 33%, Kazakhstan with 9.4% and Japan and the USA with 4% each (2015). The main import goods are consumer goods, oil and gas, machinery, and chemicals. The most important export partners are Switzerland with 24.6%, Uzbekistan with 21.4%, and Kazakhstan with 19.8%, the United Arab Emirates with 6.2% and Russia with 5.8%. The main exports are gold, vegetables and fruits, electricity, cotton, sheep's wool, clothing, meat, tobacco, and mercury. Kyrgyzstan continues to have a large trade deficit. While exports totaled 1.7 billion US dollars in 2012, imports exceeded this value by 3.7 billion US dollars at 5.4 billion US dollars. Thus in 2015 the foreign trade balance was already 2.6 billion US dollars. This deficit is only partially offset by money transfers from abroad and is currently increasing due to rising imports and a relative stagnation of exports. The tourism industry is another area that can be expanded because of the attractive landscape. Tourism around Lake Issyk Kul has contributed to economic growth in recent years (Akbar et.al., 2021). The number of tourists from the "near abroad," the other former Soviet republics, rose from 59,000 in 2000, 300,000 in 2011, to 1.2 million in 2016. The abolition of the visa requirement for citizens of many states is likely to play a decisive role here. For the majority of those seeking relaxation (from Kazakhstan and Russia), beach holidays were still the top priority. Since 2012, however, the number of round trips and those tourists who have dedicated themselves to mountain tourism has also increased. Shortly after independence, the idea of "Community Based Tourism" was established. In 2003 a corresponding umbrella association was founded. This can be compared with the common terms such as gentle, social or ecotourism. The World-Wide Fund defines community-based tourism as "a form of tourism in which local communities have extensive control and participation over their own development and management. Most of the profit remains in the community itself" (https://cbtkyrgyzstan.kg/). The point is to develop tourism models and to focus on responsibility towards foreign cultures and the environment.

According to the CIA World Factbook 2016, agriculture contributed almost 17.9% to the gross domestic product. However, almost half of the workforce works in general agriculture, with the mainstay of agriculture being cattle-raising consisting of sheep, cattle, and horses. Currently, 85% of the total agricultural land is used for this. Arable farming is less intensive. Only 7% of the land is suitable for it. The main crops are wheat, potatoes, cotton, watermelons, and tobacco. So far, only the grain harvest is sufficient for the country's own needs. After independence, three quarters of the pasture and arable land was given to private farmers and a quarter to municipal administrations as part of the land reform (Levine et al., 2017). In connection with the riots in 2010, there were violent land occupations. The agricultural sector is still far less mechanized and there is little or no manufacturing industry to produce competitive products for export. The farmers lack capital. In May 2011, the Kyrgyzstan government passed a program that provided for around 1.5 billion Kyrgyz Som (equivalent to around 22.4 million euros) to be released for the construction of irrigation systems by 2015. This should create 17,000 hectares of new agricultural land. Such a program had already been adopted in 2007, of which only 41% had been implemented due to a lack of participation.

There is only limited value added in Kyrgyzstan: Only 25.9% of the gross domestic product is produced industrially (as of 2016). In addition, the country only has limited production facilities. In the manufacturing industry, the manufacturers of building materials such as cement, glass, and bricks as well as the textile, shoe and clothing industries are of particular importance. Gold and other precious metals are mined on an industrial scale. There is also industrial production of small machines, electric motors, refrigerators, furniture, and food processing.

4. Kyrgyzstan's resources and energy

Compared to other countries in Central Asia, Kyrgyzstan has fewer raw materials, but the country's mineral resources are important for the economy. Kyrgyzstan has gold, coal, mercury, zinc, tungsten, antimony (whose deposits are famous for their high quality), uranium, crude oil, and natural gas. However, gold is of greatest importance. With the Kumtor mine south of Lake Issyk-Kul on the upper reaches of the Barskoon, Kyrgyzstan is home to one of the largest gold deposits in the world, which was discovered in 1978 but is mined by the Canadian company Centerra. The production was not tackled in Soviet times because of the high costs, and so the Canadian company Cameco (today Centerra Gold) received the license in 1993, and it began operating the seventh largest gold mine in the world in 1997 (Baxter, & McMillan, 2013). More than 2500 workers and engineers are employed here, 97% of whom are Kyrgyzstan citizens, who work in difficult conditions in 14 day shifts in the thin mountain air at 4000 meters above sea level. 45% of the gross domestic product generated within industrial production in Kyrgyzstan comes from there. Critics believe that the Kyrgyzstan government prematurely signed a general agreement with donors from Canada at the beginning of the 1990s and that the country's most important gold deposits were given up. Nevertheless, the trade in the coveted raw material accounts for 40% of the general export income of the state and is responsible for an average of 10% of general GDP. In addition, the mine gives people work in a structurally weak region, which is also well paid in a national comparison. Today, however, many Kyrgyzstan people view the presence of Western investors with skepticism. The dispute over the license, which had been smoldering for years, was initially settled in early 2009. In return for a significantly increased Kyrgyzstan stake of 33%, Centerra received acceptable taxation and supposed planning security for the next few years. However, since the fall of the Bakijev government in 2010, the company has returned to the center of attention. Critics accuse Centerra of negotiating the license agreement with corrupt politicians in his favor. Against the background of local residents' protests, environmental concerns and calls for the nationalization of the mine, the Kyrgyzstani government and Centerra agreed on a joint venture model with a 50% stake on both sides for the joint exploitation of the gold mine. However, the Kyrgyzstan parliament rejected this plan in October 2013 and called for a new agreement with Kyrgyzstani participation of at least 67%. There were protests from residents who were primarily concerned about the environmental problems and the associated health consequences for the workers, which would persist even if a new contract was signed. In 2011, for example, 264 tons of gold were extracted from the rock with the help of 3,650 tons of cyanide. The toxic liquid is stored in retention basins that hold 60 million cubic liters. The gold-bearing rock lies in the permafrost zone, for the most part under a glacier that de facto must be blasted away for extraction. This is particularly worrying because its ice massif is located around the huge Petrov Glacier, which is over 70 square kilometers in size, the most important drinking water reservoir for the entire Naryn Valley. In addition, the mining work pollutes the water of the glacial rivers; additional accidents dramatically damage the environment. Ultimately, financial losses are also the result of this ecological disaster. No final regulation has yet been reached for tourism. In 2014 Centerra even threatened to shut down the mine, whereupon the Kyrgyzstani authorities again approved a return to the previous way of operation. In addition to Kumtor, there is the Bozymchak deposit in the west of the country, which is considered the second largest in the country. The Kazakh gold company Kasachmys holds the exclusive rights to explore and exploit the gold and copper deposits. These rights are limited until 2027. The third largest foreign investor in the Central Asian Republic is the company "Reemtsma Kyrgyzstan" operating in Bishkek and Osh as the owner for the management and investment of 120 million US dollars.

The use of hydropower is also gaining in importance: there are already numerous hydropower plants on the banks of the Kyrgyz rivers, which flow hundreds of kilometers through mountains and gorges. In 2010, Kyrgyzstan exported around 0.7 billion kilowatt hours of energy and the trend is rising. Nevertheless, the country has so far imported more electricity than it exports. Almost everything is for personal consumption; Surplus is exported seasonally. Outdated systems, investment backlogs and loss of income due to theft characterize the energy sector. The technical and commercial losses averaged 35% of the amount of energy generated. Foreign donors must be found for necessary investments, also for cleaner solutions (Sabyrbekov, & Ukueva, 2019). So far, the low consumer prices of around 1.5 US cents per kilowatt hour (and 3.3 US cents for companies) have been subsidized. The rise in the price of gas and electricity was one of the reasons for the fall of the Bakiyev government. After April 2010, the interim government largely reduced the increases, and announced

that electricity tariffs would remain stable for the time being and that future tariff increases would only be slow and socially cushioned. With Russia, Kyrgyzstan agreed to jointly build hydropower plants that were already planned during the Soviet era. This was cascade of 4 power plants on the upper reaches of the Naryn River. The completion of the first dam was planned for 2016, and the entire cascade for 2019. The project partners were the state power station operator OAO Elektriktitscheskie Stanzii (ES) and the Russian company Rusgidro. Disputes over the allocation of costs led to the project being stopped by the Russian partner in 2016. In 2017, a Czech holding company had won as a new investor. The second major project is the construction of the Kambar Ata I hydropower plant on the Naryn near Toktogul. Project partners are ES, the Russian company Inter RAO and the Canadian company SNC-Lavalin. Both projects are also anchored in the government's development strategy. In addition to the construction of new hydropower plants, the renewal and expansion of existing facilities are also planned. The At Baschy hydropower plant is to be modernized by 2017. Switzerland is supporting the project with a loan. For the rehabilitation of the Toktogul Dam, the Asian Development Bank provided a total of 105 billion US dollars in the second section. According to press releases, the European Bank for Reconstruction and Development plans to contribute another 75 million. The coal-fired power plant TEZ Bishkek is also to be modernized. The Export-Import Bank of China provided a loan for this, not least as part of the Silk Road Initiative (Feldbacher, 2020). The ailing gas network is also to be renovated. In November 2013, the Kyrgyz parliament approved the sale of the state gas supplier Kyrgyzgaz for the symbolic price of one US dollar to the Russian company Gazprom. In return, the Russians took over the old debts of Kyrgyzgaz and pledged to invest 620 million US dollars in modernizing the gas infrastructure, building new lines, and exploring gas reserves.

Concerning currency, the Kyrgyz Som was introduced in 1993 to replace the ruble. Kyrgyzstan was the first former Soviet republic to abolish the ruble. In the first few years after the currency reform, the Som suffered a very sharp decline in exchange rates, as were the other former member states of the Soviet Union. It was only gradually that the Kyrgyz government succeeded in promoting the country's economic development and stabilizing the currency to some extent. In 2008 the exchange rate to the US dollar was 36 Som, at the end of 2014 it was 54 som. This equates to a loss in value of more than 45% in 6 years. In 2017, however, it was again around 68 Som. The exchange rate against the euro was around 80 Som in autumn 2017, which was mainly due to a strong euro at the time. The foreign debt is currently around 70% of the gross domestic product. A debt relief initiative by the World Bank and IMF failed in 2006 due to the rejection of President Bakijev, who feared for the country's independence. The country will continue to be concerned with the question of how the debt can be paid off in the future. Despite government efforts, corruption remains another problem in Kyrgyzstan (Aydıngün, & Aydıngün, 2014). In 2016, the country was ranked 136th out of 176 countries in the world in the Corruption Perception Index by Transparency International. In a regional comparison, however, the country does relatively well in the ranking on economic freedom by the liberal US think tank "Heritage Foundation", where Kyrgyzstan was ranked 89th out of 180 countries in 2017. A relatively new problem is China's Policy of Political and Lending Conditionality, which is becoming more and more of a debt trap for all cooperation partner demands (Shamiev, 2019).

5. Results

The author spent many years in Central Asia and the difficulties of border crossings did not get any easier, demonstrating the political-social tensions one continues to encounter here. Factors are added very quickly that today determine the life of pandemics on a global scale, how the current Covid-19 spread is negatively affecting the social fabric and the economic situation, and one will see how far the associated fears of globalization also affect the Silk Road Initiative. There are national and ethnic tensions around the world, often encouraged by the political grandees. In Kyrgyzstan, the populist Sadyr Japarov, elected in 2021, prepares a new constitution dismantling democratic principles (Schmitz, 2021). In Central Asia, however, it is mostly related to recent history. Consider the example of Kazakhstan: Its recent history is told as a successful story of industrialization and modernization, in which all the nationalities living in Kazakhstan had their share. The balancing act between these different narratives is not always easy. Dealing with Stalinism, which destroyed nomadic culture and created the basis for gigantic industrial and infrastructure projects by violent means, is particularly problematic.

The settling down of the nomads does not play an essential role in these narratives. It is widely regarded as a necessary and successful act of transition and overcoming archaic ways of life.

Eastern European states share with Central Asian nations the political ideological and cultural devices of an emergent past, and they use the recreation of the past as a key strategy for nation building. Both in Eastern Europe and in Central Asia, processes of decolonization from the Soviet era are an important part of nation building. Specifically, in Uzbekistan the attempts to distance the country from Soviet concepts of an organization are strongly present, but also tensions with the neighboring countries are present, affecting eventually Kyrgyzstan's economy (Ismailbekova, 2018). Another challenge is the general multi-ethnic background among all the Central Asian states (Abdulbakieva, 2020). Central Asia and in a second step South East Europe became an increasingly attractive destination for foreign direct investment (FDI). An interesting example is the planned mini-Schengen, with the aim of a free movement of goods and capital as well as a common labor market for North Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Albania and Kosovo. In an interview with the Serbian President Aleksandar Vučić, the latter reported that representatives of the World Bank calculated that ten to eleven percent of the operational costs for importing and exporting goods could be saved if this initiative were implemented (Wehrschütz, 2020). There is also a positive political aspect. As a result of these economic alliances, the community would count 20 million inhabitants and progress be noticeable. Serbia's admission to the EU is currently rather cautious. On the other hand, the European former Eastern Bloc states are interested in more intensive cooperation with China and vice versa, since the People's Republic sees this as an ideal gateway for Western Europe, which is more reserved with regard to the Silk Road. After independence from Soviet Union – beware the irony of recent history – international development agencies promoted the establishment of service and marketing cooperatives in the agricultural sector in post-Soviet states, though they failed in many cases (Cima, 2021).

6. Conclusion

It was a long way from Soviet collectivization to nomadic life style and globalization by the Belt Road Initiative in Post-Soviet Central Asia's countries. Central Asia in particular harbors a great common and shared heritage, despite all the new frontiers created mainly during modern times. With the return to the strength of those regions that have existed in cultural and economic exchange with one another over the millennia, and productive communication between the states, a more stable and profitable situation could arise for all those involved. This can happen not only across state borders, but also within the respective societies. It has to be observed again and again that economic and social injustice prevails in post-Soviet states, and that the resources, in which most states are rich, do not reach all classes.

ASEAN is another example of successful economic cooperation between states, each of which retains its own political and national idiosyncrasies and independence. This should not be forgotten in a new Silk Road initiative. Overpowering nations like China should not impose their own cultural idiosyncrasies and economic guidelines on other countries, which would lead to the loss of any independence, but individual states should approach productive cooperation on an equal footing, with one continuing to do so, existing autonomously for the individual. Not only is the transcontinental and transnational cooperation increasingly offered in the course of the Silk Road Initiative, but certain countries are rediscovering themselves and reviving forms of life that were in part prohibited. Kyrgyz as well as Kazakhs have seen themselves as nomads for 3000 years, whose way of life was the only sensible one, in view of the steppe with its dry vegetation and its sparse water reserves, in order to be able to survive permanently in the summer heat and the winter cold. The Soviet command economy has had its day in this period of self-discovery and, at the same time, the structural crisis. The survivability of nomadism is particularly evident in the countryside. The knowledge passed on from generation to generation about the peculiarities of weather, plants, water, and animals are used again. One gets the impression that semi-nomadic cattle breeding in these countries has a future, provided that great powers and international corporations do not interfere too much in the life of the population. It can be best preserved where the natural conditions are given, although the new era has arrived, and you can now find solar panels, radio, television, and mobile phones in every yurt.

Yet, it can be observed that these countries are not always moving forward, but sometimes are returning to traditions. One falls back on inventions and discoveries of the past. Development is necessary, but it is often based on the past and is necessary to preserve the past. The Silk Road is a symbol of a well-functioning political, social, and economic ecosystem that, against all today's challenges, intends to illuminate the new world again.

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The Impact of Covid 19 on the Obligations of Contractors through the Commercial Contract in Saudi Arabia and the Islamic Law Perspective

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Abstract
With the growing COVID cases internationally, there is a need for a greater focus at both academic and government levels on the disease. The existing studies published in peer review journals are not sufficient in developing policies regarding counteracting the impacts on the contractors' obligation as per the commercial contracts in Saudi Arabia. The exploratory study will look into the commercial contracts in detail to find out how the obligations of contractors are affected through legislative restrictions regarding COVID.

Keywords: COVID, Commercial Contracts, Saudi Commercial Laws, Contractors, Obligations

1. Introduction

Coronavirus 2019 (Covid-19) is an emerging health condition that was first detected in Wuhan, China in 2019 (Krishnan et al., 2021). The World Health Organization (WHO) declared the disease as a pandemic on March 11, 2020 (Jin et al., 2020). Researchers found the Covid-19 disease is cyclic or seasonal (Byun et al., 2021). Temperature, humidity, socioeconomic conditions, population density, and latitude account for the variation in COVID cases in different geographical regions (Benedetti et al., 2021; Byun et al., 2021).

Various industries have been critically affected due to the ongoing Coronavirus pandemic. The stock market prices of major for-profit hospitals have been affected after the COVID-19 outbreak (LaPointe, 2020). Mourad et al. (2021) carried out a retro-perspective study investigating the social, political, and demographic factors associated with COVID cases globally. It was found that the social deprivation index (DPI) in counties with increased cases was significantly higher as compared to counties with non-increasing cases. Moreover, the counties with an increasing number of COVID cases were likely to be metropolitan areas with a population between quarters of a million to one million. Most countries with increasing COVID cases also had a slightly higher percentage of black residents as compared to counties with non-increasing cases i.e., 9 percent versus 6 percent. It was concluded by Mourad et al. (2021) that addressing the political and legal framework related issues will play a vital role in the control of the pandemic.

2. Study Objectives

The aim of the literature review is to compile information related to the topic in order to identify patterns and gaps in research work (Rozas & Klein, 2010). The literature review is carried out to not just justify the need for a study but also to identify patterns that can be a basis of further inquiry. The literature review should be carried out continuously to find out the latest trends related to the research topic.

The literature review also helps us to assess if the research topic is 'researchable.' For instance, my topic of interest relates to the devolution of the HR manager's responsibilities to line managers in the clinical setting. I am interested in this topic since I have been associated with the mental health field for over 25 years. I am at the present serving as a Clinical Director at Wellness Recovery Center. The findings of the research will prove invaluable in knowing about the effective staff management practices in the clinical setting. The topic is 'researchable' since a lot of recent publications have critically analyzed the recent phenomena of devolution of HR manager's role to line managers. Through literature review, I can synthesize the information and critically analyze the information related to the topic in the context of my own experience (what works, what seems ineffective, etc). The research topic will help owners and C-level executives in improving the organizational structure that results in the best outcome.

Lastly, literature review should be carried out at different points of the study to find out new trends. We can revise our research methods, questions, and even topic based on the new themes identified by the literature review. This will ensure that our research study is relevant and addresses present issues that require critical evaluation. The literature review serves as the foundation of our research and we need to constantly review literature and revise our research study if required.

Identification of conflict of interest is important to prevent biases (Ariely, 2011). The Americana Research Association's (AERA) (2011) has specified that emphasize that researchers should disclose any conflict of interest in the study. A conflict of interest arises when interests and obligations are influenced by other interests or relationships. Researchers need to disclose any potential or actual conflict of interest that could affect the research study.

3. Research Method

The topic chosen for the study is phenomenological perspectives regarding the contractual obligation in the light of the force majeure event of COVID-19. The research design involves an inductive (specific to general) approach using interviewees to gain an understanding of the issue (Ponterotto, 2005). A researcher can select a research method that best fits a given situation. The pragmatic involves determining what is practical in a given situation to address an issue. The epistemological basis of the paradigm is meeting specific research goals (Morgan, 2007). I view research as assessing reality in a pragmatic manner utilizing the available resources. A researcher needs to be pragmatic and select a method based on geographic, cost, and time constraints.

Qualitative research method is used for studying the topic of contractual obligations of contractors in Saudi Arabia during the COVID-19 pandemic. The research method is based on an inductive research method where we go from specific to general. We gather data and develop theories after discovering patterns in the data after literature review. The method can be contrasted with the quantitative research is based on the deductive method where we go from general to specific. We test a theory using empirical methods and then describe trends and patterns related to the data.

One of the critical issues that can occur during a research study is that of researcher bias. Goldacre (2011) emphasized on the importance of carrying out extensive research to avoid partial theories resulting in bad sciences. Subjective evaluation based on insufficient data leads to incorrect observation. Many times selective observation leads to an incorrect assumption. A researcher needs to look at all the data based on the idiographic research method that involves looking at a topic from different perspectives as described by Babbie (2016). The study addresses the issue of contractual obligations during force majeure events and explores topics by carrying

out extensive research that involves examining various viewpoints. This mode of critical evaluation will lead to improved outcomes in the context of enhanced credibility of the research work. The research method involves critically analyzing the published research to ensure that the conclusion is made on extensive literature analysis regarding the topic. This can help reduce subjectivity bias regarding the research.

The study also uses the triangulation method to ensure objective qualitative analysis of the topic. Patton (1999) had described different sources of triangulation to check the consistency of data. This study involves examining subjects in different settings and different points in time. In addition, Patton (1999) had recommended the analyst triangulation method whereby the same data is interpreted by different observers. Using multiple theoretical perspectives can also serve as a triangulation tool to verify findings and discovering new trends and patterns. The method can help in discovering patterns not possible in studying a topic under only a particular lens. Using extensive literature review examining the viewpoints of both Islamic and western scholars regarding contractual obligations during force majeure events will help in gaining deeper insights regarding the subject matter. It can also help in avoiding issues related to researcher biases that may occur in subjective interpretation of the data.

Objectivity is important regardless of the instrument chosen for research. While the qualitative research is based on subjective evaluation (Thanh & Thanh, 2015), the research study would lose integrity if it isn't based on an objective assessment of relevant information. To ensure objectivity, we should justify each of the research decisions relating to methodology, evaluation, and other aspects of the research through citations. This will help us in developing an objective research study that is not biased in any way. We should select an instrument of another researcher only if it best suits our research objectives.

Abductive observation involves the best explanation or fits for a given situation, according to Babbie (2016). In this context, abductive research is a pragmatic approach whereby a researcher selects an appropriate method or instrument based on special circumstances (Bierley, 2017).

4. Theoretical Assumptions

Every paradigm has its own ontological and epistemological foundation (Scotland, 2012). So, a particular paradigm the assumptions should be relevant to that paradigm. Creswell (2015) recommends that qualitative research should start with the personal experiences of the researcher putting forward the experiences and criticize the prevalent views in the research paper. The theoretical basis of the research article is on critical realism and constructivism.

Critical realism helps us in developing and auguring for social phenomena by revealing the underlying causal mechanism (Danermark et al., 2002). According to Cohen, Manion and Morrison (2009), knowledge is determined by the positional and social power of the advocates of knowledge. In other words, researchers can criticize and advocate for a particular cause. The ontological basis of critical realism is that there is an external reality that can be identified by the researcher. The social reality can be understood by criticizing the underlying interviewee's biases or other issues relating to the gathered research. According to Scotland (2012), researchers make value-laden judgments throughout the research process including in interpretations of the findings. The ontological position of both critical realism and interpretive paradigms is relativism that puts forward the view that reality is subjective and differs from one person to another. There are different realities that are individually constructed and there are as many realities as there are individuals (Scotland, 2012).

5. Rules of Islamic Sharia for Contracts and Modern Man-made Laws in Dealing with Disasters

Commercial contracts in Saudi Arabia are governed by the Contract Law that is based on the Hanbali interpretation of the Sharia Law derived from the Muslims' holy books including Quran and Hadith. In addition, Saudi Arabia is also a signatory of international treaties and abides by the terms such as the Royal Decree 11 regarding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Brill,

1994). Commercial contracts in Saudi Arabia are of four main types viz transactional contracts, financing contracts, intermediation contracts, and social welfare contracts (Vogel & Hayes, 1998).

The Islamic contract of Saudi Arabia is grounded on the current obligations rather than future contractual facts that limit the type of contract that the contractual parties can enter into. Islamic contract laws forbid collection of interest and instead allow profit and loss sharing contracts (Kamla & Alsoufi, 2015). The risk of contracts is shared by the contracting parties through a system that can be compared to lease, joint venture, and partnership structure of modern contractual laws. In addition, rules of Islamic sharia do not allow contracts in certain activities including gambling, prostitution, speculation, and alcohol (Fasih, 2012).

Another way Islamic contract law is different than conventional contractual law is that it prohibits contracts regarding businesses that involve high risk and speculation. The principle of good faith applies in Islamic contracts with a focus on transparency (Choi et al., 2018). Good faith as per the contract rules of Sharia includes the comparable modern concepts of ethics, transparency, and respect of rights of the contractual parties. The aim of good faith is broad that encompasses respecting the rights of not just the contractual parties but the society at large.

The concept of 'Aqd,' which literally translates into the tying a knot by two parties, is also an important concept regarding contract rules based on Sharia laws. Saudi Arabian contract law has transformed the sharia law into a statutory law that binds parties to a contract and both Muslims and non-Muslims have to abide by the contractual law. In this context, the law has implanted the sharia law into statutory legal corpus that must be obeyed by all. It is in accordance with the Islamic faith that must be followed by every business and individuals in Saudi Arabia. Islamic contract law is valid (sahih) only when it is effective, valid, and enforceable (Islam, 1998). Similar to the modern legal concept of force majeure clause, Islamic contract law allows absolute (*mutlaq*) and relative (*nisbi*) voidance of contractual obligations depending on the choice of the contractual parties. The voidance of contract is rooted in the concept of risk sharing between the contracting parties. A loss is equally shared by the party in the case of a natural disaster such as the COVID pandemic.

5.1. Risk Management in Islamic Contractual Laws vs Modern Laws

Disasters create certain risks that should be understood in the light of sharia law. Risk in terms of sharia law has slightly different connotation as compared to the modern laws. The term risk according to western scholars comprise of perceived exposure and uncertainty towards a loss (Holton, 2019). Odds ratio is the regression coefficient's exponential function (e^{bi}) that is used to measure the association between an exposure and outcome (Szumilas, 2010). The ratio is defined as the likelihood of an outcome in the presence of exposure as compared to without the exposure. It is used to determine whether the exposure is a risk factor and to compare the magnitude of different risk factors of an outcome. Enterprise risk management (ERM) refers to the process of identifying, managing, and preparing for potential disasters (Kenton, 2020). It involves identifying, assessing, and prioritizing risks. The process also involves creating a risk management plan to address the risks to the organization. The risk management process involves the board of directors, management, and personnel who identify and manage the risks as a group. The risk management framework offers value to the organizations as compared to the traditional risk management approaches. In the traditional risk management approach, business unit heads are responsible for managing risks within the respective departments. For instance, the Treasurer is responsible for managing risks within the finance department, Chief Technology Offer (CTO) manages risks within the technology department, Chief Marketing Officer manages risks relating to customer relationship and public relations, and Chief Operating Officer is responsible for managing risk in the production and distribution department. Enterprise risk management aims to manage the risks through a holistic view of the risks. It involves cross-unit collaboration to identify all types of risks faced by an organization. The cross-department collaboration results in getting an overview of the essential risks that result in improved decision making. Effective ERM allows the identification of critical risks for enterprises. It allows prioritization of risks so that management can address the most critical risks. Effective ERM processes go beyond meeting Sarbanes Oxley (SOX) reporting and control requirements. It involves meeting the IEEE/ISO standards for effective risk management. Enterprise risk management should have the characteristics of objectivity, proactivity, and

adaptability. Moreover, risk management is carried out at both the planning and the execution stage to be effective (Shayan, et al., 2019). Lastly, effective ERM consists of aligning the risks management effort with the strategic goals of the organization.

In contrast, risk according to the sharia perspective specifically refers a bad outcome and a different term (*khatr*) is used for exposure to bad outcomes (Noor et al., 2018). Islamic law allows risk management to reduce the risk of losses. In this respect, contractors are allowed to diversify the risk through measures that are acceptable in Islam. The limitation is the raison d'être for the introduction of Islamic financial instruments that differs from traditional instruments.

An important thing to understand is that Islamic sharia law is applicable to contracts rather than a single contract (Coulson, 1984). Unlike traditional laws, the sharia contract law doesn't go into the specifics of the obligation of contractor in the wake of a pandemic. It is up to the jurists and learned scholars to make decisions about the contractual obligations based on *ijma*. The term refers to the majority opinion or consensus of Muslim scholars on a point of view and is the secondary source of sharia law in Islam. But there is some disagreement regarding the implementation of ijma. The Hanbali school of Islamic thought that is practiced in most Arab regions unlike the Hanafis and Malikis does not allow blind adherence to the consensus of the majority as it can result in abuse (Ali, 2002). Instead of ijma, the Hanbali group recommends independent reasoning (*ijtihad)* through studying Quran and Hadith (Esposito, 2003). Imam Hanbal whose teachings are largely followed in Saudi Arabia and indirectly influenced the contractual laws don't accept consensus (*Ijma)* to be religiously binding but accepted the consensus of the first generation of Muslims known as Sahaba (Farooq, 2006). However, the later day Hanbali theologian and reformer Imam Taymiyyah accepted consensus but only of the learned scholars of Islam, which is termed as *Ijtihad* (Farooq, 2006). The later day Hanbali scholars allowed addressing novel problems not discussed in the primary sources of Sharia law – Quran and Hadith – through application of the *Maslaha* concept for the public interest (Horo, 1989). A comprehension of the sources of contractual law in Saudi Arabia is essential to understand the flexibility in addressing the impact of disasters such as COVID-19 on the contractual obligations in Saudi Arabia.

5.2. The Concept of Maslaha and Utilitarianism Explored in the Light of Contractual Obligations during a Force Majeure Event

The concept of *Maslaha* in addressing unaddressed issues regarding contractual obligations among others in Sharia law is similar to the relatively modern ethical concept of utilitarian that promotes the, 'greatest amount of good for the greatest number of people' (Tardi, 2021). In treating contractual obligations due to disasters, jurists in Saudi Arabia consider *Maslaha* when making laws. The contractual obligations are set based on what is good for the public interest. This makes the Saudi Arabian contract laws that are derived from Sharia laws to be extremely flexible contrary to the contemptuous view that sharia-based laws are restrictive or set in stone. The concept prohibits and allows activities based on the necessity during a particular circumstance. Applying the concept of Maslah to contractual obligations implies that firms are absolved of their duties during special circumstances such as pandemic or disasters. This methodological concept of sharia focuses on the concept of social welfare in law making. The term Maslaha can be identified in terms of the antonym Mafsadah that refers to activities that causes harm. Understanding the distinction between the two is important to realize how Islamic jurists implement divine laws relating to contractual obligations in force majeure circumstances.

Ibn Ashur a renowned Tunisian Islamic scholar of the 20th century says in his book Treatise on Maqasid Al-Shariah proposed the theory of Maqasid al-shariah to address the present and real challenges facing Muslims today (Ashour, 2006). The theory of maqasid put forward by Ibn Ashur implies that government can take actions that facilitate a functioning society for the public good or maslaha. It implies economic and social justice that improves the welfare of the community and the environment. Shariah forbids actions that has a negative impact on the economy, society, and individuals (IIBI, n.d.). Islamic shariah lawmakers are required to legislate rulings that provide the greatest benefit (maslaha) and avoid harm (mafsadah) to them (Lokman & Ibrahim, 2017).

New consensus (ijtihad) is needed to define contract laws in the event of COVID-19 during the pandemic. The fiqh doctrines of the Islamic contract laws must be modified to bring them in line with the modern situation. The rulings must be made in view of the maslaha or greater goods of the people and avoiding actions that are harmful or mafsadah. The theory is recommended by many reform minded Islamic scholars that apart from Ibn Ashur include Rashid Rida, Muammad Abduh, and Muhammad Said Ramadan (Saharuddin, 2010). The scholars view that the objectives of shariah are ensuring the wellbeing of the society through appropriate legislation. Still, there is disagreement on the limits of applying the concept of Maslaha through legislative means. The classical jurists belonging to the Al-Shafii school of thought (fiqh) who rejects the concept of maslaha on the ground that it leads to personal opinions (ray) due to which it would exceed the use of human reasoning or qiyas. (Saharuddin, 2010). The viewpoint was accepted by Islamic scholar Al-Ghazali who defined parameters for using the Maslaha-Mafsadah framework to make rulings regarding an activity. He had put forward three conditions for fulfilling the legal parameters that include necessity (darurah), certainity (qatiyyah), and universality (kuliyyah). Looking at the problem of contractual obligations, one can deduce that the shariah law allows annulment or at least delay of meeting the terms of agreements for the contracting parties during force majeure events such as COVID-19 pandemic due to meeting the three elements of necessity, certainty, and universality.

The concept of Maslaha was also accepted by scholar Abu Hanifa who consented it as one of the sources of law in solving legal issues (al-Buti, 2005). The legal concept is used by Hanafi scholars in devising laws that are not present in the primary source of sharia laws. Maliki scholars explicitly accept maslaha as a source of Islamic laws. A Maliki scholar Al-Shatibi has place importance on the concept of Maslaha for deriving laws that are not contained in the primary sources of law. Hanbalis particular al-Tufi enhanced the concept of maslaha by emplacing that the personalized opinion (ray) as the main factor in determining the interest of the people that were related to man-man relationships i.e. contractual obligations but not ibadat that relate to the obligations of God (Shaharuddin, 2010).

Anglo-American laws related to contracts, torts, restitution and others have a theoretical underpinning of utilitarianism theory (Posner, 1979). The concept of utilitarianism is the most persuasive moral theory that has implications for legal principle and policy making (Bagaric, 2002). This theory is similar to the maslaha concept in that it encourages following a policy that maximize wellness of the public. The theory of justice is evident in western laws seeks to create political and material conditions that secure each individual's goal of a good life in the community (Kelly, 1990). The utilitarianism approach to contract law is in alignment with the wealth maximization theory of justice that is applied to the contract law (Jimenez, 2010). So, it can be concluded that the underlying principles of contract laws in sharia and modern laws are the same. The treatment of contract laws for force majeure can therefore be implied to be similar for the contracting parties. The concepts that are accepted among respective Muslim and western scholars and jurists encourage taking actions that result in benefit of the masses. The understanding of the two laws can help in reconciling the contract enforcement during force majeure events such as COVID-19 pandemic. The sharia law similar to the western law permits delay or annulment of contractual obligations during extraordinary circumstances based on the concept of justice and benefit maximization.

6. Conclusion and Suggestions

The study applied the grounded theory for the understanding of the impact of disasters on contractors in Saudi Arabia based on the sharia contract laws. The impact of the pandemic will indeed be felt for a long time. It has changed the way society functions and operates. Organizations in Saudi Arabia need to adopt new strategies to build resiliency in the face of economic challenges due to the COVID-19 pandemic. They need to remain flexible to the revenue cycle and adjust the cost factors to ensure sustainable operations going forward. Many companies have shifted to work from home and remote services in the wake of COVID restrictions.

Private firms are in urgent need of government regulations to make up for the loss in revenues due to restrictions. The assistance can be in the form of tax relief, liquidity infusions, and rebates on utility services. This is important to ensure that contractors are able to meet the contractual obligations providing critical services to the customers to maintain economic stability. Scholars also say that laws that favor intense competition can

work in favor of achieving ethical goals (Luge, 2019). Regulatory framework that focus on the competition can encourage increased efficiency in public sector (Kifman, 2017; Roediger et al., 2019). Scholars have found that competition can help achieve corporate goals including addressing the unmet medical needs, reducing the cost of treatment, and improving access to medical treatment in Europe (Roediger et al., 2019). For instance, Germany to a large extent has achieved efficiency in public care through introducing legislative changes such as providing freedom to companies to sign selective contractors with health care providers and encouraging competition between hospitals and ambulatory care providers (Kifmann, 2017). Evidenced based reaction is important when it comes to corporate policy making where the aim of the policy makers should be to normalize the operations. Policy makers need to follow ethical guidelines when creating a disaster response (Leider et al., 2017).

A comparative exertion is required with a focus on the well-being of the local population. The public policy makers should compare and implement the best strategy that ensures ethical fairness and equity (Nill et al., 2019). The government should focus on selective shutdown by imposing restrictions in areas that are COVID hotspots and putting a ban on travelling in the affected areas. This policy can be highly effective in ensuring that contractors don't face undue pressures in implementing contract regulations due to the COVID pandemic. Contractual laws should need to take into considerations that revenue streams will need to be more diversified. The coronavirus pandemic has shown the dangers on relying on few high margin activities as a major source of income. Institutions in Saudi Arabia must diversify the revenue stream by serving diverse customer segment. They need to diversify the drivers of the revenue streams instead of relying on a few sources of revenues. This should be supported by a national policy with a focus on balancing economic, medical, and social well-being (Gelter et al., 2020).

The ethics and socio economic factors are important when it comes to policy making. One of the critical issues regarding health care policymaking is ensuring adherence to ethical guidelines. Commercial contracts have a moral imperative that should not be ignored during public policymaking. Social justice is another important factor that should be understood to ensure effective decision-making. Both political and ethical legitimacy is important in creating public policy for commercial contracts. But there is still lingering confusion regarding the approach that should be taken when developing the policies. There is an ethical dilemma regarding whether we should follow the utilitarian concept of benefit of the masses or ensure freedom of choice when creating policies regarding contentious issues such as COVID restrictions. But this again has the ethical issue as whose moral philosophy should be followed when creating public health care policy. The policy at the federal, state, and institutional level affects the outcome of patient services. The ethical policies and social accountability play an important role in policymaking for commercial contracts (Mattei et al., 2018). The interplay of politics and ethics creates complexities in making policies regarding contentious issues. The two factors should be considered when creating legislations. The government should assess the socio-economic impact of polices. Moreover, they should also determine whether the policy meets the ethical guidelines. Ethics is important today more than ever in public policy making. In this regard, ethics attitude, leadership ability, and operational and strategic planning skills are all important for efficient corporate policy making (De-Oliveria, 2017). It is important to ensure consistency between strategy and implementation. Without proper execution, the public policies relating to commercial contracts will fail to result in maximum benefit for the stakeholders.

A national policy can help support the risk management effort (Nia & Kulatunga, 2017). Resistance is inevitable when changes are implemented. Contractors may not follow the procedures and take part in the training program. If the resistance of contractors to COVID restrictions not handled properly, it can create challenges for the public policy makers. To reduce the resistance, the priority should be to get a buy-in from the contractors. The feedback of contractors should be considered when implementing the changes. Any inconvenience to the contractors should be properly addressed. Another recommendation to reduce contractors resistance is to involve the contractors in the decision-making regarding COVID-19 restrictions to reduce risks. They should be encouraged to share their suggestions. A consensus should be reached regarding the implementation of the risk management plan and contingencies measures to curb COVID infections.

7. Further Research

Research indicates a range of social factors that impact residents of a country chief among which is economic stability (ODPHP, n.d.). It needs to be investigated whether social factors impact the contractual obligation in the context of commercial contracts.

A qualitative survey is recommended to assess the importance of the identified factors. A Lickert-scale questionnaire can be developed to find out the relative importance of the identified social determinants. The research study can include questions such as: Do social factors like social relationships impact the contractual obligations? Do income and job security affect self-employed contractors?

The research study can be analyzed by grouping the participants based on cultural and ethnic background. This will help in getting a more accurate analysis of the impact of social determinants on contractual obligations in Saudi Arabia.

The findings of the study will benefit international firms who want to carry out contracts in Saudi Arabia. It will let them understand their contractual obligations in the event of disasters. The results may form the basis of further research to know about the specific impact of pandemic such as COVID-19 on contractor's duties and responsibilities in Saudi Arabia.

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Transformation of Traditional Balinese House in Banjar Umacandi, Buduk Village, Bali, Indonesia

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Abstract
The phenomenon of the transformation of traditional Balinese houses in Banjar Umacandi is interesting to study. The perpetrators of the conversion of religion from Hinduism to Christianity, should live in the Christian world, but the perpetrators of the conversion in Banjar Umacadi still apply some of the values of traditional Balinese houses as a form of Balinese culture derived from the teachings of Hinduism. The change in traditional Balinese houses has three implications, namely: (a) the side of creating new concepts, (b) developing and strengthening existing concepts, (c) losing the original concept. This article will describe the transformation of traditional Balinese dwelling houses by simultaneously exploring the conversion of religion from Hinduism to Christianity. In the hope that it can be understood the extent of the change in traditional Balinese dwelling houses in the middle of an area with high religious conversion. These changes have an impact on the transformation of traditional Balinese values, especially in terms of Balinese building architecture, in addition to the values of social wisdom and other local wisdom values. Furthermore, this article aims to investigate the factors causing the transformation of traditional Balinese houses, the transformation process and the implications of transformation on socio-cultural and religious life in Banjar Umacandi, Buduk Village. The method used is qualitative research, because the emphasis is not on measurement but on trying to find the subjective meaning of the research subject. The results showed that economic factors are the main factors that influence the transformation of traditional Balinese residential houses in Banjar Umacandi. Ideological factors are not the main factors causing the transformation of traditional Balinese residential houses in Banjar Umacandi. The transformation of residential houses in Banjar Umacandi has not yet fully occurred. Local residences have transformed from traditional Balinese houses into modern houses (non-traditional architecture) in the traditional Balinese architectural style. The concept of a modern house in the Balinese architectural style that is still maintained, has implications for the socio-cultural life and the local waga religion. The fusion between the Hindu system of citizens and conversion actors who still maintain the concept of Balinese culture as a common thread, has an impact on the creation of harmonization in Banjar Umacandi to this day.

Keywords: Transformation, Residential, Traditional Balinese

1. Introduction

Indonesia with a variety of cultures, has a residence based on ancestral traditions called a traditional house. A traditional house is a building with a structure, method of manufacture, shape and function as well as a variety of decorations that have their own characteristics, are passed down from generation to generation and can be used to carry out life activities by the surrounding residents.

A house is a building, where people live and carry out their lives. In addition, the house is also a place for the process of socialization of individuals with norms and customs that prevail in a society. So, every residential house has a value system that applies to its citizens. The value system differs from one housing to another, depending on the area or the circumstances of the local community (Sarwono in Budihardjo, 1998). In general, the house is a place for humans to live for shelter. In particular, the house is a reflection of the status of the owner, both social, economic, cultural background and spiritual activities.

Traditional Balinese Architecture is one of the ethnic architectures, which is part of the richness of Nusantara Architecture. Traditional architecture as part of its culture and its birth is motivated by religious norms, local customs and is based on local natural conditions (Newmark & Thomson, 1977 in Gelebet, 1982). According to Putra (2009), Balinese Architecture has maintained and developed three types of architecture, namely Heritage Architecture (ancient), Traditional Balinese Architecture and Non-Traditional Architecture in the style of Traditional Balinese Architecture.

Bali as the final terminal of the Indonesian Hindu cultural journey has given birth to various cultural products in architecture, especially traditional Balinese houses. Along with the times, there are fears of degradation of the values of traditional Balinese houses and continue to be an identity crisis. Exploration and conservation efforts are needed to overcome the implications of change so that traditional Balinese house concepts can provide identity and meaning to modern houses. This research will conduct a deeper analysis, related to the existence of traditional Balinese houses in areas with high religious conversion.

Based on preliminary studies that have been carried out, residential houses in Banjar Umacandi, Buduk Village, are decompressed with traditional Balinese residences that have been transformed towards modern residences in the Balinese architectural style. According to Putra in Wiryaawan (2016), Balinese architecture has maintained and developed three types of architecture, namely: (a) Heritage Architecture (Ancient); (b) Traditional Balinese Architecture; (c) Non-traditional architecture in the style of Traditional Balinese Architecture. As an initial understanding and equalization of perception, it will be stated in advance about the understanding between Traditional Balinese Architecture (ATB) and Balinese Architecture (AB). Traditional Balinese Architecture (ATB) is an architecture that is grown from generation to generation and is made with traditional Balinese rules both written and oral and can be accepted by the Balinese people in a sustainable manner because it is considered good and correct (Gelebet, 1982; Son, 2009; in Wiryawan, 2016). Balinese architecture (AB) is an architecture that grows, develops and is maintained in Bali filling history, space and time from time to time. As a form of Balinese Architecture, it can consist of: Heritage (Ancient) Architecture, Traditional Balinese Architecture, non-traditional architecture in the style of Traditional Balinese Architecture. Traditional Balinese Architecture complements and perfects Heritage Architecture, while non-traditional architecture is imbued and inspired by Traditional Balinese Architecture. Balinese Traditional Architecture is a forum for Balinese cultural tradition activities. Globalization and rapid changes in all aspects can affect the existence of Traditional Balinese Architecture. Therefore, understanding its meaning and concept becomes strategic and vital in order to transform it into contemporary architecture (one part of Balinese Architecture). Contemporary architecture as a representation of the dynamics of Balinese cultural activities today, as a reflection of the past and predictions of the future.

The development of the times with several aspects of changes in people's lives, can affect the existence of traditional Balinese houses. The form of transformation of traditional Balinese houses into modern dwellings began to emerge, as a representation of the dynamics of Balinese cultural activities today, as a reflection of the

past and predictions of the future. Based on the Alternative Form Theory proposed by Rapoport, the dynamics of traditional house change can occur likely due to two factors, including *primary factors*/primary and *modifying factors/*secondary. *Primary factors* include socio-cultural factors, while *modifying factors* include climate factors, material and material factors, technological and construction factors, land factors and so on (Rapoport, 1969).

Socio-cultural factors include considerations about religion and beliefs, family and community structure, social organization, social relations between individuals, and outlook on life (Rapoport, 1969). Everyone's outlook on life, one of which is influenced by the relationship between humans and nature, is certainly different so that it has an impact on the way everyone behaves in living life. This is what gives birth to the privileges of a culture. Socio-cultural factors are of great importance in the process of the birth of architectural forms.

The transformation of traditional Balinese dwelling houses in Banjar Umacandi is interesting when it is associated with the phenomenon of religious conversion that has occurred in the area. Intensive and systematic contact with the Church began when there were *zending* (Protestant Christian) activities in 1931 and *missi* (Catholic Christianity) in 1936 (Yudha Triguna, 1997). Zending activities were marked by the evangelism of the Balinese on November 11, 19331 in Yeh Poh, Dalung Village by Jeffray. The seven Balinese who were baptized included Pan Loting, Pan Bungkulan, I Gusti Putu Sanur, Pekak Panggih, Pekak Puter, Pan Supreg and Pekak Rahayu. (Jinathan, 1978; Suwetja, 1977 in Yudha Triguna, 1997). Zending activities *caused* displeasure among Hindus in Bali, especially with religious conversion actors who carried out the dismantling of their rebuttals after baptism. As a result, religious conversion perpetrators were excluded in associations, expelled from the *banjars* and excluded from being members of *the sekaa*, especially members of *the subak* who were then very important. The events experienced by religious conversion actors are known as *big miserable* events (Kerten, 1948 in Yudha Triguna, 1997).

Meanwhile, *the missi* activity began when two Balinese, namely I Wayan Dibloeg and I Made Bronong, who were previously Protestant Christians, converted to Catholic Christianity on Easter in 1936 under the guidance of Father Johanes Kersten and Father Van der Heyden. Missi then developed through education, health and economic channels, when an elementary school was first established in Tuka Village in 1949 and Palasari Village in 1953. Furthermore, modern medicine began to be introduced for free by traveling around the village and helping to send orphans and underprivileged children to school.

In essence, the government in Bali at that time, banned zending and missi activities in Bali on the grounds that Hinduism in Bali had a unique culture, other than others and had to be maintained. In addition, so that there are no divisions among Balinese citizens that can undermine the great religious order in Bali. One thing that can be drawn from contact with the Church is the opening of the horizons of the Hindu community in Bali about the importance of education, health and efforts to improve the economy as the basic force of maintaining the existence and preservation of Hindu civilization in Bali.

Religion is part of culture, there are 7 elements that are the content of all cultures in this world. Elements of universal culture, including: (1) Religious Systems and Religious Ceremonies, (2) Systems and Organizations, Society, (3) Knowledge Systems, (4) Language, (5) Arts, (6) Living Livelihood Systems , (7) Technology and Equipment Systems (Koentjara patrician, 2009). The issue of religion and culture is one of the crucial issues that give birth to various judgments in society. Some people think that religion must be sterile from culture, while others consider that religion can dialogue with culture with some things that must be considered in order to maintain religious purity. In Bali, Hinduism has come into contact with the local wisdom culture, even the pattern of relations between the two is seen as an inseparable attachment.

The residents of Banjar Umacandi experienced religious conversion in the 1930s caused by the location of Banjar Umacandi directly adjacent to Tuka Village (Surpi, 2013). Tuka Village was one of the first spreading areas of Christianity in Bali. Religious conversion in Banjar Umacandi occurred *suddenly (sudden conversion*). Based on data from the Buduk Village Monograph (2017), the conversion actors reached 80% of the total population in the *banjar*.

The conversion of Hinduism to Christianity in Banjar Umacandi has an impact on social, cultural and the use of public facilities that have to do with differences in beliefs, such as banjars, temples and cemeteries. The cemetery has the same function, but in one location it is divided into 3 (three) areas, namely for Hindus, Protestant Christians and Catholic Christians. In terms of cultural arts, the converted residents continue to carry out activities such as *tabuh* art, Balinese dance art and *wayang rindik,* including in the implementation of religious rituals in the Church. This is the case with the habit *of* installing *penjor* when there is a holiday, but the shape of the *penjor* has changed to be shorter than the actual package. In the social life of the community, some residents who converted from Hinduism to Christianity, still wore the traditional B ali clothes when they worshipped at the Church. On the eve of Christmas, Christians, as a result of religious conversion, performed the tradition of *piggy bank vows* to be enjoyed together and distributed to local residents (*ngejot*) for both Christians and Hindus, but the ritual *of making offerings* has been eliminated. Other traditions such as nguopin each other during religious ceremonies and *saturation* of each other during death ceremonies are still maintained today. The hindu traditions entrenched in the life of the local people are not extinct despite the conversion of religion, a fundamental change more to the ceremonies of religious rituals.

In the beginning, the house of banjar Umacandi residents of Hinduism was a traditional Balinese house consisting of: *merajan*, *bale daje*, *bale adat*, *paon, jineng, angkul-angkul*, *natah* and *teba.* The layout of the building is in accordance with the level of value of an area based on the concept of *sanga mandala* and the orientation of the building in *natah*. *The physical setting of* the building at that time was *a Balinese style*. Roofing materials are made of bamboo and reeds, *popolan* earthen walls and stone foundations. The behavior of the citizens as Hindus at that time carried out religious activities that were passed down for generations. After religious conversion, beliefs in the value system of the area in the yard were adapted to new beliefs. Changes in the function of buildings have an effect on changes in the layout of the buildings, because *the extortion* buildings and *bale delods* are not in the homes of Christians. There is a building that is still maintained, namely *angkul-angkul*. The orientation of the building remains on the central lawn. In terms of *physical setting*, the building style changed to a modern *style* and still uses traditional Balinese building elements such as *menur* and *dore*. The building materials use tile roofs, adobe walls and bricks plastered, sifted and painted, as well as the foundation of stone buildings. The construction of buildings uses reinforced concrete for multi-story buildings. The roof construction uses wood and mild steel. *The behavior setting* of the residents is adapted to the new beliefs shown by the placing of the sign of the cross on the door.

A house can be seen as a *cultural landscape* feature, especially a traditional house whose physical form is very largely related to culture (Gordon and Rapoport, 1979). Turgut (2001) states that the components of residential culture concern four things, namely: 1) *Cultural setting*; 2) *Behavioral* settings; 3) *Spatial settings*; and 4) *Socioeconomic settings*. Furthermore, according to Turgut, these four *settings* form a *housing pattern* (Rapoport, 1979). The religious system as a cultural value is also contained in traditional Balinese houses that accommodate social activities, rituals, and other activities of the owner, occupants or users of the building (Gelebet, 2002). Broadly speaking, the transformation of residential houses in Banjar Umacandi includes changes in *spatial settings*, *physical settings* and *behavior settings*: Changes in resident behavior have an effect on the occurrence of several changes in the shape and function of residential houses, but the value of traditional Balinese houses is still maintained.

The phenomenon of the transformation of traditional Balinese houses in Banjar Umacandi is interesting to study. The perpetrators of the conversion of religion from Hinduism to Christianity, should live in the Christian world, but the perpetrators of the conversion in Banjar Umacadi still apply some of the values of traditional Balinese houses as a form of Balinese culture derived from the teachings of Hinduism. The change in traditional Balinese houses has three implications, namely: (a) the side of creating new concepts, (b) developing and strengthening existing concepts, (c) losing the original concept. Based on the phenomenon that occurred in Banjar Umacandi Buduk Village, it is necessary to conduct further research on the factors causing the transformation of traditional Balinese houses, the transformation process and the implications of transformation on socio-cultural and religious life.

Based on the aforementioned background, several points can be formulated, namely: (1) Why is there a transformation of traditional Balinese residential houses in Banjar Umacandi, Buduk Village? (2) What is the

process of transforming a traditional Balinese residence in Banjar Umacandi, Buduk Village? and (3) What are the implications for socio-cultural and religious life as a result of the transformation of traditional Balinese residential houses in Banjar Umacandi, Buduk Village?

This research will describe the transformation of traditional Balinese residential houses by simultaneously exploring the conversion of religion from Hinduism to Christianity. In the hope that it can be understood the extent of the change in traditional Balinese dwelling houses in the middle of an area with high religious conversion. These changes have an impact on the transformation of traditional Balinese values, especially in terms of Balinese building architecture, in addition to the values of social wisdom and other local wisdom values.

In general, this research is intended as input for the preparation of a draft concept or *design guideline for* the implementation of a regional regulation related to the preservation of Traditional Balinese Architecture. The recommendations are still general in nature, thus providing opportunities for further development creativity by development actors, in various variations of imagery and nuances. With the hope of enriching the characteristics of Traditional Balinese Architecture and Nusantara Architecture.

Theoretically, the results of this study can add to the characteristics of science, especially science in religion and culture, related to the transformation of traditional values, social wisdom values and local wisdom values, especially in the context of traditional Balinese residential values. In addition, the results of this study are also expected to be used as a reference by other researchers who are interested in researching religious and cultural issues, especially regarding the problem of transforming Traditional Balinese Architecture.

2. Literature Review

2.1. Previous Research Studies

In the literature review, findings from previous research will be reviewed, which are related to the problems studied in this study, to explore the similarities and differences in order to avoid plagiarism (Hassanuddin, 2013). In addition, through qualitative analysis methods, it is hoped that *a state of the art* will be obtained in relation to the transformation of Balinese traditional houses, in an area with a high religious conversion phenomenon, namely Banjar Umacandi, Buduk Village. In this context, the literature used is preferred on the results of the latest scientific publications related to the theme of this research and have the latest, such as official scientific publications in Garuda (Garda Referral Digital) and have been published in journals. Some of the research used as a literature review in this study can be seen in Table 1.

Table 1: Similarities and Differences with Previous Research

No	Research	Equation	Difference
1	Evangelism and Factors of Conversion of Hinduism to Protestant Christianity in Badung Regency, Bali Surpi (2012)	• Socio-cultural studies of the phenomenon of religious conversion in Bali • Research methods using a qualitative approach • One of the research locations took Buduk Village	• Not offensive regarding the transformation of residential houses • Differences in the scope of the study location
2	Transformation of Residential Design in Padma Residence Housing (Bantul, Yogyakarta) When Occupied Gabriella Calista Agnes (2013)	• Formulation of problems related to the transformation of residential houses • Research using qualitative methods	• Differences in research locations • More studies on modern residential architecture • Heeding the implications of cultural and religious studies on the architecture of housesl
3	Culturalization of Traditional Balinese Architecture in the Spatial Pattern of Ethnic	• A study on the transformation of traditional dwelling houses • Research methods using a	• Not mentioning the transformation of traditional Balinese dwelling houses but ethnic Chinese

	Chinese Houses in Carangsari Badung Traditional Village Primadewi (2013)	qualitative approach	• Research location
4	Transformation of Residential Houses and Spatial Patterns of Bali Aga Community Settlements in Pakraman Timbrah Village, Pertima Village, Karangasem District, Karangasem Regency Ni Made Swanendri ST, MT and I Nyoman Susanta ST, M.Erg (2017)	• A study of the transformation of traditional Balinese dwelling houses • Research using a qualitative approach • Theoretical studies have a commonality mainly related to transformation and traditional Balinese dwelling houses	• Research location • The phenomenon of uplifting the life of the Bali Aga people • The scope of the problem is wider not only residential houses but also spatial patterns of settlements
5	The Influence of Religious Conversion on the Building Arrangement of Traditional Balinese Houses in Banjar Umacandi Buduk' Meiasih, dkk., (2017)	• Research location in Banjar Umacandi • A study of residential transformation • Using qualitative methods	• The results of the research have not yet given rise to the cause of the transformation • More limited occupancy samples • There are important dimensions that have not been studied such as local wisdom, religious and cultural studies
6	Hindu-Christian Interaction Patterns: A Study of Religious Harmony in Dalung Village Artatik (2018)	• Assessing the interaction of Hindu and Christian communities • Research methods using a qualitative approach	• Not offensive regarding the transformation of residential houses • Differences in the scope of the study location

Source: Personal Observation, 2022.

2.2. Transformation Concept and Traditional Balinese Residence

The concept of transformation in this study is a change or adjustment of several elements of physical form, character and architectural values either partially or thoroughly changed. However, the transformation process is derived from the original study of the transformation object. The transformation will be deciphered with the variable components of the traditional house before and after the transformation. Traditional houses in Banjar Umacandi consist of: holy places (*merajan*), *bale daja* (bedroom), *bale delod* (traditional buildings), kitchens, *jineng*, *teba*, *angkul-angkul* (entrance). Variables that have undergone changes that include changes in *spatial settings*, *physical settings*, and *behavior settings*. *Spatial settings* include: spatial organization which includes relationships between spaces, orientation, value systems, patterns of relationships between spaces, patterns of settlements and *lay out units*. *Physical settings* include: the shape of the building (the shape of windows, doors, decorative variety), the use of construction systems, building materials. *Behavior settings* include: traditions or customs, belief systems, social relations and kinship.

The concept of a traditional Balinese house in this study is a traditional house that is still based on culture and values derived from hindu teachings. The initial form of a residential house that is still traditional will be compared with the current residential house, to know the extent of the transformation that occurred. The development of the architectural world gave rise to a contradiction between transformations that are synonymous with modernization, and the diversity that is synonymous with tradition. Traditional Balinese houses today are expected to develop without losing local identity, although they cannot be separated from reconstruction and reform.

2.3. Phenomenological Theory, Transformation and Reception

This phenomenological theory is used in dissecting the formulation of the first research problem in this study, in order to explore two dimensions, namely what the subject experienced and how the subject interpreted the

experience. The experience of the subject, in this case the owner of a traditional Balinese house in Banjar Umacandi with the phenomenon of transforming a traditional Balinese house as *a subject matter* to be studied. The first dimension is a traditional Balinese house that is transformed, objective and physical. The second dimension is the opinion, assessment, evaluation, expectations and meaning of traditional Balinese homeowners towards the phenomenon of residential transformation they experience. This second dimension is subjective.

In this study, it will examine the transformation related to residential houses by referring to the theory of *housing patterns* and changes in residences of N.J Habraken and Turgut. Based on these two theories, it can be concluded that the changes that occur in the physical of the house are inseparable from changes in the culture and activity patterns of its residents. Therefore, the combination of the two theories has formed a research variable in this study in answering the formulation of the second problem related to the transformation of traditional residential houses in Banjar Umacandi. The transformation that occurs will be studied with three research variables, namely, *spatial setting*, *physical setting* and *behavior setting*.

Reception theory is used to solve the formulation of the third problem. There are three main elements in the reception methodology that can explicitly be referred to as "*the collection, analysis, and interpretation of reception data*" (Jensen, 1999).

2.4. Thinking Framework and Research Model

Skeleton think be picture about stages that will Done deep research relating to the pipeline Think Researchers deep find ide-ide and him-her research so that research get Done. In this frame of mind, the steps of the researcher will be summarized from the initial research, the determination of focus to the achievement of conclusions. While the research model Aims to get face that appropriate so that get Facilitate deep do research (Figure 1).

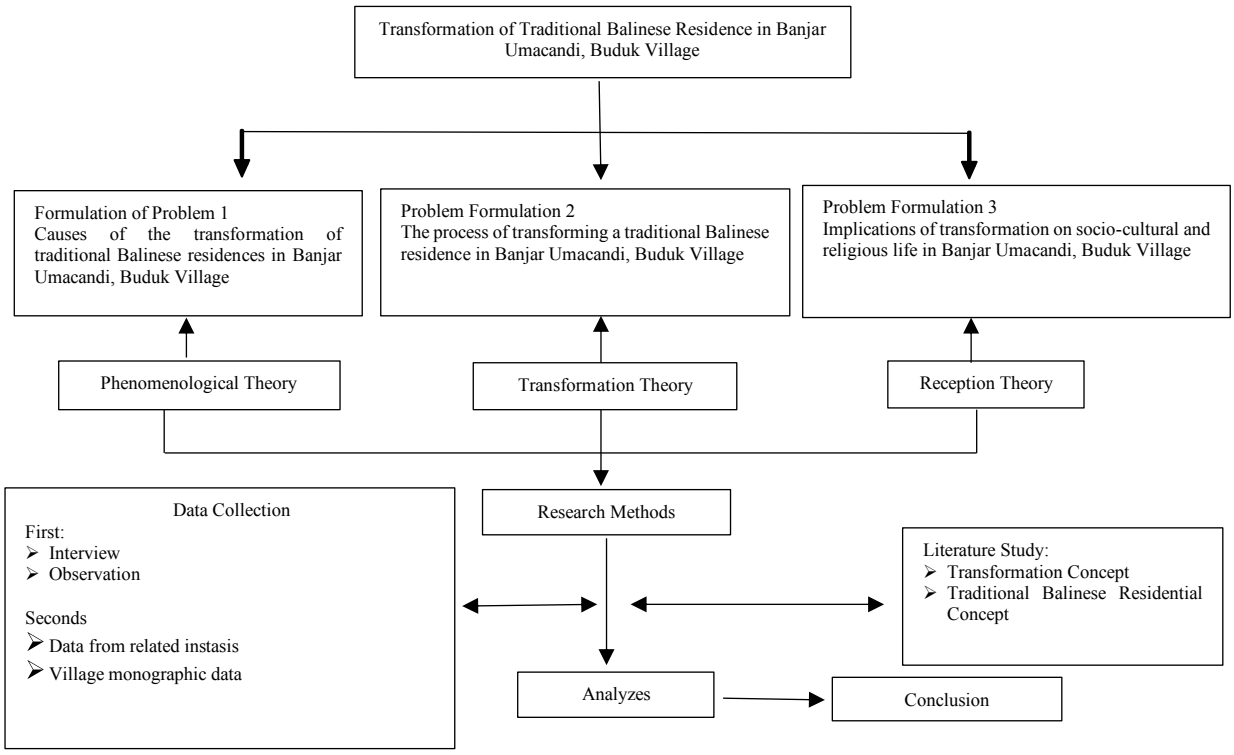

Figure 1: Research Thinking Framework
Source: personally developed, 2021.

3. Research Methods

This research is a qualitative research, because the emphasis is not on measurement but on efforts to find the subjective meaning of the research subject. This study describes all phenomenology purely in terms of spatial

arrangement. This research is a field research with a research focus, namely the transformation of traditional Balinese houses in Banjar Umacandi, Buduk Village.

The approach used is a religious and cultural approach, therefore the scientific point of view which in scientific language is called the scientific paradigm used is the phenomenological paradigm. The use of the phenomenological paradigm in the context of this study is translated ethically and constructivistically. Ethically, this study seeks objectivity based on extrinsic explanations of the phenomenon of transforming traditional Balinese houses, along with their implications for the socio-cultural and religious life of the community, especially in terms of traditional Balinese houses. Then constructivistly it means that this research was conducted to understand cultural relativity that is difficult to verify.

The research location is located in Banjar Umacandi, Buduk Village, Mengwi district, Badung Regency, Bali Province. The primary data in this study is in the form of a number of information obtained from several informants and in the form of research analysis units, namely socio-cultural life and traditional Balinese house building arrangements, with reference to the concept of traditional Balinese architectural values. The sequence data used in this study is in the form of theoretical studies which are the opinions of several experts, theories related to traditional Balinese house values and literature reviews of several similar studies to strengthen the consistency of research analysis. The research instruments used in conducting this research were stationery, digital cameras, audio recorders, meter measuring instruments, laptops and printers. Of these various instruments, the main instrument in this study is the human (human instrument). In this study, various data collection techniques were used, namely observation, in-depth interviews and document studies. The data analysis technique in this study is qualitative analysis.

4. Results of the Discussion

4.1. Factors Causing the Transformation of Traditional Balinese Residential Houses in Banjar Umacandi

By result Observation of field some big transformation house stay traditional Bali Dominated with cause main be factor internal that is status economics. Occupy Order second, Caused by factor internal Form necessity self-residents. Necessity self-aforementioned Form necessity accretion member family, Satisfaction self with Renovation house appropriate development era and Supported condition finance owner house. Factor ideology most important Associated with phenomenon Conversion religion in Banjar Umacandi, do not become cause main from Occurrence transformation house stay traditional Bali in Banjar Umacandi. Phenomenon Conversion Religion become cause main from change on the acreage place holy or Loss *merajan* at house stay traditional Bali (Figure 2).

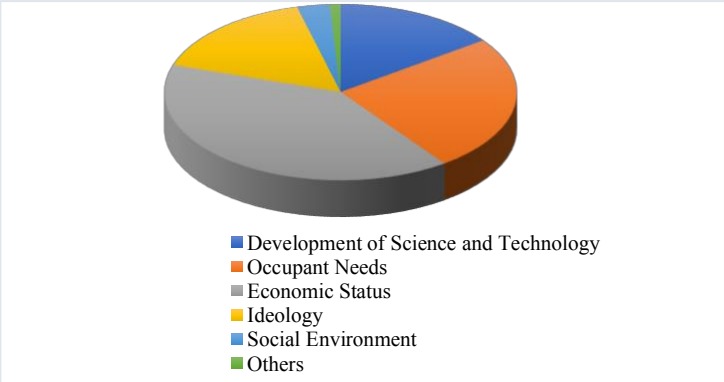

Figure 2: Causes of Transformation of Traditional Balinese Houses in Banjar Umacandi
Source: Personal Observation Results, 2021.

4.2. The Transformation Process of Traditional Balinese Residences in Banjar Umacandi

From the results of observations and interviews with 30 samples of traditional residential houses and their residents in Banjar Umacandi, conditions before and after the transformation were obtained in Figures 3 and 4.

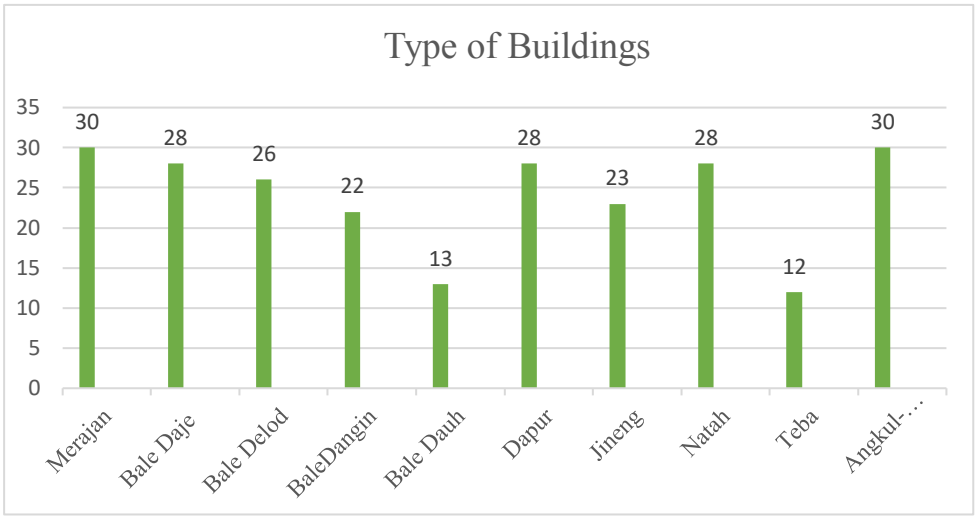

Figure 3: Types of Buildings Before residential transformation
Source: Results of interviews and personal observations 2021

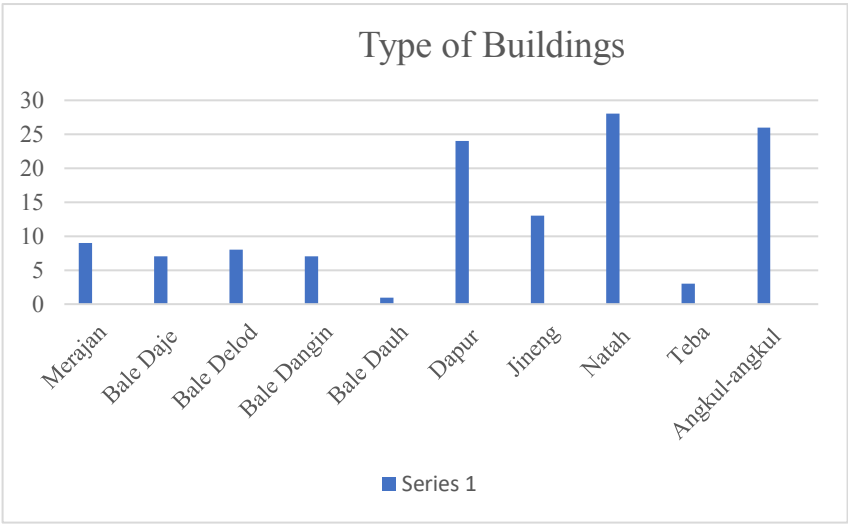

Figure 4: Types of Buildings After Residential Transformation
Source: Results of interviews and personal observations 2021

4.2.1. Spatial Setting - Layout- Hierarchy - Orientation

In general, layout-related transformations can be described as follows:

a. *Bale delod* has generally been transformed into a modern building and is used for the bedroom and living room.
b. *Bale daja* is currently transformed into a modern building and serves as a sleeping space due to the addition of family members.
c. The addition of modern new buildings is also mostly carried out towards the east and west according to the needs of each occupant of the house.
d. Some *kitchens or paons* were transformed into modern buildings, some equipped with bedrooms and bathrooms, but the layout was still designed towards the south.
e. *Angkul-angkul* is still maintained, but some are equipped with garages generally in the southeast direction close to the entrance
f. *The angkul-angkul* that is still maintained is also equipped with *aling-aling*, before entering the yard of the house

g. Some expansion of the building was carried out with additions to the place of business.
h. *Jineng* or granaries are still largely retained
i. *Teba* located in the back area of the house is used for a place to mix
j. *Natah* or yard of the house is still as an orientation center in the residential house

Some things that can be summarized are related to the value system (*hierarchy*):

a. In general*, Bale daja* is located in the *main madyaning* area, *Bale delod* is located in *the madyaning madya* area. These two buildings are located in *the* middle/middle area and *the paon* is in the *nistaning nista* area. The sanctuary/*Merajan* is in the main area of *the utama*.
b. Transformation of traditional Balinese dwelling houses, buildings are built according to the need for space. The transformation of the new building was built on an area that still exists in the yard and is not based on the value system of an area that was previously believed to be.
c. Religious conversion actors carried out the transformation of residential houses with the change of holy places.
d. After the transformation of the residential house, there was an addition of a kitchen / *paon* due to the addition of family members in the yard of the residential house. This leads to a value system that is contrary to the concept of *Sanga Mandala*.

The orientation of traditional Balinese residences in Banjar Umacandi is still oriented *towards natah* (central courtyard). The building of the sanctuary (*merajan*) is located oriented towards the sunrise.

4.2.2. Physical Setting

The physical state of the building that exists now after being partially transformed, is more inclined towards the style of modern buildings. The building materials used are more contemporary, for example, roofs use tiles or zinc, adobe walls use aci stucco or paint and floors use cement or ceramic stucco.

Angkul-angkul as part of the building is still maintained, modified mainly by residents who carry out religious conversion. In the *angkul-angkul* there are no longer holes in the left and right body parts due to changes in beliefs. The holes on the left and right parts of the *angkul-angkul* previously served as a place to put *upakara* carried out by Hindus. However, if previously the Swastika was displayed in the *angkul-angkul,* after the occupants transformed, they switched to displaying the sign of the Cross on the door of the *angkul-angkul*. Some residential houses, equipping *angkul-angkul* with garages in the form of iron fence doors.

Jineng is also one of the buildings that is still maintained. On the head, the roof covering uses zinc with a wooden frame. On the body, *the jineng* pole uses wood material that rests on the joints. On the legs use stone and rabat concrete. The *jineng* building has changed its function from a place to store rice to a place to relax under it and on the roof it is used to store goods and equipment. This is due to the advancement of existing technologies and the need for space. When the harvest season comes, the rice has been bought in the rice field and the owner only needs to receive the harvested money. This system is called *pajeg*. This system causes residents to rarely store rice products in *jineng*.

The *buildings of bale daja*, *bale dangin* and *bale delod* are also deformed along with the changes in function caused by the needs of residents. Transform the building using *a* modern style with the addition of space. However, the roof of the building still uses *a wrath* at all four ends of the roof.

4.2.3. Behavior Setting

In terms *of behavior setting,* homeowners live in traditions that are believed for generations. In the transformation of some dwelling houses with residents who converted religions, there are still customs that remained believed in the previous religion. Customs that have been carried out for generations based on Hinduism are still believed and believed to be able to protect families from danger.

4.3. Implications of the Transformation of Traditional Balinese Residences on Socio-Cultural and Religious Life in Banjar Umacandi

4.3.1. Implications for Socio-Cultural Life

Balinese culture which is the basis for the beginning of the life of the residents of Banjar Umacandi, as well as Balinese cultural traditions are still maintained in social life until now regardless of the phenomenon of religious conversion. The transformation of traditional Balinese dwellings that are more modern but still display balinese architectural concepts shows the functional aspects of conflict. Thus, conflict is not merely seen as a phenomenon that undermines social stability, but contains aspects that contribute to other aspects.

The art of dance and *tabuh* still remains both in the Church and in the Temple. Those who are Hindus and Christians have *a sekehe gong*. Even Christians in this banjar have *a child's sekehe gong*, *a* mother's gong and a father's *gong sekehe gong*. Hindus in this banjar only have 1 (one) *sekehe gong*, namely *the sekehe gong of* fathers mixed with children because their jumlah is limited. Christians have modern music groups that use musical instruments such as: guitar, piano, and drums. In church events it is not uncommon to display collaborations *of gongs* and modern musical instruments. Rindik music art is also often staged in Banjar Umacandi, those who were once Hindus and converted to Christianity continue to practice *rindik* music (musical instruments / gamelan with bamboo material). The art of music is an art that breathes Hinduism. The harmony of socio-cultural life in Banjar Umacandi is maintained regardless of the phenomenon of religious conversion. Religion is not a barrier to the formation of unity and unity of local citizens. Socio-cultural life in Banjar Umacandi shows religious differences that are united in one culture, namely Balinese culture.

4.3.2. Implications for Religious Life

In Banjar Umacandi there is a Church founded in 1933. The gate of the Church uses an *archway* called *Candi Bentar*. This *bentar temple* reflects traditional Balinese architecture. Local geniuses do not necessarily take absolutely the influence of religion as a result of contact with the Church, but rather adapted to the existing culture. The religious appearance of religious conversion actors in Banjar Umacandi, especially in religious activities, appears to be different from the original ideology, although the core of the teachings is not reduced.

Local traditions in Banjar Umacandi, require a foothold in living, maintaining and developing their culture, so that religions that are relevant to their culture can be accepted. Religious conversion actors dissolved into the local Balinese culture, there was a fusion between Hindus and conversion actors. This can be seen in the architecture of the Church which displays Balinese architecture, the naming of the converted actors still using the name of the Balinese, as well as the persistence of diversity in the Church showing the typical Balinese culture, such as the appearance of *rindik* musical instruments, Balinese traditional clothes that are often worn by converters when going to church, and decorations during religious events in the Church with Balinese cultural characteristics.

5. Conclusions

5.1. Findings

Economic factors are the main factors that influence the transformation of traditional Balinese residential houses in Banjar Umacandi. Ideological factors are not the main factors causing the transformation of traditional Balinese residential houses in Banjar Umacandi. The transformation of residential houses in Banjar Umacandi has not yet fully occurred. Local residences have transformed from traditional Balinese houses into modern houses (non-traditional architecture) in the traditional Balinese architectural style. The concept of a modern house in the Balinese architectural style that is still maintained, has implications for the socio-cultural life and the local religion. The fusion between the Hindu system of citizens and conversion actors who still maintain the concept of Balinese culture as a common thread, has an impact on the creation of harmonization in Banjar Umacandi to this day.

Based on the Phenomenological Theory used in this study mainly related to the formulation of the first study, it can be explained both the phenomenon and the nomena that occurs. The phenomenon of Banjar Umacandi residents, which is dominated by conversion actors, does not completely change the lives of local residents both in their homes and socio-cultural and religious lives. The transformation of traditional residential houses does not prioritize the ideological aspects in them, but prioritizes cultural aspects as a form of adaptation strategy, especially for conversion actors. The nomena in it deals with aspects of aesthetic ideology. Local geniuses do not necessarily take absolutely the influence of religion as a result of contact with the Church, but rather adapted to the existing culture. The religious appearance of religious conversion actors in Banjar Umacandi, especially in religious activities, appears to be different from the original ideology, although the core of the teachings is not reduced.

The theory put forward by Koentjoroningrat (1986) that religion can change the elements beneath it is true. Residents in Banjar Umacandi have made changes, especially in terms of spirituality, which are adapted to new beliefs. Religion is part of culture so that religious conversion does not provide significant changes to the cultural changes that have been attached to the lives of the people of Banjar Umacandi. The religious conversion that occurred in Banjar Umacandi residents only changed the building layout and some forms of buildings, but there are still building forms and culture that are maintained such as: angkul-angkul and murda are maintained and some Balinese cultural values are still believed.

Related to the transformation of traditional Balinese residences in Banjar Umacandi, in line with the theory of Anthony Antoniades, who takes 1 (one) strategy from 3 (three) strategies in the theory, namely traditional strategies with transformations that have limits according to local cultural customs.

In line with Laseau's Theory (1980), that transformation in Banjar Umacandi takes 3 categories out of 4 categories of transformation in the theory. The three categories are: transformations are geometric, transformations are ornamental and transformations are radical (reverse). The category of transformation is freedom (confusion) of the occupants of the house in carrying out the transformation does not apply in Banjar Umacandi. The concept of Balinese culture in the form of residential architecture still looks maintained although not completely.

The transformation of traditional residences in Banjar Umacandi, which still maintains some of the values of local wisdom of Balinese culture and customs both in residential houses and socio-cultural and religious life, is in line with the theory put forward by Jacobus (2014) and Ranjabar (2014). Based on this theory, it is explained that it is very difficult to change a culture, it is true. The religious conversion carried out by most residents of Banjar Umacandi was only able to change behavior in the field of religion. Customs that have been carried out for generations that are believed to be able to protect their families, are still carried out.

Reception theory in research, especially in answering the formulation of the third problem, is used in finding meaning related to the implications arising from the transformation of traditional Balinese dwelling houses on socio-cultural and religious life. The meaning obtained is an adaptive strategy that refers to the cultural dimension as a component that directs humans and adapts to the environment. In this case 2 (two) systems of community groups within the same environment, determine their choices and actions by displaying the same distinctive features according to those prevailing in the area.

Reflecting on the history of Hindu conversion to Christianity which caused great misery, the trials for religious conversion actors, one of which was caused by the actions of the perpetrators of the conversion, eliminated *merajan*, thus causing unrest in the Balinese community. The incident was accompanied by the revocation of the evangelistic license of Pastor Tsang To Hang in 1933, who was a figure of the spread of Christianity in Buduk Village. Based on this history, the harmony of the residents of Banjar Umacandi, both Hindus and conversion actors, as a form of efforts to achieve security and comfort for residents in carrying out worship in accordance with their respective beliefs (aesthetic ideology and functional aspects of conflict).

Adaptation strategies are not only in the form of adjusting the transformation of residential homes but also in customs, culture, language, art and religious life. Departing from conflict in the historical record, adaptation

strategies, especially from conversion actors, are a form of interpretation, especially with regard to cultural adaptation, by highlighting relevant cultures and hiding those that are less in accordance with the ongoing situation.

Based on demographic data, it can be known that citizens are increasingly aware and motivated to improve knowledge and education. Most of the residents of Banjar Umacandi have studied high school and Diploma / Strata 1. Education can provide hope to realize a better life, create a conducive atmosphere and awareness of residents to maintain the existence of Balinese architecture in residential houses, even though 66% of residents are Christians. This is in line with the Theory of Convergence (William Stern) which is that the combination of both carrying and experience or the environment has an important role in the development of the individual, it is stated that the development of the individual will be determined by innate factors (endogenous), state factors and the environment (exogenous). As well as the Theory of *Emperism* (John Lock) which states that the development of an individual person will be determined by his empirics or his experiences. In this theory, it is considered that education is a fairly capable effort to shape the individual person. Thus, the relationship between educated individuals will form an intelligent and wise person, in order to create a conducive environment.

The transformation of traditional Balinese houses in Banjar Umacandi as a form of implementation of beauty or Sundaram. In the Hindu perspective, the Hindu Trilogy includes Satyam, Siwam and Sundaram. Apart from the phenomenon of religious conversion that occurs, the aspect of beauty or sundaram is not easily released in the form of objects or artifacts in this case, namely houses. This explains that the concept of Balinese architecture as a form of beauty that is universal, cannot be separated and it takes generations to forget it even though it has changed beliefs.

5.2. Recommendations

The transformation of traditional residential houses in Banjar Umacandi in the midst of the phenomenon of religious conversion that occurred, was caused by the main factor, namely the needs of residents who were supported by economic status. The transformation that occurred shows that Balinese culture still survives, especially in the form of booking which still reflects traditional Balinese architecture. In the future, it is hoped that the booker/ gate of the house in Bali can reflect traditional Balinese architecture. This will be realized if there are local regulations governing this matter.

The residents of Banjar Umacandi, who are currently engaged in Christian conversion, are expected to receive attention from the local government or educational institutions, both private and state universities, for the development of education of residents in the area. The provision of scholarships, especially education, is closely related to the existence of Balinese culture. This area has its own story in Balinese history and as a form of tolerance between religious people in Bali.

The phenomenon of religious conversion that has occurred in Banjar Umacadi is expected to be an experience to be used as a lesson by the Balinese people, especially Hindus, Parisada Hindu Dharma Indonesia (PHDI) and the local government. The emphasis on the occurrence of religious conversion in Hindus needs to be considered, because if left unchecked, it can cause divisions that ultimately undermine the great Hindu religious order of the people in Bali. This research is expected to enrich the knowledge of culture and the transformation of traditional Balinese residential houses.

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Philosophical Meanings Behind Differences in Population Status Domiciled in Traditional Villages (*Desa Adat*) in Bali, Indonesia

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Abstract
The development of Bali to become the main destination for national and world tourism has indeed made a positive contribution to Bali itself and nationally. However, on the other hand, population problems have a very influential impact on the existence of the Bali area which results in the disruption of the comfort of the Balinese themselves. Various steps have been taken by the government from requiring migrant residents to have identity cards, especially for migrant residents, seasonal resident identity cards at a high enough cost to cause levies which actually make population problems difficult to overcome. Seeing this condition, the Bali provincial government began to function the role of Traditional Villages in regulating the existence of migrant residents, but the fact is that until now the community only knows the migrant population and has not understood the philosophical meaning of differences in population status. Based on this, this article will answer the problems about efforts to reason for differences in status of residence, efforts to determine the status of residence, and the philosophical meaning of differences in status of residence. The research method uses qualitative research that is carried out gradually and descriptively-qualitatively or through descriptions that are described and explain the subject of the study. Research shows that the implementation of differences in population status has been carried out in indigenous villages due to the high number of migrant populations. Differences in population status make it easier to order, equalize, prevent and overcome the problems of Customary Villages based on the classification of classifications that have been determined by the government as a support for the implementation of Customary Villages, namely krama, krama *tamiu* and *tamiu*. Furthermore, the practice until now in Traditional Villages in Bali still maintains the values of Balinese local wisdom in dealing with the population in the local village, even though nationally the Indonesian state in resolving the status of residence has been determined by the Civil Registry Service. So that the philosophical difference in the status of residence in traditional villages in Bali is justice in carrying out *swadharma* and self-education for residents in Bali based on Tri Hita Karana, namely three main things that cause welfare and prosperity in human life, including *parahyangan, pawongan*, and *palemahan*.

Keywords: Meaning, Philosophical, Differences, Status of Residence, Indigenous Villages

1. Introduction

Bali develops tourism through unique cultures and customs and people. Cultural life is the harmonious unity of religion, culture, and customs. The basic capital of culture is that culture functions normatively and operationally. As a normative, the role of culture is expected to be able and potential in providing identity, basic handles and being able to make the main attraction for increasing tourism.

With regard to culture, the term culture or culture comes from Sanskrit, namely *buddhayah*, which is the plural form of buddhi (mind or reason) is interpreted as things related to human mind and reason. Balinese culture is a way of life that is developed and owned by the Balinese people and passed down from generation to generation. Balinese culture which includes customs, religions, traditions, arts and culture, as well as local wisdom that can exude a positive aura is based on values derived from the teachings of Hinduism, in scale and scale. Balinese people recognize the existence of two differences (*rwa bhineda*), which are often determined by factors of space (*village*), time (*kala*) and real conditions in the field *(patra).* The concept of *village, kala*, and *patra* causes Balinese culture to be flexible and selective in accepting and adopting outside cultural influences. Historical experience shows that communication and interaction between Balinese culture and outside cultures such as India (Hinduism), Chinese, and Western particularly in the field of art has given rise to new creativity in both the fine arts and the performing arts. Themes in painting, fine art and performing arts are heavily influenced by Indian culture. Similarly, Chinese and Western/European cultures give a new feel to art products in Bali. The acculturation process shows that Balinese culture is flexible and adaptive, especially in art so that it is able to survive and not lose its identity (Mantra, 1996).

This gives a clue to how important culture is for tourism development. The development and changes in Bali tourism in the era of globalization can cause changes in the lifestyle of modern people. As a result, people tend to choose new cultures that are considered more practical. Globalization is a special phenomenon in human civilization that moves constantly in a global society and is part of that global human process. The presence of information technology and communication technologies accelerates the acceleration of this process of globalization. Globalization touches all important aspects of life. Globalization encourages us to identify and look for symmetrical points so that we can bring together two seemingly paradoxical things, namely Indonesian education with national and global implications. The impact of globalization has forced many countries to review their insights and understanding of the concept of the nation, not only because of factors (Nurhaidah, 2015). The development of technological advances, modernization, Balinese society is faced with a variety of problems including population problems. Where previously it has not been a very priority problem.

History records that Maharsi Markandya's entourage had come to Bali around the 9th century to clear forests and build *pakraman* villages. In the 11th century a number of lontars stored in various lontar libraries in Bali emphasized that *Mpu Kuturan*, which dates back to the *Majapahit* or *Wilwatikta* period, came to Bali to teach the procedures for making sacred buildings as well as to revive and purify the building. Continued in the 16th century, Danghyang Nirartha introduced *Padmasana* as a place for the Great God *Acintya*, which was the result of a reform movement led by Dang Hyang Nirartha, at which time the spread of Islam was expanding from the west through the island of Java.

History also records the arrival of Muslims who were "invited" and used by the Kings of Bali because of their expertise which was later localized in certain areas, as can now be seen in Saren Village (Buda Keling Karangasem), Pegayaman (Buleleng), Kepaon (Denpasar). The history of Bali tourism also records the first foreign immigrants who came to Bali to travel, starting from the group of Cornelis de Houtman (1597), Van Kol (1902), until then Bali was crowded with foreign tourists after the operation of the Ship of the Dutch government-owned shipping company *Koninklijk Paketvart Maatschapij* in 1920 (Sudantra, 2008).

In its later development, the establishment and development of Bali as a tourist destination since the 1930s by the Dutch colonial government, continued as the main destination by the Indonesian government which was initiated starting in the late 1960s, then even more massively in the 1970s and 1980s and beyond has caused various impacts

both on a local, regional, and national scale. In the last 50 years or so, Bali's fundamentals, which include Balinese nature, Balinese people, and Balinese culture, have changed massively and systematically.

The development of Bali to become the main destination for national and world tourism has indeed made a positive contribution to Bali itself and nationally. Recently, the invasion of migrant population due to influences in the tourism sector with various backgrounds, ethnicities, professions and goals, has made its own problems that are quite complex for Bali, especially areas rich in tourism sectors. However, on the other hand, population problems will have a very affecting the existence of the Bali area such as the increasing population density, prostitution, unemployment, criminality, narcotics abuse, and so on resulting in disruption of the comfort of the Balinese themselves.

Various steps have been taken by the government from requiring migrant residents to have identity cards, especially for residents of seasonal resident identity cards (KIPEM, KIPS/STPPTS) at a high enough cost to cause levies that actually make the population problem difficult to overcome. Under such conditions, the government began to involve indigenous villages in handling migrant populations.

Traditional Village as a unit of indigenous law community based on *the Tri Hita Karana* philosophy derived from the local wisdom of *Sad Kerthi. Tri Hita Karana* which is one of the teachings in Hinduism that teaches about the balance between humans and God, humans with humans, and humans with their environment (Sumunar, Suparmini, & Setyawati, 2017). Imbued with the teachings of Hinduism and the cultural values and local wisdom that live in Bali, it plays a very large role in the development of society, nation and State so that it needs to be nurtured, protected, fostered, developed and empowered in order to realize a *Balinese krama* life that is politically sovereign, economically independent, and has a *krama* personality in culture.

In Article 1 number 8 of the Regional Regulation of Bali Province Number 4 of 2019 concerning Customary Villages in Bali, it is emphasized: Customary Villages are the unity of indigenous peoples in Bali that have territory, position, original arrangement, traditional rights, own property, traditions, social manners of community life for generations in the bonds of holy places (*Kahyangan Tiga* or *Kahyangan Desa*), his duties and authorities as well as the right to organize and take care of his own household. Bali Provincial Regulation Number 4 of 2019 concerning Customary Villages, which was passed on April 02, 2019 and promulgated on May 28, 2019 replaced Bali Provincial Regulation Number 3 of 2001. This regional regulation in principle adheres to the philosophy of Tri Hita Karana, which includes elements of *Parahyangan, Pawongan, and Palemahan*. However, there are also new things that are intended to adjust to the development of society in the era of regional autonomy. With the issuance of Regional Regulation Regulation Number 4 of 2019 concerning Customary Villages in Bali which not only discusses villages, the regional regulation also contains clear regulations regarding the categories of *krama* along with *swadharma* (obligations) and *swadikara* (rights) respectively, consisting of: (Article 8) *krama desa adat,* namely the Balinese people of Hinduism who are mipil and recorded in the local traditional village; *krama tamiu*, which are residents of the Balinese hindu community who are not mipil but recorded in the local traditional village; and *tamiu,* which are people other than krama desa adat and *krama tamiu* who are in the *wewidangan* of traditional villages for a while or reside and are recorded in the local traditional village. This is because the fundamental problem in Bali that has been felt until now is the problem of population explosion, especially related to the growth of urbanized or migrant populations.

Seeing this condition, the Bali provincial government began to function the role of Customary Villages in regulating the existence of migrant populations, starting to be handed over to Customary Villages/Banjar Adat in the area of each regency/city throughout the province of Bali. However, the fact is that until now the community only knows the immigrant population. The meaning is not yet understood why, how, what is the philosophical meaning of the difference in status of residence.

Based on the data above, it is very appropriate for this research to be held so that it can answer the problems of efforts to reason for differences in population status, efforts to determine status of residence, and the philosophical meaning of differences in population status. Thus, this study was given the title "The Philosophical Meaning Behind the Differences in Population Status Domiciled in Traditional Villages in Bali."

The problems that can be formulated based on the background above are (1) what is behind the differentiation of the status of residence of Indigenous Villages in Bali? (2) how are these differences in status of residence implemented in the life of Traditional Villages in Bali? And (3) what philosophical meaning is behind the differences in the status of residence of Traditional Villages in Bali?

In general, this study aims to understand and explore information on why and how the background differences and implementation of the philosophical meaning behind the differences in status of residence domiciled in Traditional Villages in Bali. In particular, this study aims to (1) know and analyze the background of the different status of population of Indigenous Villages in Bali, (2) explain the differences in population status implemented in the life of Indigenous Villages in Bali and (3) understand the philosophical meaning of the differences in the status of population of Indigenous Villages in Bali.

The results of this study are expected to have benefits, both theoretically and practically. The practical benefits of this study are: (1) it is expected to be a reference for researchers who conduct research on the status of residence of Indigenous Villages in Bali, (2) to be a reference for the field of legal research studies at the university level, especially in the field of Customary Law in Bali, (3) enrich scientific insights for legal researchers related to Hinduism and Balinese culture in more depth, especially in the Customary Law that applies in Traditional Villages in Bali, as well as contributing to the development of legal science, especially in the field of Hindu and customary law in Customary Villages in Bali. While the practical benefits in this study are: (1) for *traditional village leaders*, it is expected to be used in making decisions related to the status of residence based on regional regulations and *awig-awig* of Indigenous Villages, (2) for Village institutions and communities, it is hoped that it can be used as a guide in enforcing rules in accordance with the values that grow in the community and (3) for regulatory institutions, it is hoped that it can be used as a guide in enforcing rules in accordance with the values that grow in the community and (3) for regulatory institutions, it is expected to be used as a guide in enforcing rules in accordance with the values that grow in the community and (3) for regulatory institutions, it is expected to be used as a guide in enforcing rules in accordance with the values that grow in the community and (3) for regulatory institutions, it is hoped that it can be used as a guide in enforcing rules in accordance with the values that grow in the community and (3) for regulatory institutions, it is hoped that it can be used as a guide in guidelines for making regulations in the regions according to the conditions of each region.

2. Literature Review

2.1. Previous Research Studies

Some studies of previous research that have relevance to this research include: A book written by Carol Warren (1993) entitled "Adat dan Dinas *Balinese Communities in the Inonesian State."* The dissertation written by Made Sudjana (2015) is entitled Re-actualization of Kerta Pakraman Village in Bali. A scientific journal written by Larantika (2017) entitled The Role of Indigenous Villages in the control of migrant populations: a case study of Denpasar District, Denpasar City. The book written by Thomas Reuter (2018) entitled "Our Ancestral House House is an exaggeration of *dandualism* in highland Balinese society" A scientific journal written by Ni Ketut Kantriani (2018) with the title Regulation of migrant population (*krama tamiu*) in terms of Customary Law in Bali. The dissertation written by I Nyoman Bagiastra, (2020) entitled Regulation of Health Management by the Unity of Indigenous Peoples in Health Law in Indonesia (a Study on Indigenous Villages in Bali). Scientific Journal written by Wati (2020) entitled Implications of *tamiu* data collection in Padang Luwih Traditional Village after the decision of Bali Province regional regulation Number 4 of 2019 concerning Customary Villages in Bali. The book written by Windia (2021) entitled "Customary Law and Customary Villages in Bali".

From the literature review in the form of books or scientific journalswhich can be used as a reference in this study, there are differences and similarities from previous books or research, as described in the form of Table 1.

Table 1: Similarities and Differences of Previous Research

No	Heading	Equation	Difference
1.	” Adat and Dinas *Balinese Communities in the Indonesian State”*. Book written by Carol Warren (1993)	▪ In relation to community organizations in Bali, it is good to discuss from customary institutions to the smallest part, namely *banjar*, what kind of community organization it is, what is the application of the law	▪ There is no in-depth explanation of *tamiu* and *tamiu* krama
2.	Re-actualization of Kerta Pakraman Village in Bali. Made Sudjana (2015) Dissertation, Indonesian Hindu University Denpasar	▪ Research using a qualitative approach ▪ Related to the study of Pakraman Village in Bali. ▪ The research location is in 3 (three) Traditional Villages with grouping	▪ Pakraman Village has changed to the term Traditional Village ▪ . The location of the previous research was based on the grouping classification of Bali Aga, *Apanaga* and Anyar Villages. While this study is classified as a village based on geographical location, namely Mountain Village, City Village, Coastal Village
3.	The role of Indigenous Villages in the control of migrant populations: a case study of Denpasar Subdistrict, Denpasar City. A.A.Ayu Dewi Larantika (2017) Scientific Journal, Warmadewa University	▪ The study is related to the authority of Indigenous Villages in handling the existence of migrant residents. ▪ Using qualitative methods	▪ Differences in research locations ▪ The focus of the problem is on the background of the formation of the status of residence of Indigenous Villages in Bali and philosophically meaning that exists behind the differences in population status in Traditional Villages in Bali.
4.	Our Ancestral House House is an exaggeration of *dandualism* in highland Balinese society" Book written by Thomas Reuter (2018)	▪ To get to know more about customs and socio-culture in community life, Bali Aga Village, where in this study one of the Bali Aga Villages that was used as the location of this research study was penglipuran traditional village.	▪ There has been no discussion of tentag krama *tamiu* and *tamiu*
5.	The regulation of the migrant population (*krama tamiu*) is reviewed from the Customary Law in Bali. Ni Ketut Kantriani (2018) Imiah Journal, I Gusti Bagus Sugriwa State Hindu University Denpasar	▪ Studies on manners in terms of customary law	▪ Differences in the scope of the study location ▪ A deeper study about village krama and tamiu
6.	Regulation of Health Management by the Unity of Indigenous Peoples in	▪ Related to the study of Traditional Villages in Bali.	▪ Differences in research locations

	Health Law in Indonesia (a study on Indigenous Villages in Bali) I Nyoman Bagiastra (2020) Dissertation, Udayana University	▪ Research using qualitative methods	▪ The focus of the problem used is the unit of indigenous peoples in the Customary Village in Bali regarding the regulation of the status of residence of indigenous villages in Bali.
7.	"The implications of *tamiu* data collection in Padang Luwih Traditional Village after the decision of Bali Province regional regulation Number 4 of 2019 concerning Customary Villages in Bali. Ni Luh Ernawati (2020) Scientific Journal, Hindu University of Indonesia	▪ The authority of indigenous villages to the existence of migrant populations called *tamiu* ▪ Research methods using a qualitative approach	▪ It does not mention the philosophical meaning of the differences in the status of residence of Indigenous Villages and the responsibility of each status. ▪ Differences in the scope of the study location
8.	"Hukum Adat dan Desa Adat di Bali". Books written by Windia (2021)	▪ The process of the previous regulatory dimensions to the latest regulations so as to help structure the science of Customary Law, Balinese Customary Law and Balinese culture in general.	▪ There has been no in-depth discussion about *krama tamiu* and *tamiu*

Source: Author, 2021

2.2. Concept Description

The concept of this study is entitled the philosophical meaning behind the differences in the status of residence domiciled in the Traditional Village di Bali, which is described as the concept of philosophical meaning, the concept of status of population, the concept of Indigenous Villages.

The concept of philosophical meaning, namely philosophical meaning in this study is a meaning formed by thoughts about differences in the status of residence in traditional villages in Bali so that they become more effective and function in solving the problem of differences in status of residence in Traditional Villages in Bali. The concept of the meaning of status of residence, is that the status of residence in this study is the position of a person in a social group in general, so that the position or grouping of the community in terms of its origin, religion, rights and obligations of the community in an Indigenous Village.

The concept of Customary Village is a Customary Village is a unit of indigenous peoples in Bali that has territory, position, original arrangement, traditional rights, own property, traditions, social manners of community life for generations in the bonds of holy places *(kahyangan tiga* or *kahyangan desa),* duties and authorities as well as the right to regulate and take care of their own households.

2.3. Theoretical Foundations

2.3.1. Phenomenological Theory

Phenomenology seeks to seek an understanding of how human beings construct important meanings and concepts within the framework of intersubjectivity (our understanding of the world is shaped by our relationships with

others). (Kuswarno,2009). The apparent phenomenon is a reflection of a reality that cannot stand alone, since it has a meaning that requires further interpretation.
The objective of phenomenology, as proposed by Husserl, is to study human phenomena without questioning their causes, actual reality and appearance. Husserl says, "The world of life is the basis of meaning forgotten by science." interpreting life not as it is, but based on certain theories, philosophical reflections, or based on interpretations colored by our interests, life situations, and habits. Thus, phenomenology mentions *zuruck zu de sachen selbst* (returning to the objects themselves), that is, an attempt to rediscover the world of life.

Basically, there are two main things that are the focus of phenomenological research, namely: (Aryani et al., 2015)
a. Textural description: that is, what the subject of research experiences about a phenomenon. What is experienced is an objective aspect, data of a factual nature, a thing that happens empirically.
b. *Structural description*: that is, how the subject experiences and interprets his experience. This description contains subjective aspects. This aspect concerns the opinions, judgments, feelings, expectations, as well as other subjective responses of the subject of the study with regard to his experiences.

This phenomenological theory is used in dissecting the formulation of the first and second research problems in this study, in order to explore two dimensions, namely what the subject experienced and how the subject interpreted the experience. The experience of the subject, in this case the status of residence with the phenomenon of determining the status of residence as *a subject matter* to be studied. The first dimension is the background process of differences in the status of residence that is established, is objective and physical. While the second dimension is the opinion, implementation, assessment, evaluation, expectations and meaning of Indigenous Villages on the phenomenon of population status that occurs. This second dimension is subjective.

2.3.2. Reception Theory

There are three main elements in the reception methodology that can explicitly be referred to as "*the collection, analysis, and interpretation of reception data*" (collection, analysis, and interpretation of reception data) (Jensen in Soerjono. 1990). The three elements in this study are:
a. Data collection related to the status of residence *of krama* domiciled in a traditional village in Bali
b. Data obtained through in-depth interviews both individually and in groups. In the reception analysis, the interview took place to dig up data from *the perpetrators* in the Traditional Village itself.
c. Analyze the results of the data that has been obtained through interviews or recordings. Interview data can be tidied up by categorizing according to questions, statements, or comments.
d. Conducting interpretations, collaborating the results of findings in the field both from interviews and observations, with the theories used so as to produce new findings in the form of new values or meanings that appear.

2.3.3. Theory of Justice

According to John Rawls (2005), justice is fairness (justice as fairness). John Rawls's opinion is rooted in Locke and Rousseau's social contract theory and the deontological teachings of Immanuel Kant. Some of his views on justice are as follows:
1) This justice is also a result of a just choice. This stems from Rawls's assumption that actually humans in society do not know their original position, do not know their goals and life plans, and they also do not know what society they belong to and from which generation (veil of ignorance). In other words, the individual in society is an unclear identity, because of that people then choose the principle of justice.
2) Justice as fairness produces pure procedural justice. In pure procedural justice there is no standard to determine what is called "fair" apart from the procedure itself. Justice is not seen from the results, but from the system or the process itself.
3) Two principles of justice, first is the principle of greatest equal liberty. These principles include:
a. Freedom to participate in political life (right to vote, right to stand for election)
b. Freedom of speech including freedom of the press)
c. Freedom of belief (including religious belief)

d. Freedom to be yourself (person)
e. The right to retain private property.
This theory of justice is used to dissect the formulation of the third research problem in this study, to understand the philosophical meaning behind the differences in population status. In justice as fairness produces pure procedural justice in pure procedural justice there is no standard to determine what is called fair apart from the procedure itself. Justice is not seen from the results but from the system or process behind the differences in population status itself. The theory of justice helps examine the extent to which justice is achieved with differences in population status according to the objectives of justice in the Balinese cultural concept of kasukertan.

2.4. Conceptual Framework and Research Model

2.4.1. Frame of Mind

The framework of thinking of research carried out specifically in Indigenous Villages with customary laws in force and becomes the basis for all the implementation of the rules of community life. In overcoming differences in the status of indigenous people and balancing their obligations, it is necessary to pay attention to the effective service at every level based on the *awig-awig/pararem of the* local community. The pattern of handling Indigenous Villages with *krama adat, krama tamiu* and *tamiu* will be realized if it is preceded by an agreement coordinated through the institution of the Customary Village Assembly (Figure 1).

2.4.2. Research Model

This research is a literature study research *and data survey* or qualitative combination combined with critical thinking using a phenomenological theory approach to describe and analyze the conditions of differences in population status domiciled in Traditional Villages in Bali. In this study, an in-depth study was carried out in order to find out the background of differences in population status in Indigenous Villages, the implementation of differences in population status in the life of Indigenous Villages, and the philosophical meaning behind the differences in population status domiciled in Customary Villages in Bali (Figure 2).

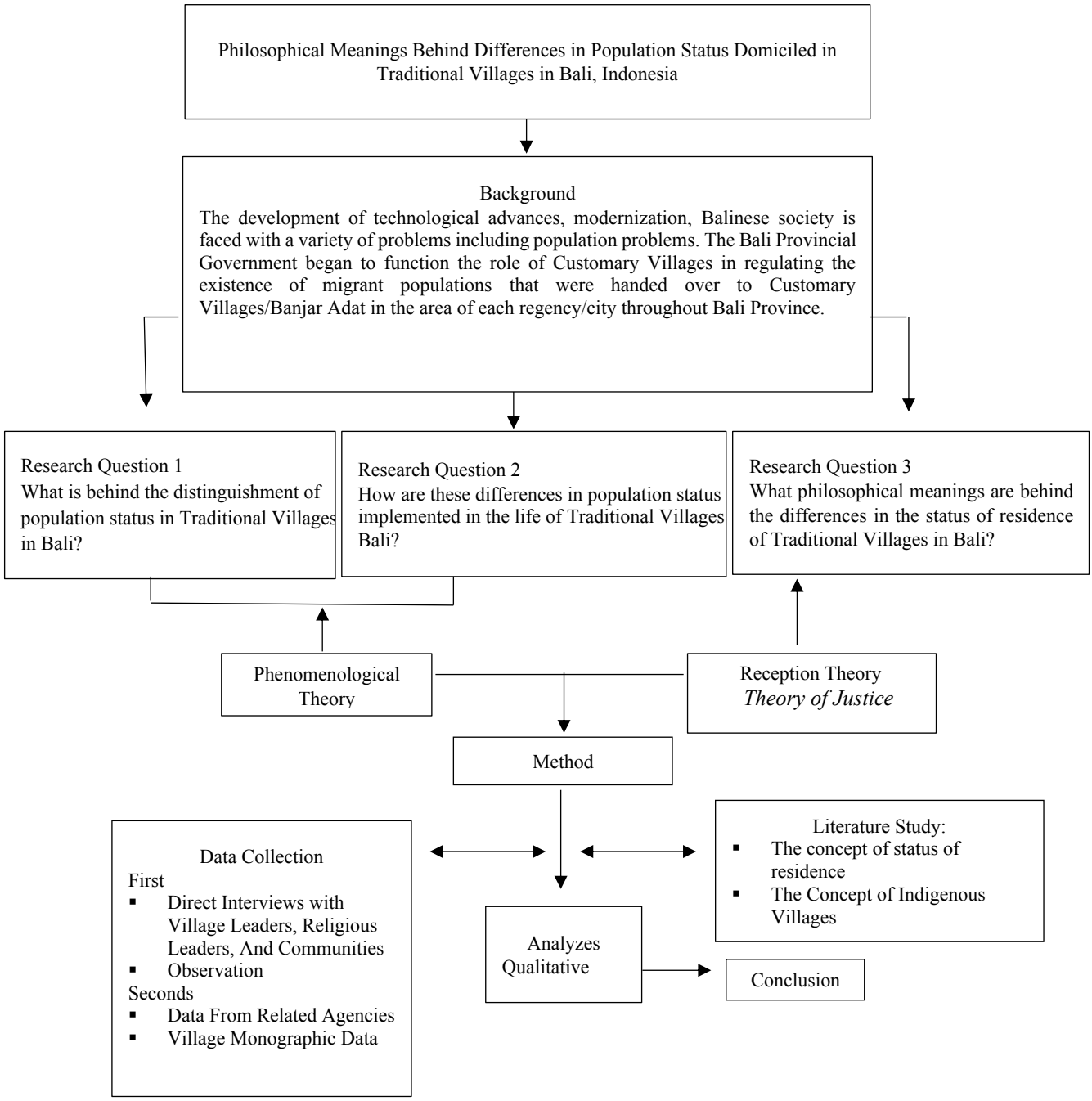

Figure 1: Research Thinking Framework
Source: Author Developed, 2021

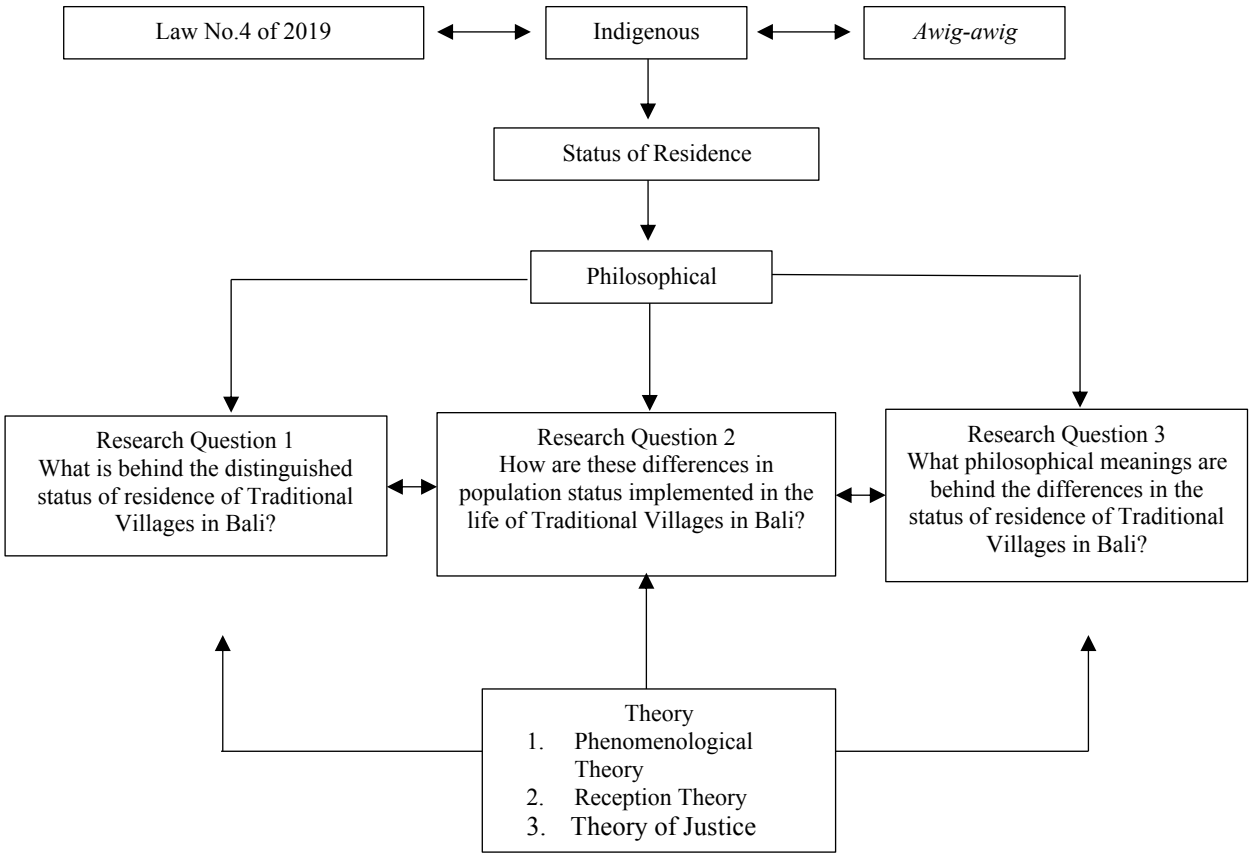

Figure 2: Research Model
Source: Author developed, 2021

3. Research Methods

3.1. Design, Location, Types and Sources of Research Data

The design in this study uses qualitative research that is carried out in stages, namely from planning, designing, determining the focus of research, and conducting research. The writing of the results of this study is carried out descriptively-qualitatively or through descriptions that are described and explain the subject of the study. This research is related to the philosophical meaning behind the differences in population status domiciled in traditional villages in Bali using normative and juridical approaches. The normative approach is used to examine legislation and the sources of customary law. The juridical approach is to examine research problems using a legal perspective in the hope that differences in status of residence can be understood, especially in relation to applicable laws and regulations.

The design of this study can be described, namely (1) the first is research on the background of the differentiation of the status of population of Indigenous Villages in Bal, (2) the second is research on the differences in population status implemented in the life of Indigenous Villages in Bali and (3) The third is the preparation of the philosophical meaning behind the differences in population status in traditional villages in Bali.

The research locations were conducted in three places, namely (1) Mountain Village in Penglipuran Traditional Village, (2) Urban Village in Panjer Traditional Village and (3) Coastal Village in Canggu Traditional Village.
The types of data in this study are primary and secondary data types. The primary data in this study includes direct interviews with data sources such as traditional *bendesa,* traditional *kelian*, community leaders, and several

community leaders who are considered to understand the problems studied. Secondary data is data obtained through literature review sources such as documents, meeting notes, journals, reference books, magazines, and other sources that have something to do with this research.

3.2. Data Collection Techniques, Research Instruments and Data Analysis Techniques

In this study, data collection was used by various techniques, namely observation, *depth* interviews, and document studies.

1. Observation Techniques. The observation of this research was carried out by plunging and looking directly at the field the object under study, for example the activities carried out by the Institution and Prajuru of Indigenous Villages in Bali in handling the status of residence, the process of differences in the status of residence implemented in the Customary Village, and various regulations governing the existence of customary manners in Bali.
2. Depth Interview. In an in-depth interview, an in-depth excavation of a predetermined topic (based on the purpose and intention of the interview is held) using open-ended questions. The informants who will be interviewed are *Bendesa* Penglipuran I Wayan Budiarta Traditional Village, *Bendesa* Panjer A. A Ketut Oka Adnyana Traditional Village, Sst. M.Si, Bendesa Canggu I Wayan Suarsana Traditional Village and local Traditional Village *prajuru*. Excavations are carried out to find out their opinions based on the perspective of respondents in looking at a problem.
3. Document Study Techniques. Document studies are used to collect various types of data or information sourced from journals or articles, books, laws, bylaws, *awig-awig* and documents such as village monographs, archives related to the problem under study, and documents obtained from photos, images, related articles published in print or electronic media.

Researcher as the first instrument in the collection and interpretation of data. The tools used are video cameras, voice recorders, notebooks, in-depth interview guidelines. Data analysis techniques in the form of data reduction, data presentation, data inference or verification.

4. Results and Discussion

4.1 Background of Differences in Population Status of Indigenous Villages in Bali

4.1.1. Differences in Status of Residence in Traditional Villages

Penglipuran Traditional Village, differences in the status of residence in Traditional Villages related to migrant residents have been carried out from before the existence of the Law in the form of unwritten rules that were made and agreed upon from the results of the penglipuran indigenous village community with joint witnesses. The existence of rules still has legal force. Having a unity of traditions and social manners of Hindu life for generations in the *Kahyangan Tiga (Kahyangan Desa) bond* which has a certain territory and its own wealth and has the right to take care of its own household. Penglipuran Traditional Village has a system of differences in status of residence with a membership system. In Penglipuran Traditional Village, which is a member of the Traditional Village, there are all traditional *Hindus* and *Nyungsung Kahyangan Tiga* in Penglipuran Traditional Village. The classification of membership in Penglipuran Traditional Village can be distinguished as follows *krama pengarep, krama roban, krama nyada, krama pengampel, krama balu, krama tamiu*, and *tamiu*.

The difference in population status in Panjer Traditional Village is motivated by the condition of a heterogeneous or mixed community due to the large number of migrants from other regions who mingle with the local indigenous people. Traditional VillagePanjer and *kelian banjar* must know and understand *the awig-awig*, *pararem* and *ilitika krama* issued by the City Customary Village Council to put in order *the krama tamiu* and *tamiu* based on Regional Regulation No.4 of 2019 concerning Customary Villages, which are already under the auspices of the Panjer Customary Village has the function of regulating the population in the Panjer Traditional Village called *bage pawongan.*

Canggu Traditional Village applies according to the status of residence in Traditional Villages according to Law/Perda No.4 of 2019 concerning Customary Villages divided into 3, namely: *krama* Desa Adat, are residents of the Hindu Balinese community who are Mipil and are recorded as members in the local Customary Village. Secondly, *krama tamiu*, is a hindu Balinese citizen who is not mipil, but is recorded in the local traditional village. The three *tamiu* are people other than *krama* Desa Adat and *krama tamiu* who are in the wewidangan of Traditional Village for a while or reside and are recorded in the local Traditional Village.

4.1.2. Status of Residence in Awig-awig Traditional Village

Awig-awig is a rule made by *the Traditional Village* and/or *Banjar Adat* that applies to the *Krama* Desa Adat*, krama tamiu,* and *tamiu.* Penglipuran Traditional Village, the status of residence in *awig- awig* in *pawos* 4 indic *krama awig-awig* Penglipuran Traditional Village is defined regarding the meaning of *village krama*. In panjer traditional village, the status of residence in awig-awig *Trityas Sargah Sukerta* Tata Pakraman Palet 1 article 7 Indik Krama as follows *krama desa, krama penyanggra, krama tamiu*, and *tamiu*. Meanwhile, Canggu Traditional Village has a population status arrangement in *awig-awig* in *pallets* 1 *indic krama pawos* 4 *awig-awig* Canggu Traditional Village.

4.1.3. Responsibility of Each Status of Residence

The responsibility of each status of residence is backgrounded by each Customary Village *having* the authority to make regulations (*awig-awig or pararem)* according to their respective conditions and needs (*Mawacara Village*). An area of a Customary Village is generally found a principle that applies universally in every *awig-awig*, namely the balance between rights and obligations as residents who live in a settled or temporary residence within the territory of a Customary Village. Penglipuran Traditional Village the rights and obligations for *village krama* are regulated in written rules, for *krama tamiu* and *tamiu* rights and obligations are regulated in unwritten rules that are respected in the *paruman* or *sangkep* of the Customary Village. In penglipuran traditional village, every *krama tamiu* or *tamiu* gets a residence permit if they have reported themselves through *the krama pengarep*, the *krama* has a responsibility if the *krama* invites the migrant population. Panjer Traditional Village, the arrangement of the rights and obligations of each krama is arranged on the awig-awig for the village krama and on the ilikita krama for the krama tamiu and tamiu. The obligation for the krama tamiu and tamiu by giving punia to the Panjer Traditional Village which is used for the denial of *kapancabayan* (maintaining social order and security), and the interests of the denial of the earth parisada (maintaining harmony in human relations with the sanctity of the surrounding nature), and the Canggu Traditional Village the fulfillment of the rights and obligations of every *village krama, krama tamiu* and *tamiu* regulated in *pararem* and *sedhana adat* Desa Adat Canggu, will bring balance, maintain social order, security, maintain harmony in human relations with humans and the sanctity of the surrounding nature.

4.2 Implementation of Differences in Population Status in The Life of Indigenous Villages in Bali

4.2.1. The Determination Process of the Bylaws

Based on the regulations in force in 2019 the Bali Provincial Government issued Regional Regulation Number 4 of 2019 concerning Customary Villages in Bali. This regulation has the intention of being an adequate legal umbrella to be used as a comprehensive and integrated guideline for Indigenous Villages in Bali. Where in the Regional Regulation of Bali Province Number 4 of 2019, the assistance of krama according to article 1 is as follows:

1. *Krama* Desa Adat is a hindu Balinese community who is *Mipil* and is recorded as a member of the local Traditional Village.
2. *Krama Tamiu* is a resident of the Balinese community who is Hindus not *Mipil*, but is recorded in the local Traditional Village.
3. *Tamiu* is another person *of Karma* Adat and *Krama Tamiu* who are in *Wewidangan* Traditional Village for a while or are located in the local Traditional Village.

4.2.2. The Determination Process in Awig-awig

Traditional Villages in Bali in general in their *awig-awig*include the regulation of migrant residents (*krama tamiu),* in Perda No. 4 of 2019 it is stated that balinese residents are grouped into 3, namely; *krama desa*, *krama tamiu,* and *tamiu. Awig-awig* is used as the legal basis for the establishment of the Penglipuran Traditional Village. In *the awig-awig* of Penglipuran Traditional Village, the concept used until now is the classification of indigenous villagers in only two groups, yiatu *krama* desa and *tamiu*. The determination of the status of residence *in the awig awig of* the Panjer Traditional Village the concept adopted until now is the classification of *indigenous villagers* in three groups, namely *village krama, krama tamiu* and *tamiu. Awig-awig* Canggu Traditional Village also applies three classifications of indigenous villagers, namely village *krama*, *krama tamiu* and *tamiu.*

4.2.3. Process of Determining Each Status of Residence

Penglipuran Traditional Village in determining the status of residence of indigenous villages is clearly discussed about *Krama Pengarep* its determination in accordance with the content of *the awig- awig* of Penglipuran Traditional Village, for *krama tamiu* and *tamiu* is explained in general in *awig-awig*, the rules are established through unwritten rules, in unwritten regulations it has been agreed through the paruman/sangkep of the village which has joint sanctions.

Panjer Traditional Village in determining the status of residence of Traditional Village is clearly discussed about *Krama Pengarep* (*krama desa*) its determination is in accordance with the content in *the awig-awig* panjer traditional village which is clearly regulated in the requirements to become a *village krama* (*krama pengarep*), while for *krama tamiu* and *tamiu* it is only explained in general in *awig-awig* , rather, it is regulated in *the pararem ngele* in the written regulations that have been agreed upon through the paruam/sangkep of the village.
Canggudalam Traditional Village the determination of the status of residence of the Customary Village is clearly discussed about *the kramadesa* of its determination in accordance with the content in *the awig- awig* of Canggu Traditional Village, which is clearly regulated in the requirements of being a *village krama,* for *krama tamiu* and *tamiu* is only explained in general in *the awig-awig* , and regulated in the Canggu Customary Village Decree Number 01/Kep/DAC/I/2018about the Customary Sedhana of Canggu Customary Village in written regulations has been agreed upon through the village paruam/sangkep.

4.3 Philosophical Meaning of Differences in Status of Residence in Indigenous Villages

4.3.1. Meaning of Differences in Status of Residence

The meaning of the difference in population status in Traditional Villages in Bali is justice in carrying out *swadharma* and *swadikara* for residents in Bali based on *Tri Hita Karana. Tri Hita Karana* is the three main things that cause the well-being and prosperity of human life, including *parahyangan, pawongan*, and *palemahan*. This *Tri Hita Karana* gives guidance to *balinese krama* for compassion to nature (*palemahan*), *punia* to fellow humans (*pawongan)*, as a form of bhakti to God (*parahyangan)*. *Tri Hita Karana* is sourced and operationalized in the local wisdom *of Sad Kerthi*, namely six noble deeds, which include efforts to purify the soul, maintain the preservation of forests and lakes as a source of clean water, the sea and beaches, dynamic social and natural harmony, and build the quality of human resources both individually and collectively so that it is expected to maintain and harmony or balance of customary values, religion, tradition, art and culture as well as local Balinese wisdom. both *at scale* and *scale.*

4.3.2. The Meaning of Differences in Responsibilities of Each Status of Residence

The difference in the responsibilities of each status means that each krama has a responsibility for *obligations that each krama* must fulfill such as to protect the environment properly, not to damage the environment, and always respect and respect the differences that occur in society and provide justice for each *krama* which is located in a Traditional Village that makes the difference in status always prioritizes the values of Pancasila. The value of

Pancasila in the second precept is a just and civilized humanity and the fifth precept of justice for all Indonesian people.

4.4. Awig-awig Model of Status Differences

The life of the people in Bali is arranged in a unified Traditional Village which has its own law called *awig-awig*. Every Traditional Village has an *awig-awig,* which is based on the *Tri Hita Karana* philosophy. Traditional Villages in Bali in general in their *awig-awig*list the arrangement of the migrant population (*krama tamiu).* Penglipuran Traditional Village, Kubu Village, with a *tamiu* arrangement model in more detail in *awig-awig,* starting from its understanding to its rights and obligations. Panjer Traditional Village, the model of setting *tamiu krama* on *awig-awig* is discussed in general, then the regulation of the problem of the migrant population in more detail in *pararem* and *Ilikita krama* which has a more flexible and dynamic nature so that it is easier to change at any time through *paruman* to adapt to the needs and changes of the times. In Canggu Traditional Village, with its *awigs*, it is accepted in *Tritiyas Sargah, Sukerta Tata Pakraman,* while more detailed arrangements are left to *the pararem* and the Canggu Traditional Village Decree on Traditional Sedhana (Figures 3 and 4).

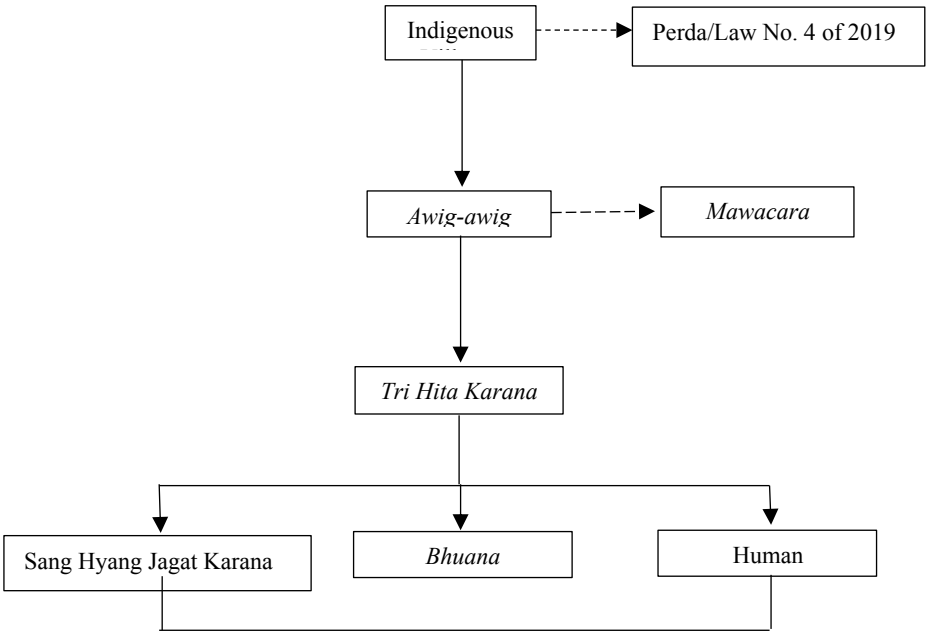

Figure 3: *Awig-awig* Model
Source: Author Analysis, 2022.

5. Conclusion

5.1 Findings

The background of the difference in the population status of Traditional Villages in Bali is partly because of the problem of injustice that has been felt by one group. In this case, the burden felt by the village krama is heavier than the others due to the sekala and niskala burden, compared to other krama groups, namely krama tamiu and tamiu the burden is felt only on a scale.

The implementation of differences in population status has been fully carried out in Urban Villages (Panjer Traditional Villages) and Coastal Villages (Canggu Customary Villages), due to the high number of migrant populations. Differences in population status make it easier to order, equalize, prevent and overcome the problems of Customary Villages based on the classification of classifications that have been determined by the government as a support for the implementation of Customary Villages, namely *krama*, *krama tamiu* and *tamiu.* In Perda No. 4 of 2019 article 8, it is stated that *krama* is grouped into three, namely *Krama Desa* is a resident of the Balinese Hindu community who is mipil and is recorded as a member in the local Traditional Village. *Krama tamiu* is a Hindu Balinese citizen who is not mipil, but is recorded in the local traditional village. *Tamiu* is a person other than *krama* Desa Adat and *krama tamiu* who are in the *wewidangan* of Traditional Village for a while or reside and are recorded in the local Traditional Village. On the other hand, The Mountain Village (Penglipuran Traditional Village) has not fully implemented the difference in status of residence. Penglipuran Traditional Village is a Mountain Village that existed during the Ancient Balinese period, before the Majapahit era, so that the difference in population status has more complex characteristics, especially in arranging inwards (*krama* only) by paying attention to *tamiu* and *tamiu* krama due to the lack of migrant population in Penglipuran Traditional Village. The classification of *krama* in Penglipuran Traditional Village consists of, *krama pengarep, krama roban, krama nyada, krama pengampel* and *krama balu.* The classification of the population is different from the Regional Regulation of Bali Province Number 4 of 2019.

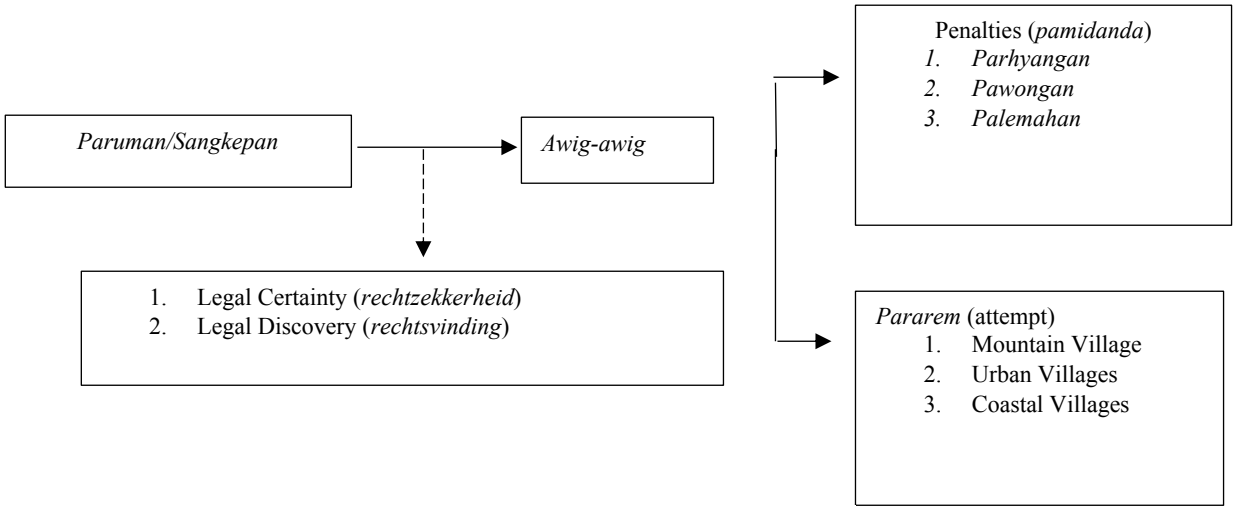

Figure 4: *Awig-awig* process
Source: Author Analysis,2022.

Differences in population status in Traditional Villages in Bali basically mean the realization of peace (*kasukertan*) for village manners, krama tamiu, and tamiu in Traditional Villages in Bali. This meaning needs to be emphasized based on the fact that in Bali there are two villages, namely the traditional village and the official village. The management of the Dinas Village is based on positive law and the governance of the Traditional Village is based on customary law in Bali which is based on *Tri Hita Karana*. *Tri Hita Karana* are the three main things that cause the well-being and prosperity of human life, including *parahyangan, pawongan*, and *palemahan*. This *Tri Hita Karana* gives guidance to *balinese krama* for compassion to nature (*palemahan*), *punia* to fellow humans (*pawongan)*, as a form of bhakti to God (*parahyangan)*. *Tri Hita Karana* is sourced and operationalized in the local wisdom *of Sad Kerthi*, namely six noble deeds, which include efforts to purify the soul, maintain the preservation of forests and lakes as a source of clean water, the sea and beaches, dynamic social and natural harmony, and build the quality of human resources both individually and collectively so that it is expected to maintain and harmony or balance of customary values, religion, tradition, art and culture as well as local Balinese wisdom. both *at scale* and *scale.*

In relation to the phenomenological theory used in this study which is focused on answering the formulation of the first and second problems, two things can be revealed both related to the phenomenon and the nomena that occurs. The phenomenon in this study can be revealed that differences in population status can maintain the value of local wisdom in Bali and provide a real *(sekala*) and unreal (*niskala*) sense of justice in dealing with population

problems in Balinese Traditional Villages, in this study, namely Penglipuran Traditional Village, Panjer Traditional Village and Canggu Traditional Village. The impact of the development of tourism in Bali, resulting in an increase in the number of people, especially the immigrant population. Strict rules are needed in regulating indigenous people and migrants, where *awig-awig* has been enforced since the Regional Regulation of the Level I Bali Province Number 6 of 1986, Bali Provincial Regulation Number 3 of 2001 to the latest Regional Regulation, namely Bali Provincial Regulation Number 4 of 2019 concerning Customary Villages. *The awig-awig* applied in each Traditional Village is expected to anticipate the influence of the migrant population by regulating the differences in the status *of krama, krama tamiu* and *tamiu*. This is an effort to conserve and explore in preventing the degradation of local wisdom, the crisis of Balinese cultural and customary identity. The nomenanya is the difference in status of protecting existence, especially for *krama* (indigenous residents of Balinese Traditional Village), but the difference in population status cannot be fully implemented in Penglipuran Traditional Village because as one of bali Aga Villages which has a collective government system (*ulu apad*) based on lineage, it is dominated by *krama* and there is very little *krama tamiu* or *tamiu*, so that with regard to the local status of residence, *the awig-awig* of Penglipuran Traditional Village tends to regulate inwardly, namely *krama* only.

Thetheoretical ideas in this study are in line with the concept of local *wisdom (local genius*) according to Koentjaraningrat cited by Kasiyan and Ismadi, first introduced by archaeologist H.G Quaritch Wales in his article entitled "*The Making of Greater India: A Study in South-East Asia Culture Change"* which was published in *the Journal of the Royal Asiatic Sociaty* (1948). Distinctive features or what is commonly referred to as 'indigenous' by Wales are termed '*local genius,'* in which it is contained in meaning as '*basic personality of each culture*.' With reference to Wales' opinion on *local genius* broadly, it can be interpreted as *a process of cultural characteristic*, namely the development from phenomenological processes to cognitive traits, in this study using phenomelogical theory can be produced several basics as follows:

a. *Awig-awig* as an implementation of the outlook on life, especially every resident of a traditional village in Bali, one of which is the view in regulating the status of residence in his village. (*orientation*).
b. *Awig-awig* is a form of community response in Bali to the outside world, especially the presence of migrants (*perception*).
c. The status of residence that has been regulated in *awig-awig,* is able to regulate the activities of the Indigenous Village community in Bali both between indigenous people and immigrants, related to *Tri Hita Karana* (*attitude and pattern of life*).
d. With the grouping of status of residence in Bali which has been regulated in the awig-awig of the local Traditional Village, protecting the existence and local wisdom of the Balinese people for generations (*life style*).

The reception theory used in research, especially in answering the formulation of the third problem, can be obtained the meaning of differences in population status to social, cultural and religious life is *Tri Hita Karana*. Where this theory is supported by the theory proposed by Deddi H. Gunawan (2013), who explains Traditional Villages as villages that carry out the rule of religious law or traditions or customs that apply in their respective territories. Thus, the customary law used by traditional villages in Bali, both *awig-awig* and *pararem*, is a customary law that applies in maintaining balance and justice by adjusting to the local *Kala Patra Village*.

The difference in the population status of Traditional Villages in Bali is in line with John Rawls' Theory of Justice. John Rawls assumes that individuals in society are unclear identities, because of that people then choose the principle of justice, in line with the different backgrounds of demographic status. Differences in population status basically clarify the differences in rights and obligations for both krama, krama tamiu and tamiu as an effort to achieve kasukertan in the life of Traditional Villages in Bali.

In practice until now in traditional villages in Bali, they still maintain the values of balinese local wisdom in dealing with the population in the local villages, both *krama*, *krama tamiu* and *tamiu* related to customs in Bali. Although nationally the Indonesian state in resolving the status of residence has been determined by the Civil Registry Service, there is also still an opportunity for the existence of Customary Villages through *Prajuru Desa* to regulate its population based on customs in the area.

The practice in the application of the responsibilities of each status of residence in the Traditional Village in Bali enriches and provides space in the application of justice. The sense of justice expected by *krama, krama tamiu, and tamiu* in Bali is not only a real sense of justice (*sekala*), but also unreal justice (*niskala*) which in its achievement can be done by synergizing or realizing between moral teachings, laws, and community desires.

The settlement of violations committed by migrant residents in Traditional Villages in Bali still uses the method of deliberation and consensus. The method of deliberation and consensus in solving problems is a real application of pancasila values, especially the fourth precept which prioritizes the values of togetherness and mutual cooperation as well as mutual agreement in the settlement.

5.2 Recommendation

Based on the conclusion, it can be seen that the classification of population status has not been fully implemented, especially in the Penglipuran Traditional Village due to the lack of *tamiu* in the area. This situation can cause injustice due to the unclear classification of the status of residence that ensures the fairness of the implementation of *swadharma* and *self-education* for the residents of Traditional Villages in Bali. In an effort to avoid conflicts due to this, it is hoped that several related parties' attentions, including the Regional Government and the Customary Village Assembly, will pay attention, especially to Pengunungan Village (Penglipuran Village) to be able to implement properly and correctly the classification of population status based on Regional Regulation No. 4 of 2019.

Penglipuran Traditional Village, Panjer Traditional Village and Canggu Traditional Village, which is the location of the research, are expected to pay attention to better data archiving, so that there is a balance of population data to avoid the answer "*nak mule keto"* (that's what it used to be) regarding the basis of regulations for determining the status of residence of Indigenous Villages in Bali. To the migrant community, it is recommended that all rules issued from the local village regarding the migrant population be archived or asked for proof of the rules as legality that the rules are correct issued from the village. This attitude is carried out so that the existing documents can be used as a strong foundation when unwanted things happen and there are no misunderstandings of residents for the sake of sustainability both socially, culturally and economically.

It is realized that the results of this research are still lacking because there are still dimensions that have not been fully studied, such as the implications of classifying the status of residence on the socio-cultural, economic and religious life of the population in Bali. Therefore, it is hoped that subsequent researchers can develop research studies and always make adjustments to the latest applicable regulations.

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Initiating a National Criminal Law Profile in the Future in Indonesia

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Abstract
The Indonesian nation does not yet have its product national criminal system. The current national criminal law system is the legal system left by the Dutch colonialists. The national criminal law system must be built based on the ideals of the nation contained in the Preamble to the 1945 Constitution. The research aims to formulate a future profile of national criminal law in Indonesia. This research uses a philosophical approach, which is to analyze the ideal law in the future. Data were analyzed qualitatively. The results of this study indicate the existence of criminal law in society as crime prevention through criminal law laws. Criminal law has a repressive and preventive function. Criminal law is part of the overall law that applies in a country in implementing criminal provisions. The Indonesian nation needs its own national criminal law system. The national criminal law is a criminal law based on Pancasila and the 1945 Constitution which applies nationally in Indonesia. Having its national criminal law for the Indonesian people is an effort to reveal national identity by the hopes and ideals of the independence of the Indonesian nation. The national criminal law profile ideally is the ideal of Pancasila law which is the perspective of the Indonesian people and places the bonds of togetherness and kinship ties as the core of the social life of the Indonesian people. The national criminal law system must be oriented to three pillars, namely: oriented to the values of "God"; oriented to the values of "Humanity"; and oriented to "Society" values.

Keywords: Profile, Criminal Law, 1945 Constitution, Indonesia

1. Introduction

The Indonesian nation until now (2022) does not yet have its product national criminal system. The current national criminal law system is the legal system left by the Dutch colonialists. Many experts have also tried to put forward the idea of a national criminal law profile in the future.

If the national criminal law system is seen as a legal substance, it means that the legal system is the elaboration of Pancasila in the legal field. The national criminal law system must be oriented to the values contained in Pancasila, namely divinity, humanity, unity, deliberation, and justice for all. Because Pancasila is the soul of the nation and the crystallization of the diverse values of the Indonesian nation.

The national criminal law system must be built based on the ideals of the nation, the goals of the state, the ideals of the law, and the guidelines contained in the Preamble to the 1945 Constitution (Mahfud M.D., 2007). The 1945

Constitution in Indonesia is the most basic source of law, the highest law that contains values, principles, and norms that must be obeyed. Implementatively, the implementation of the national criminal law system to be built depends on the direction of national legal politics.

National criminal law is one of the components that become a point in the development of the national legal system. The development of the criminal law system includes the development of legal substance, legal structure, and legal culture. Public legal awareness is very essential to be considered in the development of national law so that the resulting law does not conflict (Pane, 2018).

The development of the national criminal law is still in progress. The essence of national criminal law development implies an effort to reorient and reform criminal law by the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society. The development of national criminal law is very necessary because the current criminal law, namely the Criminal Code (KUHP) is not to the demands and developments of today's society.

The current Criminal Code is a product of the Dutch colonial law which is not by the life perspective of an independent, sovereign, and religious Indonesian nation (Lala, 2021). Historically, the criminal law inherited from the Dutch colonial era came from the Continental legal system (Civil Law System). The values that underlie the legal system of Continental Europe are individualism, liberalism, and individual rights which of course are not the values adopted by the Indonesian people (Itmam, 2013).

The colonial government at that time applied criminal law in colonized countries so that there were similarities with their parent countries. The Criminal Code was only applicable when the Indonesian people were still under Dutch colonial rule (Wahyuningsih, 2014). The Dutch colonial government deliberately prepared the criminal law material in question (Wetboek van Strafrecnt voor Nederlandsch Indie 1915) specifically to be applied to the colonial nation in the Dutch colony. All legal life was fostered to achieve the purposes of the colonizers so the legal conception at that time was not profitable for the Indonesian people (Sudaryatmi, 2012).

After Indonesia's independence, it was very natural, even a body to build its criminal law. The development of national criminal law must be based on extracting the values contained in the form of awareness and legal ideals (rechtidee), moral ideals, individual and national independence, humanity, peace, political ideals, and state goals. The profile of the national criminal law will later reflect the values of life that exist in society and the values contained in Pancasila (Pane, 2018).

Pancasila must be used as a paradigm in the development of national criminal law (Sunaryo, 2013). Because Pancasila contains the basic conception of life that is aspired and involves the idea of a form of life that is considered good for all Indonesian people, namely a prosperous society (Sudjana, 2018). The idealized profile of the national criminal law will be by the legal awareness of the community.

The problems that will be discussed in this study are the function of criminal law in society, the need for a national criminal law for the Indonesian nation, and the profile of national criminal law as the ideal of Pancasila law.

2. Research Methods

This type of research is library research. Library research is research that is carried out by examining library materials or secondary data. This research includes library research because the data used are more secondary in the form of legal documents. The approach used in this research is philosophical. The philosophical approach in legal research is to examine the law from the ideal side. This study uses a philosophical approach because the law being studied is at an ideal level. The source of data used in this study is secondary data. Secondary data is data obtained indirectly or has been provided by other parties. Secondary data is used as the main reference that is already available in written form in books, scientific journals, and other written sources. Qualitative data analysis is the process of organizing and sorting data into patterns, categories, and basic units of description so that themes

can be found that are presented in narrative form. This study uses qualitative data analysis because the data will be presented in a narrative-descriptive manner, not in the form of numbers or numeric.

3. Discussion

3.1. Functions of Criminal Law in Society

The existence of criminal law in society is an effort to overcome crime through criminal law laws. With the existence of criminal law, crime can be avoided through criminal law enforcement with criminal threats. Criminal law has a repressive and preventive function.

Each country has its criminal law. Because criminal law is part of the overall law that applies in a country that has the rule of law. Criminal law is coercive and binding, so it has consequences for its implementation. The result is a criminal threat (Putri & Purwani, 2020).

Many experts have formulated the definition of criminal law with all its functions. Criminal law can be interpreted as a legal regulation regarding crime" (Lamintang, 1999). The word "criminal" means things that are "criminalized," namely things that are delegated by the competent agency to a person as things that are not pleasant to feel and also things that are not delegated daily (Purnowo, 1982). Criminal law is all the legal rules that determine what actions should be punished and what kind of crime it is (Muljatno, 2008).

Criminal law can be interpreted objectively and subjectively. Objectively, criminal law is several legal regulations that contain prohibitions and orders or obligations in which violators are threatened with legal sanctions in the form of certain crimes. Criminal law in this sense is often called ius poenale. Subjectively, criminal law is a regulation that stipulates the investigation, further investigation, prosecution, imposition, and execution of a crime. According to this understanding, criminal law is often called ius puniendi (Abidin, 1993).

The definition of criminal law is a law that regulates violations and crimes against the public interest, acts that are threatened with punishment that constitutes suffering or torture. Criminal law is not a law that contains new norms, but only regulates violations and crimes against legal norms concerning the public interest (Kansil, 1997). Criminal law is part of the overall law that applies in a country that provides the basis and rules.
Criminal law is not absolute and has limitations, namely:

1. Determine which actions should not be carried out, which are prohibited, accompanied by certain criminal threats for anyone violating the prohibition.
2. Determining when and in what cases those who have violated the prohibitions can be imposed or sentenced to the punishment that has been threatened.
3. Determine in what way the imposition of a crime can be carried out if there are people who are suspected of having violated the prohibition (Abidin, 1993).

Seen from the point of view of social institutions that have the authority to make criminal law, it includes all orders and prohibitions imposed by the state and which are threatened with a crime/misfortune for those who do not obey them (Soeharto, 1993). This definition puts pressure on the state as the only party that enforces criminal law. Criminal law is a whole of the principles and regulations that are followed and determined by the state or other legal community. The state as the custodian of public law and order has prohibited the conduct of unlawful actions and has linked violations of its regulations with special suffering in the form of punishment (Abidin, 1993).

The scope of criminal law includes several components. Criminal law sometimes means material law, namely the rules regarding prohibited acts (delict/criminal acts/criminal acts), criteria that make people liable to punishment (criminal responsibility), and sanctions or punishments (criminal sanctions). Sometimes criminal law means formal criminal law, namely the procedures or procedures for imposing criminal sanctions for someone who violates material criminal law. In addition, criminal law sometimes means the implementation of a crime, namely the provisions on how a criminal sanction that has been imposed on a person is carried out.

3.2. The Need for a National Criminal Law for the Indonesian Nation

The Indonesian nation is in dire need of its own national criminal law system. National criminal law is a criminal law that is based on the ideological foundations and the state constitution, namely Pancasila and the 1945 Constitution which apply nationally in Indonesia (Sularno, 2006). According to this understanding, the Indonesian nation does not yet have a national criminal law, because the existing criminal law is a legacy of the Dutch colonial government which is not based on Pancasila even though it has a constitutional basis.

Having its national criminal law for the Indonesian people is an effort to reveal national identity by the hopes and ideals of the independence of the Indonesian nation as contained in the Preamble to the 1945 Constitution. Efforts and efforts have been made by the Indonesian people to achieve these ideals, namely National Law Development Program. The absence of national criminal law is one of the problems of legal development in Indonesia that has emerged since the independence of the Republic of Indonesia (Azizy, 2004).

The policy of developing national criminal law as a system is directed at the realization of a legal system that supports national interests (Risdiarto, 2017). Friedman likens the legal system to a factory, where the “legal structure” is a machine. The legal substance is what is produced or done by machines and "legal culture" is anything or anyone who decides to turn on and turn off machines and decides how machines are used (Akmal, 2021).

The legal system is a unified whole of orders consisting of parts or elements that are interconnected and closely related to each other (Nurhardianto, 2015). The explanation of the three legal elements is as follows:

1. Structure, namely the entire existing legal institutions and their apparatus, including the Police with their police officers, the prosecutor's office with their prosecutors, the courts with their judges, and others.
2. Substance, namely the entire rule of law, legal norms, and legal principles, both written and unwritten, including court decisions.
3. Legal culture, namely opinions, beliefs, habits, ways of thinking, and ways of acting, both from law enforcers and from citizens about the law and various phenomena related to law (Nurhardianto, 2015).

The legal system has a certain mechanism that guarantees the implementation of the rules in a fair, definite, and firm manner, and has benefits for the realization of public order and peace. Legal reform related to the development of law in Indonesia in the formation of laws and regulations is one element of legal products, so the principles of formation, enforcement, and enforcement must contain legal values in general. To be binding in general and have effectiveness in terms of the imposition of sanctions, in its formation it must pay attention to several juridical prerequisites (Risdiarto, 2017).

Legal development is a management mechanism in a national legal system. The legal development model is ideally placed within the framework of development law management, which fulfills the elements of management. The elements that should ideally be contained are legal planning, legal organizing, legal creating, legal implementing, legal controlling, and legal reviewing (Nurhardianto, 2015).

Criminal law must be able to become a tool for carrying out development in society (social engineering). This means that criminal law can create conditions that lead people to a harmonious state in improving their lives (Pane, 2018). If this condition is achieved, then the purpose of criminal law has been fulfilled in society.

The background of the development of the national criminal law is: First. The Criminal Code is considered incomplete or unable to accommodate various problems and aspirations and the dimensions of the development of new forms of crime. Second, the Criminal Code is not by the socio-philosophical, socio-political, and socio-cultural living in society. Third, the Criminal Code is no longer by the developments and thoughts/ideas, and aspirations of the demands/needs of the community. Fourth, the Criminal Code is not a complete legal system, because some articles/offenses have been revoked (Arief, 2009).

One thing that must be considered is that legal development must be based on the foundation of the ideas contained in Pancasila and the 1945 Constitution. Legal development is carried out systemically, in the sense that it is carried out by planning and implementing work as well as overall performance evaluation regarding the achievements of legal development. (Muhtamar, Razak, & Wahid, 2011). The preamble to the 1945 Constitution states the ideals and goals of the Indonesian nation. The ideals of the Indonesian people are to bring the Indonesian people to the front gate of Indonesia's independence, which is independent, united, sovereign, just, and prosperous.

The goals of the Indonesian people are to form a government that protects the entire Indonesian nation and the entire homeland of Indonesia, advances public welfare, educates the nation's life and takes an active role and participates in implementing a world order based on independence, eternal peace and social justice (Ratnaningsih, 2016).). Legal development activities are not just changing a law that is currently in effect. If the legal development activity is referred to as an act of planning a new legal system, then the activity of changing a law is changing an existing law (Pane, 2018).

Based on the provisions contained in the 1945 Constitution, the desired state is a democratic welfare state. All activities of the state after the proclamation are aimed at realizing the conception of the state. In other words, as the embodiment of values, the presence of law is to protect and promote the values upheld by the people.

3.3. Profile of National Criminal Law as the Ideal of Pancasila Law

Rechtsidee (legal ideals) Pancasila is the legal philosophy of the Indonesian nation or the Indonesian nation's perspective which places the bonds of togetherness and kinship ties at the core of the social life of the Indonesian people. The underlying value is the spirit of helping, cooperation, and kinship (Latumeten, 2017). The ideals of law will give birth to the Pancasila legal system.

The Pancasila legal system installs signs and gives birth to guiding principles in national legal politics, namely the prohibition of the emergence of laws that are contrary to the values of Pancasila (Tongat, 2012). Apart from being a rechtsidee, Pancasila is a Staatsfundamentalnorm, the highest norm of a country. The highest norm is a norm that is not formed by a higher norm but is pre-supposed by the community in a country and is a legal norm depending on the legal norms under it (Ibrahim, 2010).

Pancasila as a whole must be seen as a national guideline, as a national standard, norm, and principles, which at the same time contain human rights and human responsibility. The function of Pancasila is as a margin of appreciation, namely the boundary or margin of appreciation for the law that lives in a pluralistic society (the living law) so that it can be justified in the life of national law. In this regard, the development of national law must rely on and be able to utilize the universal ethics contained in the precepts of Pancasila.

The national criminal law must not conflict with the principles of God Almighty, which respects the order of religious life, religious feelings, and religion as a great interest. The national criminal law must also respect the values of human rights, both civil and political rights as well as economic, social, and cultural rights, and within the framework of relations between nations must respect the development rights. In addition, national criminal law must also base national unity on respect for the concept of civic nationalism, which appreciates pluralism (Sunaryo, 2013).

The index or core values of democracy as a democracy audit tool must also be respected and have a place in the national criminal law. In addition, it must place legal justice within the framework of social justice and in relations between nations in the form of the principles of global justice. The development of criminal law is also part of an effort to review and reassess the main points of thought or basic ideas or socio-philosophical, socio-political, and socio-cultural values that underlie criminal policies and criminal law enforcement policies so far (Pradityo, 2017).

The development of criminal law is an effort to reorient and reform criminal law by the central socio-political, socio-philosophical, and socio-cultural values that underlie and give sides to the normative content and substance

of the aspired criminal law (Arief, 2010). 2009). The scope of criminal law development includes four things, namely:

1. Part of the policy (rational effort) to renew legal substances to make law enforcement more effective.
2. Part of the policy (rational effort) to eradicate/handle crime in the context of protecting the community.
3. Part of the policy (rational effort) to address social problems and humanitarian problems to achieve/support national goals (i.e. “social defense” and “social welfare”).
4. Part of an effort to review and reassess ("re-orientation and re-evaluation") the main points of thought, basic ideas, or socio-philosophical, socio-political, and socio-cultural values that underlie criminal policies and policies (enforcement) of criminal law so far (Wahyuningsih, 2014).

The development of criminal law is an effort or way to replace the existing criminal law with a better criminal law, which is through justice and community development. This shows that the development of criminal law cannot be separated from the politics of criminal law as part of legal politics. The legal political position determines how to seek or make and formulate good criminal legislation (Maroni, 2016).

The development of criminal law that is carefully planned must be directed at building a modern national legal order by referring to the ideals of the Pancasila law which can provide an efficient and responsive legal framework and rules for the implementation of present and future life. The Indonesian National Legal Order must contain the following characteristics:

1. National insight and archipelago perspective.
2. Accommodate legal awareness of regional ethnic groups and religious beliefs.
3. Written.
4. Rational which includes rationality-efficiency, the rationality of fairness (redelijkheid), rationality-rules, and rationality-values.
5. Procedurals that ensure transparency.
6. Responsive for the development of community aspirations and expectations (Ratnaningsih, 2016).

If the national legal system is seen as a legal substance, it means the Pancasila legal system. The national legal system should be oriented towards three pillars:

1. Oriented to the values of "Divine."
2. Oriented with the values of "Humanity."
3. Oriented to the values of "Society" (Arief, 2009).

The legal system consists of three elements that have a certain independence, and a relatively clear identity that is interrelated, namely: the ideal element, the operational element, and the actual element. There should be no legal product that is contrary to Pancasila and the development of the national criminal law must be by the personality values of Pancasila (Atmadja, 2018). Pancasila is the source of all sources of law for the Indonesian nation.

The values contained in Pancasila come from the Indonesian people themselves, namely the values of customs, culture, and religious values. Pancasila is also a way of life for the Indonesian nsation. All behaviors and actions of every Indonesian human must be inspired and are the emanation of all the precepts of Pancasila because Pancasila is a weltanschauung and an organic unity.

It can be said that the development of criminal law is slow due to the strength and influence of the development of legal law and international trends (Atmasasmita, 2012). The development of a comprehensive criminal law must include the renewal of material (substantive) criminal law, formal criminal law or criminal procedural law, and criminal law enforcement. The three areas of criminal law must be renewed together. If only one problem arises in its implementation, the purpose of the reform will not be fully achieved. Efforts to develop criminal law in the formation of the National Criminal Code are a basic need for the community to create fair law enforcement.

4. Conclusion

Based on the above discussion, it can be concluded that the existence of criminal law in society is a way to prevent crime through criminal law. Criminal law has a repressive and preventive function. Each country has its criminal law. Criminal law is part of the overall law that applies in a country in implementing criminal provisions. The Indonesian nation needs its own national criminal law system. The national criminal law is a criminal law based on Pancasila and the 1945 Constitution which applies nationally in Indonesia. The Indonesian nation does not yet have a national criminal law. The current criminal law is a legacy of the Dutch colonial government. Having its national criminal law for the Indonesian people is an effort to reveal national identity by the hopes and ideals of the independence of the Indonesian nation. The policy of developing national criminal law as a system is directed at the realization of a legal system that supports national interests. The national criminal law profile ideally is the ideal of Pancasila law which is the perspective of the Indonesian people and places the bonds of togetherness and kinship ties as the core of the social life of the Indonesian people. The underlying value is the spirit of mutual help, cooperation, and kinship. The national criminal law must not conflict with the principles of God Almighty, which respects the order of religious life, religious feelings, and religion as a great interest. National criminal law must also base national unity on respect for the concept of civic nationalism, which appreciates pluralism. The national criminal law system must be oriented to three pillars, namely: oriented to the values of "God"; oriented to the values of "Humanity"; and oriented to "Society" values.

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A Survey of Kenya's Policies, Institutional Arrangements and Legislation on Traditional Medicine

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Abstract
Traditional medicine (also called ethno-medicine) is indigenous medicine based on traditional medicinal knowledge systems and passed down by word of mouth from generation to generation within the particular indigenous community, especially along familial lines as well as through informal apprenticeships; and which is largely undocumented. For a long time Kenya lacked policies, institutional arrangements and legislation on traditional medicine. Years later that scenario has changed, as the country now has an extensive policy framework and institutional arrangements on traditional medicine, comprising an avalanche of policies and institutional arrangements on the subject. It also has an extensive corresponding legislative framework comprising several pieces of legislation that are scattered over several sectors and line ministries and touching on one or other aspect of traditional medicine. New policies have been made, new legislation promulgated, and some of the then existing legislation amended. The earlier situation, and which has as already stated changed, was perhaps attributable to the nascent stage of traditional medicine policy and legislation at the time. With the effluxion of time, there have been marked developments in Kenya's policies, institutional arrangements, and legislation on the subject. Notably however, although the effective operation of these institutional arrangements together with that of these scattered pieces of legislation can to some extent promote or impact positively on traditional medicine, they are bedeviled by lack of coordination and harmonization. This paper makes recommendations that if implemented can provide the much-needed coordination and harmonization in Kenya's policies, institutional arrangements and legislation to ensure effective management and development of traditional medicine.

Keywords: A Survey, Kenya, Policies, Institutional Arrangements, Legislative Framework, Traditional Medicine

1. General Introduction, Definition of Key Words, and the Factual Background

1.1. General Introduction

The republic of Kenya is located in the Eastern region of Africa; where it borders South Sudan to the northwest, Ethiopia to the north, Somalia to the east, Uganda to the west, Tanzania to the south, and with the Indian Ocean on its south eastern coastal line. This paper discusses Kenya's policies, institutional arrangements and legislation on traditional medicine. Traditional medicine (also called ethno-medicine, as opposed to bio-medicine also called conventional medicine or western medicine) is a critical and integral part of the country's health care system. The research for this paper was prompted by previous reports and commentaries by commentators who over the years either reported that over the years either reported that Kenya lacked policies, institutional arrangements, and legislation on traditional medicine. Or who reported that there was a glaring disconnect among these three aspects of Kenya's traditional medicine regulatory regime. This paper has extensively discussed the author's findings on the present situation. It is divided into five main parts. Part One is this introductory part that makes a general introduction and lays out a factual background for the entire paper. It explains the main theme and main objective of the paper, then defines the key words, and subsequently lays out the subject's factual background, starting with

the basic facts on traditional medicine generally, then moving to the global context and finally laying bare the African context. Part Two delineates the conceptual framework for the entire paper; discussing the interplay between policy and legislation and then justifying the need for having in place policies, institutional arrangements and legislation on traditional medicine. Part Three discusses the state of allopathic and traditional medicine health care systems in Kenya, starting with the allopathic one, and then the traditional medicine one. Part Four discusses country's policies, institutional arrangements as well as legislation on traditional medicine. Part Five is the conclusion part that summarizes the paper and ties up its key findings in a solid conclusion, and then recommends certain interventional actions to address the current situation.

1.2 Definition of Key Terms

(a) The Term "Traditional Medicine"

The term "traditional medicine" as used in this paper refers to indigenous medicine based on traditional medicinal knowledge systems and passed down by word of mouth from generation to generation within the particular indigenous community especially along familial lines as well as through informal apprenticeships, and which is largely undocumented. The World Health Organization (WHO) defines traditional medicine (TM) as 'the sum total of the knowledge, skills and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement, or treatment of physical and mental illness' (WHO, 2002; Badal & Delgoda, 2017). It comprises health practices, approaches, knowledge and beliefs incorporating plant, animal and mineral based medicines, spiritual therapies, manual techniques and exercise, applied singularly or in combination to treat, diagnose and prevent illnesses or maintain well-being (Fokunang et al., 2011). It in essence is a system of health practices based on indigenous knowledge (also called folk knowledge, indigenous knowledge or ancestral knowledge) that has over a long span of time been passed on from generation to generation. Gakuya et al. (2020) have reported that this term is a broad one, incorporating various systems and forms of indigenous medicine.

(b) The Term "Policy"

Policy and legislation are at the core of this paper. The term "policy" as used in this paper refers to governmental policy, also known as public policy. It comprises statements on what the government intends to do or not to do, on a particular problem, cause or issue (Dye, 1972).

(c) The Term "Legislation"

The term "legislation" for its part, as used in this paper, refers to the law made by Parliament, comprising primary legislation (Acts of Parliament) as well as subsidiary legislation (comprising regulations and rules made pursuant to the provisions in the primary legislation). While the former is promulgated by Parliament itself, the latter is made by the executive to facilitate the former's application, implementation and enforcement.

1.3. A Factual Background on Traditional Medicine

Traditional Medicine Generally

Traditional medicine is indeed as old as humanity, and has been used in health care since time immemorial. FAO (1985) has opined that prior to western science and conventional medicine (orthodox medicine), medicinal practices were somewhat similar in many parts of the world. Indeed traditional medicine has been and remains important in the treatment and cure of diseases and illnesses, especially in the rural areas which are characterized by shortage of health care facilities, health care workers and allopathic medicaments. Akerele (1987) has further added that that the WHO has for decades encouraged its use, especially in the developing counties by incorporating its useful elements into national health care systems (See WHO, 2002). While noting that traditional medicine as an alternative and complementary therapy is gaining prominence in primary health care worldwide, Adeniyi et al. (2015) attribute this increasing prominence largely to its phenomenal efficacy in the management of mild as well as chronic and seemingly incurable diseases and ailments.

Upretty & Asselin (2012) for their part have reported that medicinal plants have been used in traditional health care systems since prehistoric times and are still the most important health care source for the vast majority of the population around the world. They further estimate that 70 to 80 percent of people worldwide rely on traditional herbal medicine to meet their primary health care needs. This traditional herbal medicine can be an important driver in the primary health and even in the curative health of the predominantly poor, less literate and unsophisticated setting of the rural populations. This is not only for reason of being cheaper and more accessible than biomedicine, but also for reason of being based on traditional knowledge systems that have endemically existed in the local communities for generations. Given that it does not require the technological sophistry of modern medicine, it is more convenient and adapted to the circumstances of the largely traditional setting of environments. Writing on traditional medicine among the Maasai, Sankan (2006) identifies two parallel systems of traditional medicine, namely, the "genuine medical practice" and the "deceptive medical practice"; and observes that while the former is based on actual traditional knowledge, the latter is based on deceit and trickery, and is meant to exploit and fleece the public. In other words, the latter is a conduit for unjust enrichment.

Notably, traditional medicine is more of curative medicine than preventive medicine, in that it is more cure-oriented than prevention-oriented, as it is focused on cure rather than preventive health care; the cure of diseases rather than their prevention. Mothibe & Sibanda (2019) for their part have reported that 'African traditional medicine has been used by African populations for the treatment of diseases long before the advent of orthodox medicine and continues to carry a part of the burden of health for the majority of the population; and further that it plays a role in health, in terms of preventive, curative and even palliative health care.' Further, unlike allopathic medicine that focuses on diseases and health, traditional medicine not only focuses on diseases, but on social problems as well. It therefore comports well, with the World Health Organization's definition of the concept of "health". With regard to diseases, traditional medicine goes beyond the conventional diseases and encompasses other health maladies such as mental illnesses, sexual libido problems, bareness, as well as social problems and social maladjustments e.g financial problems, matrimonial problems, witchcraft, demonic attacks, evil spirits, bad luck, and love-related problems such as marital infidelity. The methods used in traditional medicine include: use of herbs, prayers, cursing, oathing, witchcraft, and even magic.

The International Recognition of Traditional Medicine

Traditional medicine has been the subject of interest and has received formal recognition at the local, national level and even the international level. International efforts for the formal international recognition of traditional medicine as a source of health care date back to the 1970s and were spear-headed by the WHO (Rukangira, 2001). These efforts begun when the 30th World Health Assembly (WHA) of the state parties of the WHO held at Geneva from 2nd to 19th May 1977 unanimously recognized the importance and role played by traditional medicine in the health systems especially of developing counties, and the need to mainstream it. The Assembly urged member states to promote this genre of medicine. This was in 1978 followed by a call to governments in their national drug policies and regulations to give priority to utilizing traditional medicines (Akerele, 1987). This call was made in the 1978 Alma Mata conference. This was the International Conference on Primary Health Care held the Alma Mata Kazakhstan from 6th to 12th September 1978. The conference even adopted a Declaration of Principles named The Alma Mata Declaration. Those resolutions and recommendations regarding traditional medicine were re-affirmed at the WHO's 40th World Health Assembly at Geneva held from 4th to 15th May 1987. Akerele (1987) has further added that that the WHO has for decades now encouraged its use, especially in the developing counties by incorporating its useful elements into national health care systems (See WHO, 2002). While noting that traditional medicine as an alternative and complementary therapy is gaining prominence in primary health care worldwide, Adeniyi et al. (2015) attribute this increasing prominence largely to its phenomenal efficacy in the management of mild as well as chronic and seemingly incurable diseases and illnesses. In the year 2002, the World Health Organization designated the 31st of August of every year as the African Traditional Medicine Day (African Health Monitor, 2003).

The African Context of Traditional Medicine

In Africa, traditional medicine is indeed as old as humanity, and has been used in health care since time immemorial. FAO (1985) has opined that prior to western science and conventional medicine (orthodox medicine), medicinal practices were somewhat similar in many parts of the world. This genre of medicine has been and remains important in treatment and cure of diseases and illnesses, especially in the rural areas which are characterized by a shortage of health care facilities, health care workers and allopathic medicaments. Admittedly, traditional medicine, and especially African traditional medicine (ATM), remains the most affordable and easily accessible medical care in many poor countries, especially sub-Saharan ones such as Kenya. African traditional medicine is in fact the oldest of all the world's traditional medicine systems (Ebu et al., 2021). Yet, it is the least established traditional medicine system in the world and has remained rudimentary, informal and with little, and sometimes no governmental recognition, endorsement and/or support; as well as lack of overall public acceptance. This situation is in diametrical contrast with Asian traditional and alternative medicine for instance. It is largely due to those factors that Africa's traditional medicine has remained a cropper, yet it is an important source of health care for millions of the continent's inhabitants, and especially the pre-dominantly poor populations in sub-Saharan Africa, found mainly in rural and peri-urban areas of the continent.

Rasamiravaka et al. (2015) have observed that 'African traditional medicine is characterized by a belief in the supernatural as a cause of illness, divination as a diagnostic tool, and the ritualized use of a wide variety of plants and animal-derived agents in its treatment'. It is worth noting however, that WHO's support is only for scientifically-proven traditional medicine and not for superstitious claims. This is a tricky balancing affair because one of the major challenges that traditional medicine suffers is lack of scientific credibility for most of its claims. This can be majorly attributed to the fact of it being primarily founded on mysticism, superstition, deity, magic, supernatural powers, and even witchcraft, sorcery, as well as wizardry. Banquar (1995) has for his part reported that traditional herbal medicines, for instance, play a vital role towards the well-being and development of rural populations, and that herbal therapy although still an unwritten science, is well established in the indigenous people's cultures and traditions and has become a way of life for almost 80 percent of the people in Africa. Further that many diseases which could not be cured by the allopathic or other systems of treatment have been cured by traditional medicine. This view is corroborated by Kipkore et al. (2014), who have reported that traditional medicine remains an important component of the health care in sub-Saharan Africa largely due to the prevailing poverty, inadequate health services and shortage of health workers.

Despite its usefulness, traditional medicine in many parts of Africa is beset by multiple limitations and challenges, including the following: (a) Its tendency to imprecise diagnosis that is based on guess work, devoid of scientific diagnostic investigation such as X-Ray, CT Scan, MRI or even laboratory tests; hence its diagnosis and prognosis are usually presumptive and inaccurate (b) It offers symptomatic instead of etiological therapy (c) Its lack of precision in dosage forms (d) Its susceptibility to possibilities of poisoning as its concoctions and dosages are not preceded with scientific tests as to safety, quality standards fitness for human consumption (e) Its potential for witchcraft, sorcery and wizardry, especially due to its mystic nature and the fact of its being based largely on superstition, and with the thin line between it and the practice of black magic as well as witchcraft, sorcery and wizardry (f) Its proneness to quackery as a result of its having no requirements for academic or professional qualifications (g) Its being largely informal and unregulated (h) Its lack of firm formal legal recognition through law (i) There being no specific or identifiable official institution superintending it (j) Its lack of a specific governing legislation (k) The pharmacokinetics, pharmacodynamics, contraindications and even side-effects of many traditional medicaments are largely unknown, unascertained and/or undocumented.

2. The Conceptual Framework

2.1. The Policy-Legislation Interplay

There is a horse-rider relationship between policy and legislation; because the formulation of policy on any subject is usually followed by or accompanied with the promulgation of corresponding legislation on the same. Legislation therefore is an important tool for enforcing government policy; hence a policy always needs to be backed by the

enactment of corresponding legislation not only to enforce, but also to validate that policy to enable its implementation. There is thus, as already stated in this paper, a horse-rider relationship between policy and legislation, as the three primary functions of legislation in relation to policy are: (1) To validate policies by giving them legal legitimacy, (2) To enforce policies by converting them into legally enforceable edicts, and (3) To establish or designate the agencies responsible for implementing such policies as well as those for enforcing the legislation. (Sifuna & Mogere, 2002). Legislation thus validates policies, and also issues edicts and prescribes as well as proscribes certain conducts and actions; and often also creates or designates particular agencies and vests them with the responsibility of implementation- which are in this paper called implementing agencies. Whereas such agencies can be created or designated by those policies themselves, it is better if they are created or designated by law (the Constitution or legislation), rather than administratively or by policy alone, or by executive whim. However, unlike a policy, legislation creates legal sanctions for breach of its edicts and non-compliance with it. Ogolla (1992) has argued that law: "…translates policy into specific enforceable norms, standards of social behaviour and compels, by threat of sanctions, their observance by laying down to public officials, basic guidelines for implementation of demands of the normative regime." A law that criminalizes or characterizes particular actions and conduct as offences, will also usually prescribe sanctions and penalties for non-compliance. By so doing, law unlike policy, insulates itself from indifference and disregard, and also enhances compliance with its edicts. This is because it spells out punitive sanctions and penalties for those as willfully or negligently break or disobey it, or simply fail to comply with it. These sanctions/penalties include: imprisonment, fines, surcharge, restitution, restoration, as well as payment of compensatory damages; and are intended as punishment for infraction and non-compliance rather than a reward for obedience and compliance. Admittedly, the legal duty to obey the law has the effect of not only discouraging non-compliance, but also ensuring and even increasing compliance with laws.

Without the subsequent enactment of corresponding legislation, a policy is a toothless dog that barks but cannot bite; as it is legislation that gives policies the required "teeth" to bite; by converting its statements into enforceable prescriptions and proscriptions (backed by sanctions and penalties), as well as enforceable legal obligations and rights. Without corresponding legislation, policies remain mere "paper tigers" or innocuous empty rhetoric inked on paper, and remain mere rhetoric. On a lighter note, this could be the reason why some countries call their governmental policy documents, "Papers". In some countries they are called "White Papers", in others they are called "Blue Papers", while in others they are called "Green Papers". Admittedly, without the further act of legislation, these "Papers" remain merely "Papers" and just "Papers". It follows therefore that having policies and political will alone without subsequently enacting specific corresponding legislation is not enough. Any governmental policy should be followed by the enactment of corresponding legislation to implement it, as law is an important tool for enforcing policy (Sifuna & Mogere, 2002). Otherwise having policies alone without the supporting corresponding laws is not enough, hence it is illogical to have beautiful policies, without the subsequent enactment of the supporting corresponding legislation. This is because unlike a policy, law creates legal sanctions and penalties for breach of its edicts or non-compliance with it.

2.2. The Need for Policies, Institutional Arrangements and Legislation on Traditional Medicine

The protection and promotion as well as the growth and development of traditional medicine requires policies, institutions and a corresponding legislation. There is as already stated, a horse-rider relationship between law and policy, with policy being the horse and law being the rider; as one of the fundamental functions of laws is to implement policies. This is in the sense that the formulation of a policy always needs to be followed by the enactment of corresponding legislation, not only to validate it (policy), but also to enforce and enable its implementation. Law is thus a tool for enforcing governmental policy. As policies require the enactment of attendant legislation to implement them, they also require the creation and/or designation of the agencies vested with the duty of implementing them (implementing agencies). As already stated in this paper, while such agencies can be created or designated by such policies, it is better when they are created or designated by law rather than administratively or by executive whim. Just the way a policy will designate a particular agency and charge it with its (the policy's) implementation, a law will likewise create or designate a specific institution or entity to enforce

it (the law). Without enforcement, policies and even the law will be mere words and empty rhetoric. Even as policies create and designate implementing agencies, and as laws create and designate enforcement agencies, the law is further required to not only spell out the functions and responsibilities of such agencies, but to also prescribe penalties and sanctions for abdication of these functions and responsibilities by functionaries in those agencies, and also for law breakers. It cannot be gainsaid that legal creation or designation of agencies makes them legal entities hence giving them juristic legitimacy, as well as clothing them with legal authority in the sense that they have legal backing for their roles and are legally liable for their actions. That is why these agencies function well when they have been created (or designated) by the law, rather than administratively or by policy only, or by executive whim. While such policies, institutional arrangements and corresponding legislation are necessary, their effectiveness is even more crucial.

3. The State of Allopathic and Traditional Medicine Systems in Kenya

3.1. The State of Allopathic Medicine in Kenya

Kenya is a low-middle-income country (LMIC) with a land surface area of 580,367 square kilometers, and a population of 47.5 million people comprising 12.2 million households (GOK, 2019 National Population Census-KNBS); and a GDP of Ksh 9.6 trillion (GOK, 2020) and high poverty index, with almost half of its population living below the poverty line- earning less than 1 USD per day. Its governmental expenditure on health being approximately 8% of the general governmental expenditure (GGE), and 2% of the country's GDP instead of the 15% and 5% respectively, internationally recommended threshold. This is far below the stated threshold recommended by the Abuja Declaration (GOK, 2020). This paltry expenditure on health has still not taken health services close to the people, thus making the Kenya Government's policy clarion "Health for All", mere policy rhetoric with nothing to show for it. The actual state of affairs is that the bulk of the Kenyan populace still lacks access or any meaningful access to health care. This is especially in the predominantly rural setting, which comprises over 80 percent of Kenya, and which is characterized by illiteracy, low per capital income and a traditional health care system (traditional medicine) that has no governmental support. Besides, Kenya's health care facilities and workforce (health care workers- doctors, clinical officers, nurses and midwives) are far below the World Health Organization's internationally recommended ratio of the population; with most of these facilities and workforce being not only poorly distributed, but also largely concentrated mainly in urban areas (GOK 2020; The World Bank Group, 2018a, 2018b, 2020; Mulaki & Muchiri, 2019). Kenya's current ratio of doctors, clinical officers, nurses and midwives to 1000 people of the population which ranges between 0.2 and 1.2 is a far cry from the WHO's internationally recommended ratios; and so is the current ratio of approximately nine health care workers per health care facility (GOK, 2020). With this sad state of affairs, the country has challenges in meeting the Sustainable Development Goal of Universal Health Coverage (UHC).

Sadly, despite significant reductions in the recent years, Kenya still has high prevalence of diseases such as HIV/AIDS, malaria, tuberculosis, and other disease associated with water, sanitation, hygiene, environmental factors, nutrition. Its health workforce has a small and poorly distributed health workplace, of nine heath workers per facility, with most of it concentrated in urban areas (GOK, 2020). In essence, Kenya's rural areas are heavily understaffed, yet it is these areas that bear brunt of diseases, illnesses, poor sanitation, poor hygiene, inadequate water supply, lack of access to safe water, high poverty levels and low literacy levels. Notably, this situation has from March 2020 been compounded by the COVID 19 pandemic which has overstretched not only the health budget but also the health care workers, health care infrastructure, health care supplies, health care equipment, health care transport such as ambulances, as well as heath education and training. With such a limping and overwhelmed allopathic health care system, traditional medicine not only flourishes, but needs to be promoted and developed. While Okumu et al. (2017) have attributed its slow development in Kenya to inadequacies in regulation and promotion; and its thriving in rural areas to the poor state of allopathic health care system in such areas. Especially the shortage of health care workers and facilities. This means therefore that even in this 21st Century, Kenya is yet to meaningfully take health care services to the people; which makes the government's goal of attaining Universal Health Coverage (UHC) a pipe dream. Although allopathic medicine is Kenya's mainstream health care system, traditional medicine remains the complementary and alternative health care system, hence worthy of attention. The part below discusses the state of traditional medicine in Kenya.

3.2. The State of Traditional Medicine in Kenya

Although traditional medicine received international (and even national recognition) many decades ago, in many parts of the world including Kenya, its growth and development has been stifled by the skepticism and reluctance by governmental authorities and even the general public in accepting it. The general public, especially the elitist intelligentsia and the lot influenced by American and European cultures as well as western religions such as Christianity, have often doubted and challenged the knowledge and claims made by its practitioners and some segments of the community who support it or benefit from it. This state of affairs has been acknowledged by the Kenya Government; which in the 1989-1993 National Development acknowledged the important role played by traditional medicine in the country's health care but blamed its lack of growth on skepticism and lack of information about its contribution and potential (GOK, 1989). Gakuya et al. (2020) have observed that owing to its social, economic and cultural significance, traditional medicine is a concept that resonates well with many inhabitants of developing counties such as Kenya. Sindiga (1995) observed that despite the formal over-popularization of conventional medicine (biomedicine), the bulk of the population in Kenya especially in the traditional rural areas relies on traditional medicine for their primary health care as well as the treatment of diseases and illnesses. As illustrated in this paper, traditional medicine is undeniably an invaluable and complementary branch of medicine that should not be considered as inferior to conventional medicine. Following the official recognition of traditional medicine by Kenya in the 1990s, the Government later established a task force to craft policies and draft laws on it. While commentators and researchers such as Kigen et al (2013) have lamented Kenya's policy and legislative framework, the findings by this author in the study for this paper, is in contrast to those earlier findings and opinions, partly due to effluxion of time, and also due to sustained stakeholders' lobby efforts that nudged Kenya into adopting new policies and legislation on the subject. With the result that many of the then draft policies and draft bills were finally adopted; and are at present the prevailing regulatory framework in the country. This is because without their subsequent adoption and enactment, they would have remained mere recommendations for future action, as they could neither be implementable nor enforceable.

Traditional medicine is therefore important in the treatment and cure of diseases and illnesses in the country, especially in the rural and peri-urban areas which are characterized by widespread poverty as well as a shortage of health care facilities, health care workers and allopathic medicines. Almost two-thirds of the Kenya's population (especially in the rural and peri-urban areas) rely on traditional medicine for their health care needs; which makes it an integral and invaluable component of Kenya's health care system, such that the Kenya Government needs to accord ample attention to it. This requires that it be mainstreamed into the country's health sector, especially given its relative affordability and accessibility compared with allopathic health care (Banquar, 1995; Githae, 1995). It is an important and often underestimated part of health care services (WHO, 2014). In Kenya as many other jurisdictions especially in Asia and Africa, traditional medicine is a subject of policy and legislation—such that there exists a cocktail of policies and legislation on it.

Apart from its beneficial use for maintenance of health as well as in the prevention, diagnosis, improvement, or treatment of diseases and illnesses, traditional medicine in the African context is also used for malevolent purposes such as witchcraft, sorcery, wizardry and black magic. Its other malevolent uses include use in traditional oathing, curse ordeals, and many other harmful and malicious uses. Overall, however, this system of medicine is important in the treatment and cure of diseases and illnesses, especially in the rural and peri-urban areas which are as already stated in this paper characterized by widespread poverty as well as a shortage of health care facilities, health care workers and allopathic medicines. Indeed, traditional medicine's malevolent employment should be a cause for concern, as to warrant some regulation to ensure it is employed only for the common good of society. Such regulation being through policy-making and legislation.

In sum, it need not be gainsaid that traditional medicine is important in the treatment and cure of diseases and illnesses in Kenya, especially in the rural and peri-urban areas which are characterized by widespread poverty as well as a shortage of health care facilities, health care workers and allopathic medicines. Whereas allopathic medicine is Kenya's mainstream, most formal and dominant health care system, the weaknesses, challenges that

beset it has invariably resulted in more and more people resorting to traditional medicine for their health care needs as an alternative and complementary health care system. This is the opportunistic and resilience character of traditional medicine in the modern African society. Despite its resurgence, traditional medicine still lacks the blanket formalness and governmental embodiment that its counterpart (allopathic medicine) enjoys. There is in the typical African sub-conscious mind a general and perhaps mistaken belief, that "what allopathic medicine cannot do, traditional medicine can do". This persuasive portfolio, makes traditional medicine a legitimate province of governmental policy-making and legislation. The next part examines the Kenya Government's policies, institutional arrangements and legislation on traditional medicine.

4. Kenya's Policies, Institutional Arrangements and Legislation on Traditional Medicine

As already noted in this paper, commentators have in previous reports and studies over the years either reported that Kenya lacked or lacks policies, institutional arrangements and legislation on traditional medicine, or that there was a glaring disconnect among these three aspects of Kenya's traditional medicine regulatory regime. It is these harsh judgments, that years later prompted the author to conduct research that has led to this paper. In the part below, the author discusses Kenya's policies, institutional arrangements and legislative framework on traditional medicine; and presents the findings of his research on the same. Interestingly, his findings are markedly different from the said previous claims, conclusions and assertions by commentators. This is the author's contribution and point of departure from previous literature, commentaries and reports on the subject matter (e,g . Chebii et al., 2020).

4.1. Kenya's Policies on Traditional Medicine

Although traditional medicine received international and even national recognition many decades ago, its growth and development in many parts of the world including Kenya has been stifled by the skepticism and reluctance by governmental authorities and even the general public to accept it. There has been marked doubt and skepticism on the knowledge and claims made by its practitioners and some segments of the community. This state of affairs has been acknowledged by the Kenya Government, which in the 1989-1993 National Development Plan acknowledged the important role played by traditional medicine in the country's health care, but blamed its lack of growth on skepticism and lack of information about its contribution and potential (GOK, 1989). Gakuya et al. (2020) have observed that owing to its social, economic and cultural significance, traditional medicine is a concept that resonates well with many inhabitants in developing counties such as Kenya. Sindiga (1995) observed that despite the formal over-popularization of conventional medicine (biomedicine, also called allopathic medicine) the bulk of Kenya's population especially in the traditional rural set up relies on traditional medicine for primary health care in the treatment of diseases and illnesses. It is, as illustrated in this paper, an invaluable and complementary branch of medicine that should not be considered as inferior to conventional medicine.

Following the official recognition of traditional medicine by Kenya in the 1990s, the Government later established a task force on it, to craft policies and draft laws on the same. While commentators and researchers such as Kigen et al. (2013) lamented Kenya's dearth of a policy and legal framework on traditional medicine, the findings by this author in the study for this paper are different from those earlier findings, partly due to effluxion of time, and also due to sustained lobby effort, that nudged Kenya into adopting new policies and legislation. With the result that many of the then draft policies and draft bills were finally adopted; and are as at now the prevailing regulatory regime in the country. This is because without their subsequent adoption and enactment, they would have remained mere recommendations for future action, as they could neither be implementable nor enforceable.

Notably, the Kenya Government has in several policy documents over the years expressly formally recognized traditional medicine and acknowledged its importance in the country's health care system. These policy documents include: The National Development Plan 1989-1993 (GOK, 1989), the National Drug Policy of 1994 (GOK, 1994), the National Policy on Traditional Medicine and Medicinal Plants of 2005 (GOK, 2005), as well as the National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (GOK, 2009). The major problem with this policy framework has over the years been partly its inadequacy, and partly implementational challenges especially the lack of a supporting corresponding specific legislation and the lack of

total public acceptance by the Kenyan populace for traditional medicine. Admittedly, traditional medicine has until very recently been a kind of clandestine enterprise or underworld, operating in secrecy away from the public eye and meaningful governmental regulation. The part below examines that policy outlay to establish the extent of their support for traditional medicine.

4.1.1 The National Development Plan 1989-1993

It is in this Development plan (also called the 6th National Development Plan), that the Kenya Government was, for the first time, explicit on the role of traditional medicine, when it stated in part as follows:

> "Although for a long time the role of traditional medicine and its potential contribution to health has been viewed with skepticism, a large proportion of people in Kenya still depend on it for their cure. One reason for the continued skepticism lies in the lack of information on its effectiveness, drug quality and safety. During the plan period [1989-1993], Government will encourage the formation of professional associations for traditional medicine practitioners. Such associations will facilitate the gathering of necessary information for use, development and appropriate adaptation of traditional diagnostic, therapeutic and rehabilitative control technologies that will become part and parcel of formal medical research and the Primary Health Care Programme." (p.244)

4.1.2 The Kenya National Drug Policy of 1994

This policy was crafted with the object of ensuring that pharmaceutical services in the country meet the requirements of all Kenyans, for the prevention, diagnosis and treatment of diseases using efficacious, high quality, safe and cost-effective pharmaceutical products. Its part 5.6 was on Traditional Medicine. In it the Kenya Government acknowledged the place of traditional medicine and traditional medicines, and the need of mainstreaming them into the country's primary health care system. It provided for registration and recognition of traditional medicine practitioners.

4.1.3. The National Policy on Traditional Medicine and Medicinal Plants of 2005

This Policy was formulated in the year 2005 by the Kenya Government as its policy on traditional medicine and medicinal plants. It proposes the establishment of an institution known as "Traditional Healers' Council" and vests it with the task of registering, licensing and regulating traditional medicine practice and traditional medicine practitioners. It emphasizes the need to document current availability of plants and to promote nurseries and herb gardens (Okumu et al., 2017). It also proposes to establish an inventory of all medicinal plants in the country; and also provides for establishment of tree nurseries and herb gardens for bio-conservation and research.

4.1.4. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009

The policy defines these three terms. It defines "traditional knowledge" as a body of knowledge vital to the day to day life of indigenous and local communities derived through generations of living in close contact with nature. It defines "traditional cultural expressions" as any forms whether tangible and intangible, in which folklore and traditional culture and knowledge are expressed, appear or are manifested; and "genetic resources" as genetic material of actual or potential value. It states that traditional cultural expressions are expressed in tangible forms such as folk art, paintings, carvings, sculptures, pottery, crafts, costumes, musical instruments, as well as architectural forms. Further that it may also be expressed in intangible forms such as verbal expressions (e.g. stories, epics, legends, poetry, riddles and narratives) and musical expressions (e.g. folk songs). Luckily, Kenya is a state party to the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (ICH), having ratified it in October 2007. The treaty recognizes Intangible Cultural Heritage as a mainspring of the cultural diversity and a guarantee to Sustainable Development. The policy is intended to protect, develop and promote all the aforegoing aspects of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions.

It in its preamble states that it was developed in response to the growing need to address the challenges facing the

country today with regard to the three subjects, in terms of accelerating technological development, integration of world economic, ecological, cultural, trading and information systems. It notes that traditional knowledge, genetic resources (biological resources) and traditional cultural expressions (TCEs—especially folklore) are closely intertwined and raise similar concerns with regard to intellectual property rights (IPRs- the term generally refers to the property rights creations of the mind). In this regard, it notes that under the Industrial Property Act of 2001, some aspects of traditional knowledge and genetic resources can be protected as utility. It further acknowledges Kenya's cultural and biological diversity in terms of culture and biodiversity; as well as its richness in traditional knowledge and traditional cultural expressions (especially folklore). It further acknowledges the diversity of Kenya's people in terms of, *inter alia*, traditional literature; traditional arts and crafts; traditional music; traditional visual arts; traditional ceremonies; traditional beliefs; traditional architecture associated with particular sites; as well as traditional knowledge forms related to traditional medicines, traditional medical practices, agriculture, forest management, and sustainable use of biological resources. Further that traditional knowledge is transmitted vertically through generations and laterally through repeated practice as well as apprenticeship with elders and specialists. It further notes that traditional cultural expressions especially oral traditions including folklore is transmitted through oral means such as sayings, proverbs, and metaphors.

The policy however, also identified the following six major challenges that traditional knowledge, genetic resources and traditional cultural expressions continue to face in Kenya, namely: 1) Lack of recognition and mainstreaming into national policies and decision-making processes, 2) Lack of a comprehensive database, 3) High cost of their collation and documentation. 4) Weak community institutional linkages, and 5) Inadequate capacities 6) Inadequate framework for intellectual property protection. To attenuate these challenges, the policy outlined the actions that the Kenya Government would in collaboration with stakeholders undertake to support, protect, regulate, develop and promote traditional knowledge, genetic resources and traditional cultural expressions in the county. Having set out the Kenya's policy outlay on traditional medicine, it is now necessary to examine her legislation on the subject to see whether it is in tandem with and adequately supports the said policy outlay as there is supposed to be a horse-rider relationship between policy and legislation.

4.2. Kenya's Institutional Arrangements on Traditional Medicine

Policy and law are not self-executing; hence rely on external actors, personnel, agencies and institutions for enforcement (Sifuna, 2021b). For the most part, its usefulness will depend on the conduct of these enforcers together with other external factors. Indeed, the functionality of policies and laws are often influenced by extraneous drivers manifested in the actions of the actors and institutions entrusted with their implementation. Notably therefore, understanding these institutional dynamics that inform and influence the formulation and implementation of policies and laws is very important. Since policy and law are not a self-contained enterprise, they are dependent on these actors and institutions for formulation and implementation. In the opinion of this author, such actors and agencies function well when they have been created (or designated) by law; as their legal creation or designation makes them legal entities, thereby giving them juristic legitimacy. This legal creation also clothes them with legal authority, in the sense that they have legal backing for their roles and are legally liable for their actions. Such creation being invariably accompanied with legal provisions spelling out their functions and responsibilities, as well as sanctions and penalties for non-performance or wrong performance of these roles.

Kenya has a handful of institutions on traditional medicine, most of which have been established by mere policies, administrative arrangements and executive whim, rather than by law(s); hence are mere administrative entities rather than legal entities. Such entities unlike legal entities (those created by law) lack the legal authority that legal entities have. Neither their existence nor purported mandates and responsibilities are spelt out in the law. For that reason, their powers, functions, duties and roles are and remain amorphous. As already stated in this paper, whereas agencies can be created or designated by such policies, it is better when they are created or designated by the law rather than administratively or by policy alone, or by executive whim. Besides, as also already observed in this paper, these agencies and institutions function well when they have been created (or designated) by the law. This author has identified the institutional entities existing in Kenya on traditional medicine, and has discussed them below. These are of two categories, namely governmental entities and private entities, There are three notable governmental agencies that Kenya has on traditional medicine, namely: (a) Centre for Traditional Medicine and

Drug Research (CTMDR), (b) Department of Culture, and (c) The Pharmacy and Poisons Board (PPB). Apart from these governmental agencies, there are also private associations of traditional medicine practitioners. Notably, these have been created by them for purposes of advertising their vocation rather than regulating their practice. A regulatory outfit will be expected to have rules relating to training, recognition, quality assurance, ethical standards, disciplining wayward members, as well as pricing of their services and products. Those associations lack these attributes. The said entities are discussed below.

4.2.1 The Centre for Traditional Medicine and Drug Research (CTMDR)

The other Government institution/agency with regard to traditional medicine, is the Centre for Traditional Medicine and Drug Research (CTMDR). It was established administratively by the Kenya Government in 1984 at the Kenya Medical Research Institute (KEMRI) (See the KEMRI Website). The latter is a government institution established as a national body responsible for carrying out health research in the country. It is a State Corporation established through the Science and Technology (Amendment) Act of 1977 (Cap 250) as amended in 1979. The Act in its preamble stated that it its object was to establish mechanisms through which the Government may be advised on all matters relating to scientific and technological activities and research. It was repealed and replaced by the Science, Technology and Innovation Act of 2013. KEMRI as an institute is headed by a Director, while the said Centre is headed by a Deputy Director of the Institute. The latter was established with a mandate of carrying out research to rationalize traditional medicine in Kenya. It was intended to promote the quality and safe use of traditional medicine, and discharges this mandate through collaboration with traditional healers as well as evaluation of herbal drugs using medicinal phytochemistry, pharmacology and toxicology; and the formulation of herbal remedies.

4.2.2 The Department of Culture

The Department of Culture for its part is a line department of the Ministry of Sports, Culture and Social Services. The Department is tasked with the mandate of recognition and registration of traditional medicine practitioners in the country, and was administratively established under the National Drug Policy of 1994. That policy designated the Department as the one responsible for recognition and registration of traditional medicine practitioners. The categories of its practitioners that the department is mandated to register include the following: Traditional birth attendants (TBAs), bone-setters, traditional surgeons and herbalists (Chebii et al., 2020). Each of these categories of traditional medicine practitioners has a corresponding category of health professionals as follows: TBAs are the equivalent of midwives; traditional bone setters are the equivalent of orthopedic surgeons; traditional general surgeons are the equivalent of medical general surgeons; while herbalists are the equivalent of pharmacists. As for traditional medicaments, registration eligibility criteria included submitting 3 to 6 drug samples, medicinal plant preparations and plant specimens to recognized government and certified research institutions for laboratory analysis (Chebii et al., 2020).

Kigen et al (2013) have reported that most traditional herbalists (and traditional medicine practitioners) in the rural areas are not even aware of this registration process, hence the records on the number of herbalists practicing in the county is not known; and that there are many fake herbalists and fake traditional medicine practitioners. While recognition and registration is plausible, locating this function in the Culture Ministry rather than the Health Ministry is inappropriate, and most likely stems from the misconceived position of perceiving traditional medicine as a cultural artefact rather than a health system. It would have been better if it were located at the Ministry of Health a line ministry in charge of health, which is where health experts are as well as a reservoir for health/medical expertise and information. It is also the generator and nerve of health policies and programmes. The department has generated a Form for the Registration of Traditional Medical Practitioners, coded Form 0001 (GOK, 2010).

4.2.3 The Pharmacy and Poisons Board (PPB)

The other institution that the Kenya Government has tasked with traditional medicine matters, traditional medicines in particular, is the Pharmacy and Poisons Board (PPB). The board is established by the Pharmacy and Poisons Act (Cap 244 Laws of Kenya), a piece of legislation enacted to regulate the manufacture, prescription,

use, and trade in drugs and poisons. The Act has tasked the board with, among other responsibilities, the regulation and licensing of the manufacture of drugs and medicinal substances manufactured or for sale and/or use in the country. Under it a drug is defined as including any medicine, medicinal preparation or therapeutic substance; while a medicinal substance is defined as any medicine, product, article or substance claimed to be useful in the prevention, diagnosis or treatment of diseases- or alleviation their symptoms. These definitions cover traditional medicines as well as biomedicines (pharmaceutical drugs).

In carrying out the aforesaid role, the Board developed guidelines for the registration of herbal and complementary medicines. These have been published into a booklet on the same titled *"Registration of Herbal and Complementary Products: Guidelines to Submission of Applications"* (GOK, 2010). In their preamble, the Guidelines state that they are intended to address, inter alia, the many issues on the quality of herbal and complementary medicines. These include: (a) Misconception amongst herbalists that the documentation demand by the Board (Pharmacy and Poisons Board) is intended to steal their indigenous knowledge; (b) Lack of documented evidence on quality, safety and efficiency of herbal and complementary products; (c) Unethical practices such as adulteration of herbal and complementary products with conventional medicines, advertising of herbal and complementary products in print media, electronic and even billboards; (d) Peddling of products with no therapeutic benefits; (e) Unsubstantiated medicinal claims by herbal practitioners; (f) Dealing with herbal products whose toxicological profile is not known; and (g) Poor standards of preparation as well as manufacture and sale of herbal and complementary products.

Those Guidelines also require an applicant's application to submit information on the herb or complementary product with regard to: (a) Its name, dosage and therapeutic use(s), (b) The plant or natural part from which it is extracted, (c) Its ingredients and chemical composition, (d) Its pharmacological and pharmaco-toxicological profile, (e) Its ethno-medical profile, including proof of long period of use in the particular ethno-community together with the relevant folklore or other anthropological evidence. Moreover, with regard to traditional medicine, the Board has a specific mandate, namely the registration of herbalists and herbal medicines, not only from Kenya, but from other parts of the world as well. This role has the potential to promote the growth and development of traditional medicine and traditional medicines in the country. Notably, however, it has been reported that currently most of the herbal and complementary products registered by the Board, are those from Asia, and particularly India and China (Kigen et al, 2013). Further, the guidelines focus primarily on products that have been formulated in a commercial manner as opposed to medicinal substances and medicaments produced in rudimental manner by traditional medicine persons using traditional medicinal knowledge as is the case in sub-Saharan African countries such as Kenya. The other flaw with this registration by the Board is that it focuses on registration of herbalists rather than traditional medicine practitioners generally.

4.2.4 Private Informal Associations of Traditional Medicine Practitioners

As already stated above, apart from these governmental agencies, there exist in Kenya, private associations of traditional medicine practitioners. Notably, these have been created by them for purposes of advertising their vocation rather than regulating it. A regulatory outfit will be expected to have rules relating to training, recognition, quality assurance, ethical standards, disciplining wayward members, as well as pricing of their services and products. Those associations lack these attributes. Being rather informal outfits, these associations are scattered around the country and are undocumented, hence information on them is largely informal and not readily available. These include: (a) An association called *Welfare Association for Stakeholders in Traditional and Alternative Health Care (WAKESTRAH)* (b) An Association called *National Traditional Practitioners Association (NATHEPA),* (c) An Association called *Central Province Herbalists Association* and (d) An Association in Kwale County called *Muungano wa Waganga wa Kienyeji na Watabibu wa Miti ya Kiasli* (Association of Traditional Witchdoctors and Herbalists). With the aforegoing audit of Kenya's policy and institutional arrangements on traditional medicine, this paper in the part that follows interrogates her existing legislative framework on the same. This is for purposes of firstly establishing whether Kenya has corresponding legislation, and secondly the the suitability and effectiveness of such legislation for the promotion traditional medicine in the country.

4.3. Kenya's Legislation on Traditional Medicine

For traditional medicine to meaningfully play its role in Kenya's health sector, it requires legal recognition and protection; and needs to be in the policy instruments and law statutes. In a constitutional democracy such as Kenya, the legal foundation is the national Constitution. For Kenya it is the Constitution of 2010; which in terms of Article 2, is the supreme law of the land, from which all other laws derive legitimacy, hence any law that contradicts it or is inconsistent with it, is null and void to the extent of such contradiction or inconsistency. For its part, the constitutional basis for the legal recognition and provisioning for traditional medicine is Article 11 of the said Constitution; which recognizes culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation. It further directs the State (government) to recognize the role of indigenous technologies in national development (Harrington, 2016; Harrington, 2018). Unfortunately, even with all this constitutional foundation, Kenya lacks a specific statute or legislation on traditional medicine. All it has is a plethora of scattered pieces of legislation which although are on other subjects, nevertheless have some provisions whose application has significance and implications for it. These include following five pieces of legislation, which are discussed below in that order: (a) The Health Act of 2017 (Act No. 21 of 2017), (b) The Public Health Act (Cap 242), (c) The Pharmacy and Poisons Act (Cap 244), (d) The Witchcraft Act (Cap 67), and (e) The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016).

4.3.1 The Health Act of 2017 (Act No. 21 of 2017)

This Act in its preamble states that it is an Act of Parliament to establish a unified health system; to co-ordinate the inter-relationship between the national Government's and the county governments' health systems; to provide regulation of health care services and health care service providers, health products and health technologies; and for connected purposes. The enactment of this legislation was a milestone in Kenya's health legislation history. With regard to traditional medicine, this fact is in the sense of it being the first legislation in Kenya's legislative history so far, to expressly recognize alternative medicine as a health system in Kenya. It is also Kenya's first legislation to expressly recognize traditional medicine and adopts the World Health Organization's (WHO) definition of traditional medicine already stated in the introductory section of this paper. Part X of the Act is on Traditional and Alternative Medicine. It defines traditional medicine as "including the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness." (Section 2).

In section 74, the Act directs the national government to formulate policies to guide the practice of traditional and alternative medicine. Notably, rather than focusing on the promotion of traditional medicine as a health system and acknowledging traditional medicine as a health system in its own right and embedding it in the mainstream health care of the country, the Act only focuses on regulating its practice. The focus is thus on its practitioners rather than on it as a system of health care; on its practitioners only, rather than holistically on its growth and development. Section 25 states that there shall be established a regulatory body by an Act of Parliament to regulate the practice of traditional medicine and alternative medicine. This is a wide departure from other Acts that in so provisioning expressly name and designate or create such agencies. Why didn't this Act itself not create and name the agency? Why leave that to future legislative action? The mere propositioning instead of creating the organ, is to this author, an escapist approach that is rather evasive and shy, instead of being forthright. On the functions of the proposed institutional outfit, the Act further directs that it (the agency) shall be vested with the responsibility of documentation, standardization, prescribing the charges charged to practitioners for registration and licensing; as well as providing for and regulating referrals from traditional medicine practitioners to conventional health facilities. Why not the vice versa? i.e. referrals from conventional health care facilities and health professionals to traditional medicine practitioners.

4.3.2 The Public Health Act (Cap 242 Laws of Kenya)

This piece of legislation in its preamble states that it is an Act of Parliament intended to make provision for

maintaining health. It is called the Public Health Act because it focuses on public health i.e. the health of the whole population (or as large as possible a proportion of the population) rather than the health of an individual—including those who would benefit from but do not seek medical care (Sifuna & Mogere, 2002). This is unlike clinical medicine that is concerned with individual health, especially of those that seek medical care; which explains why public health is sometimes referred to as population medicine.

The author has identified four reasons why traditional medicine should concern any legislation on public health. First, as already stated in this paper, traditional medicine is concerned with diseases as well as the overall health; and the overall well-being rather than just diseases and illnesses. Secondly, just the way public health emphasizes preventive and promotional health, traditional medicine is used for both the treatment and cure of diseases (curative medicine), and to a limited extent the avoidance, avertment and prevention of diseases (preventive medicine). Similarly, traditional medicines are used in curative health care as well as preventive health care (Eddouks et al., 2012). Preventive health care is indeed a key aspect of public health. Thirdly, traditional medicine avoids, averts, prevents, diagnoses and treats several diseases that are of public health importance. Such include venereal diseases, epidemics, as well as those related to hygiene. Sofowora et al. (2013) have for instance discussed the role of medicinal plants in diseases of public health importance (public health diseases). The fourth reason is that a large segment of the Kenyan population (over two thirds) and even the world population (between 70 percent and 80 percent of it), especially in the rural and peri-urban areas rely on traditional medicine for their health care needs.

For the four reasons *inter alia*, traditional medicine can be used to promote public health goals and programmes. It is therefore surprising that despite traditional medicine's implications for public health, Kenya's Public Health Act (Cap 242) which is her primary legislation on public health, neither mentions nor has any specific or any provisions on traditional medicine. This is glaringly anomalous! It cannot be gainsaid that this genre of health care has an important place in public health, especially in the prevention and cure of diseases and illnesses, as well as the promotion of overall health and well-being of society. It for instance therefore would be legitimately expected that the parts of a public health legislation (e.g. the Public Health Act) on diseases should have provisions relating to traditional medicine. Disappointingly, this is not the case as for this Act. The parts on diseases have no provisions on it, and just like the entire Act, do not even mention it. The relevant parts in this regard are: Part IV on Prevention and Suppression of Infectious Diseases, Part V on Venereal Diseases, Part VII on Leprosy, and Part VIII on Smallpox. Apart from these categories of diseases, traditional medicine practitioners and traditional medicines in Kenya are known to treat many other categories of diseases including chronic and even terminal diseases. As already noted in this paper, traditional medicine has been professed to cure virtually all diseases including the chronic and terminal diseases, and even the biomedically incurable ones.

4.3.3 The Pharmacy and Poisons Act (Cap 244 Laws of Kenya)

This is an Act of Parliament to control the profession of pharmacy and the trade in drugs and poison. It defines a drug as "any medicine, medical preparation or therapeutic substance". Even though this definition would by interpretation and implication include traditional medicines, the Act has no provision on traditional medicine, and neither does it mention the words "traditional medicine" or "traditional medicines". This is a glaring omission, that future legislative amendment on this Act should consider, as traditional medicine and traditional medicines are a proper province of the object of this Act. Under the Act, a drug is defined as including any medicine, medicinal preparation or therapeutic substance; while a medicinal substance is defined as any medicine, product, article or substance claimed to be useful in the prevention, diagnosis or treatment of diseases—or alleviation of their symptoms. As already observed in this paper, these definitions cover traditional medicines as well as biomedicines (pharmaceutical drugs).

4.3.4 The Witchcraft Act (Cap 67 Laws of Kenya)

In the context of this paper, the term "witchcraft" is used to refer to the malevolent invocation of evil spirits to cause harm to others, by bewitchment, black magic, sorcery, and wizardry (Sifuna, 2021a). In Kenya, traditional

medicine has from colonial times to this date been associated with witchcraft and black magic, which are practices prohibited under the Witchcraft Act (Cap 67), hence illegal. The Act prohibits the practice and promotion of witchcraft as well as the possession of witchcraft articles and paraphernalia. Notably, the only lawful and legally permissible use of traditional medicine is its beneficial use for diagnosis, treatment and cure of diseases and illnesses; and not its harmful use for evil and suffering, such as its employment in witchcraft (witch medicine). In criminalizing the practice of witchcraft, the Act has prohibited and prescribed criminal penalties for the following overt acts: "*holding oneself out as a witchdoctor able to cause fear*, *annoyance or injury to another in mind*, *person or property*; *holding oneself out as being able to exercise any kind of supernatural power*, *witchcraft sorcery or enchantment calculated to cause such fear*, *annoyance or injury*; *a witch-doctor supplying advice or article for witchcraft*; *using witch medicine with intent to injure others*; *possession of charms or other article usually used in witchcraft or sorcery*; *and attempting to discover crime by witchcraft.* For these acts the Act provides for imprisonment ranging from one year to ten years.

Traditional medicine in Kenya can be stifled by the legal prohibition on witchcraft and witchcraft-related conduct (Sindiga et al., 1995). Thairu (1975) has for instance reported that the decline of folk medicine during the colonial era was due to the colonialists associating it with witchcraft and "black magic". This explains why in Kenya, folk medicine started declining at the onset of colonial rule. Mutungi (1977) has noted that Kenya's Witchcraft Act has a definitional problem with regard to the term "witchcraft" which it has not precisely defined. Notably, African communities know what may be described as witchcraft, i.e. the invocation of evil powers. Mbiti defined it as the use of mystical power to harm others in society (Mbiti, 1969). The colonialists associated it with the magic of the black African people—variously referred to as "black magic". Nevertheless, with an overly positivist judiciary together with an overzealous, corrupt, less literate, and socially insensitive police force such as Kenya's, there is a higher likelihood of this Act being used (actually misused) to stifle folk medicine (Sifuna, 2021ab).

This is unlike in the neighbouring country of Uganda, whose Witchcraft Act (Cap 108 Laws of Uganda) is so carefully worded as to avoid such a mischief. The Act in its interpretation section states as 'For purposes of this Act, witchcraft does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines.' Luckily, a proposal for a review of Kenya's Witchcraft Act was already made by the Kenya Law Reform Commission (KLRC) and it is long-overdue. Just like the Ugandan Act, a future amendment to the Kenyan Act should similarly expressly exempt the bona fide practice of traditional medicine, as well as the bona fide manufacture and supply or sale of traditional medicines. Such an amendment will not only harmonize the provisions of Kenya's Witchcraft Act with those of the traditional medicine legislation proposed in this paper, but will also promote and protect the country's traditional medicine and its practice.

4.3.5 The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016)

This piece of legislation is intended to protect traditional knowledge (TK) and traditional cultural expressions (TCE) from exploitation by third parties. Such expressions are usually in the form of varied media, for instance folklore. It in its preamble states that it is an Act of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Article 11, 40 and 69 (1) of the Constitution (i.e. the Constitution of Kenya, 2010). Article 11 is on culture. It recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation; and enjoins the Government to protect and promote traditional knowledge and cultural expressions by inter alia enacting legislation. It is pursuant to this constitutional edict that the Kenya Government enacted this Act. The Act has definitions of key words and terminology; which include those that are germane to the subject matter of this paper. It defines a community as a homogenous and consciously distinct group of the people who share any of the following attributes: 1) common ancestry, 2) similar culture or unique mode of livelihood, 3) geographical space, 4) ecological space, 5) community interest. It defines the term "customary" as the use of traditional knowledge or cultural expression in accordance with practices of everyday life of the community, such as for instance, usual ways of selling copies of tangible expressions of folklore by local craftsmen. It defines "customary use" as the use of traditional knowledge or cultural expressions in accordance with the customary laws and practices of the holders. It defines "customary laws and practices" as customary laws, norms and practices of local and traditional communities that are legally

recognized.

The Act provides for equitable sharing of the benefits accruing from traditional knowledge. It gives the community exclusive use rights over their traditional knowledge, and allows the owners of such knowledge to enter into agreements with others. With regard to traditional medicine and traditional medicinal knowledge, one area in which this may be manifested is negotiation and execution of use agreements between traditional medical practitioners and their counterparts in the conventional medicine system, or even the government and other non-governmental actors such as pharmaceutical companies. Under the Act, the following acts are prohibited, and penalties prescribed for infraction: 1) The derogatory treatment of traditional knowledge and their holders 2) Misappropriation, misuse, abuse, as well as unfair, inequitable or unlawful access and exploitation (use) of traditional knowledge and cultural expressions 3) The use of traditional knowledge without the prior informed consent of its owners. For infractions, the Act imposes punishment of imprisonment ranging from 5 to 10 years; and fines of up to Kenya Shillings One Million (Approximately 10,000 US Dollars). The next part is the conclusion and recommendations section that summarizes the theme and major findings of this study, and recommends certain institutional and legislative reforms.

5. Conclusion and Recommendations

5.1. Conclusion

Commentators have in previous reports and studies over the years either reported that Kenya had no policies, institutional arrangements, and legislative framework on traditional medicine, or that there was a glaring disconnect among these three aspects of Kenya's traditional medicine regulatory regime. Years later, a study that this author undertook for this paper, arrived at a remarkably different finding. That far from that, Kenya indeed has an avalanche of policies, institutional arrangements and legislative framework on traditional medicine. This new finding can be attributed largely to effluxion of time, that has led to marked developments in Kenya's policy-making and legislation- with new policies having been made, and new legislation having been promulgated, and some of the then existing legislation having been amended. The earlier situation, and which has as already stated changed, was perhaps attributable to the nascent stage of tradition medicine policy and legislation at the time. The latter developments and the present situation are plausible, given that traditional medicine is a crucial and integral part of the country's health care system, with over two thirds of the population (mainly in the rural and peri-urban areas) relying on it for their health care needs.

The study has further established however, that Kenya's regulatory regime (i.e its policies, institutional arrangements and legislation) fragmented and scattered over several sectors and line ministries and touching on one or other aspect of traditional medicine. Further that although their operation can in a way still promote or impact positively on traditional medicine, they are bedeviled by lack of coordination and harmonization. This fragmented, disjointedness, lack of coordination and lack harmonization is undesirable, because given the inter-disciplinarity and inter-sectoriality of traditional medicine, inter-sectorial co-operation is required. Notably, that undesirable state of affairs compounded by the fact that Kenya lacks a specific institution and a specific legislation exclusively devoted to traditional medicine. Which anomalous state of affairs has curtailed and clawed back on the adequacy and sufficiency of the existing regulatory regime and impacted negatively on its effectiveness in the protection, promotion and development of traditional medicine in the country. To attenuate this anomaly, there is urgent need for the Kenya Government to undertake the reforms discussed in the part below.

5.2. Recommendations

To streamline Kenya's regulatory regime (policy framework, institutional arrangements and legislation) on traditional medicine and enable this system of medicine meaningfully play role in the country's health care, this paper recommends three actions that the Kenya Government should take, namely: (a) Establish an inter-ministerial committee to coordinate the traditional medicine agenda among the relevant ministries, (b) Enact, through Parliament, a framework legislation (Act of Parliament) to coordinate specific Act exclusively on traditional medicine, (c) Amend the existing related pieces of legislation that touch on traditional medicine, to create harmony

between them and also align them with the proposed framework legislation (Act of Parliament) so as to manage and coordinate matters and actions relating to traditional medicine.

(a) Establish an Inter-Ministerial Committee on Traditional Medicine

Traditional medicine transcends several disciplines and sectors. This inter-disciplinarity and inter-sectoriality begs for a framework coordinating legislation that retains the existing fragmented pieces of legislation, while creating a new legislative statute to co-ordinate and create harmony among the respective sectoral pieces of legislation to streamline the provisions that relate to traditional medicine to avoid both intra-legislation and inter-legislation conflicts. This inter-disciplinarity and inter-sectoriality of has engendered the need for coordination and harmonization, to co-ordinate and harmonize efforts by actors in the various respective sectors and line ministries; in order to avoid conflict and duplication of efforts, as well as inaction, and ensure collective and concerted action by all. With this approach the respective ministerial actors will play complementary roles and avoid taking contradicting positions or actions on issues or agendas that are cognate to traditional medicine. This is because where there are overlapping responsibilities there is likely to be inaction as one ministry expects/looks to the other to take action. This author recommends that for that inter-disciplinary and inter-sectoral approach to work well, the Kenya Government needs to establish an inter-ministerial committee on traditional medicine, whose mandate will be: (a) To ensure co-operation between relevant ministries on matters relating to traditional medicine, (b) To co-ordinate traditional medicine efforts and actions among the respective cognate ministries. (c) To deal with cognate matters and issues with regard to traditional medicine, (d) To harmonize traditional medicine actions, efforts, and agenda within the cognate ministries.

This committee can be coded **"The Inter-Ministerial Committee on Traditional Medicine"** (IMCM), and will be a forum for coordinating and harmonizing traditional medicine actions and agenda within participating ministries. The Committee can draw membership from the following ministries in Kenya's Cabinet structure: (a) Ministry of Health (b) Ministry of Sports, Culture and heritage (c) Ministry of Environment and Forestry (d) Ministry of Tourism & Wildlife (e) Ministry of Devolution (f) Ministry of Sports and Gender (g) Ministry of Interior and Coordination of National Government, and (h) Ministry of National Treasury and Planning.

(b) Enact a Specific Act Exclusively on Traditional Medicine

There is need for Kenya's Parliament to enact a specific statute (an Act of Parliament) on traditional medicine. The need for such a specific or specialized new enactment is that with almost two-thirds of the Kenya's population (especially in the rural and peri-urban areas) relying on traditional medicine for their health care needs, traditional medicine is an integral and invaluable component of Kenya's health care system. The Kenya Government needs to accord it more attention than it has accorded it so far. There is need for the government to mainstream traditional medicine in its the Universal Health Coverage (UHC) programme currently being undertaken. Infact given its relative affordability and accessibility compared with allopathic health care (Banquar, 1995; Githae, 1995), this genre of medicine squarely fits in the UHC objectives and agenda, pretty much like hand in glove. This has made it an important and critical health care system, that if Kenya leaves unsupported or unregulated, may have undesirable and even catastrophic consequences for the population's health as well as the country's health care at large. This awareness together with the infirmities that this author has in this paper identified in Kenya's legislative framework, provides ample justification for enactment of a new statute as proposed above.

Such a legislation could either be a comprehensive statute exclusively on traditional medicine, or as proposed in this paper, a framework statute (framework legislation) to manage and co-ordinate efforts on matters related to traditional medicine. If a comprehensive (composite) statute it can be named "The Traditional Medicine Act". If a framework legislation it can be named *"The Traditional Medicine Coordination Act"*. This author has in recently published journal paper configured it as a framework legislation and extensively set out a preferred structure for it (See Sifuna, 2022). Admittedly, the inter-disciplinarity and inter-sectoriality of traditional medicine begs for such a framework coordinating legislation that retains the existing fragmented pieces of legislation, while creating a new legislative regime to co-ordinate and create harmony among the respective sectoral pieces of legislation to streamline the provisions that relate to traditional medicine. This is intended to avoid both intra-legislation and

inter-legislation conflicts as the ones existing in the current legislative outlay. The author posits that the name and structure of such legislation may be the subject of further debate and research, now hence.

(c) Amend the Existing Cognate Pieces of Legislation, to Align them with the Said New Legislation

In order to ensure efficacy, sanity and order, the author recommends that upon the enactment of the aforesaid new legislation, the existing traditional medicine-related pieces of legislation already discussed in this paper (The Health Act of 2017, The Public Health Act, The Pharmacy and Poisons Act, The Protection of Traditional Knowledge and Cultural Expressions Act of 2016, The Industrial Property Act of 2001, and The Witchcraft Act) be amended to include provisions on traditional medicine and traditional medicines. This is because traditional medicine as already observed in this paper is inter-disciplinary and inter-sectoral in character, hence can neither be divorced nor isolated from the cognate sectors and line ministries aforesaid, as these others have each the pool of experts and expertise in the respective sector.

Declaration on Conflicts of Interest

The author declares that there is no conflict of interest regarding the publication of this paper. Further, the research leading to it was his individual scholarly enterprise devoid of any economic gain or prospect thereof, and was not funded by any organization, institution or entity.

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Execution of Fiduciary Guarantee by Auction Way

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Abstract
The execution of fiduciary guarantee objects in the event of a debtor in default can be carried out in several ways, one of which is by auction. This study aims to determine and analyze the implementation of the auction in the execution of fiduciary guarantee objects and legal protection for the parties. This study uses the socio-legal method with library research to obtain secondary data related to auctions and field research to obtain primary data with the implementation and legal protection of the parties in the auction of fiduciary guarantees. The concepts and theories used are the concept of auction, fiduciary guarantee, execution, legal protection. The results of the study indicate that the auction of fiduciary guarantee objects is used by creditors in the event that the debtor is in default. Legal protection for the parties is carried out both preventively and repressively.

Keywords: Auction, Fiduciary Guarantee, Execution, Legal Protection

1. Introduction

In various human activities almost always need funds. These funds are needed for productive and consumptive activities. The funds were obtained internally and externally. Funds obtained externally are from other parties, one of which is through loans. In this case, the legal relationship between the parties is based on a loan agreement. In the loan agreement the creditor has a high risk. In financing the collateral becomes a very decisive factor (Fan & Yao, 2017). Therefore the guarantee is very important in the agreement (Calomiris et al., 2017). One of the steps to secure creditors' receivables is to require collateral.(Rona-Tas & Guseva, 2013) Guarantee is an accesoir agreement, which is an additional agreement that is agreed to back up the certainty of counter-achievement that was agreed upon in the main agreement. Because the guarantee is dwingen recht, the guarantee law that regulates the main points of the accessoir agreement must be able to provide certainty for the realization of the counter-achievement (Heriawanto, 2019).

One of the guarantees that are widely used in people's lives is fiduciary guarantees.(Paparang, 2014) "Fiducia is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object" (Article 1 point 1 of Law No. 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Guarantee Law).

Article 1 number 2 of the Fiduciary Guarantee Law states that:

Fiduciary security is a security right on movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law no. 4 of 1999 concerning Mortgage which remains in the control of the Fiduciary Giver, as collateral for the repayment of the debt, which gives priority to the Fiduciary Recipient over other creditors."

From the above understanding, it can be seen that the fiduciary guarantee is a guarantee right. Therefore, its function is to ensure the security of creditors' receivables. Fiduciary guarantees provide great benefits for the parties. For creditors, fiduciary guarantees can guarantee the security of their receivables. For debtors, with fiduciary guarantees, they can obtain funds from financial institutions while retaining control of the collateral object. Thus the object can still be used for daily purposes (Badriyah, 2015).

One of the main characteristics of fiduciary guarantees is the ease and certainty of their execution. This is because the fiduciary guarantee is collateral. In the event that the debtor defaults, the creditor can sell the object of the fiduciary guarantee without filing a lawsuit to the court. In Article 29 Paragraph (1) of the Fiduciary Guarantee Law it is stated that "If the debtor or Fiduciary Provider is in breach of contract, the execution of the Fiduciary Guarantee object can be carried out by: a. implementation of the executorial title contained in the Fiduciary Guarantee Certificate. b. the sale of the object of the Fiduciary Guarantee under the authority of the Fiduciary Recipient through a public auction as well as taking the settlement of his receivables from the proceeds of the sale; c. underhand sales made based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained that benefits the parties."

The first and second methods are carried out by auction, while the third method is carried out by selling under the hand. Thus, the auction of the object of a fiduciary guarantee can be carried out in the event that the debtor is in default. In Article 1 Number 1 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 213/PMK.06/2020 concerning Instructions for Implementation of Auctions, it is stated that "An auction is a sale of goods that are open to the public with a written and/or verbal price offer that is increasing or decreasing to reach a price. highest, preceded by the Announcement of the Auction." In the auction as an effort to execute fiduciary guarantees in the event that the debtor defaults, there is a risk for the auction winner. Legal protection is needed for the parties, one of which is the auction winner.

2. Research Problem

Based on the description above, in this study several issues were raised as follows:
1. Why is the object of fiduciary guarantee executed through an auction?
2. How is the legal protection for the winner of the fiduciary guarantee execution auction?

3. Material and Method

3.1. Material

There are two kinds of guarantees, namely general guarantees and special guarantees (Articles 1131 and 1132 of the Civil Code). Special guarantees consist of personal guarantees and material guarantees. Fiduciary guarantee is one of the material guarantees.(Suharto et al., 2020)

From the understanding contained in Article 1 of the Fiduciary Guarantee Act, it can be seen that there are several elements contained in the fiduciary guarantee, namely as follows:
1. Fiduciary guarantee is a guarantee right.
2. In a fiduciary guarantee, there is a constitutum possessorium surrender, namely submission by continuing to control the object
3. Fiduciary guarantees are based on the principle of trust
4. In a fiduciary guarantee, there is a transfer of ownership rights to objects from the fiduciary giver to the fiduciary recipient
5. Fiduciary guarantees give priority to creditors.

As collateral, if the debtor defaults, the creditor can execute the object of the fiduciary guarantee. One of them is by auction. As mentioned in the introduction, the sale of fiduciary guarantee objects is regulated in Article 29 of the Fiduciary Guarantee Law. One way to execute the object of a fiduciary guarantee is by auction. Auctions are carried out in the sale of fiduciary guarantee objects based on the executorial title that exists in fiduciary guarantees as well as sales of fiduciary guarantee objects based on the power of the fiduciary recipient to sell fiduciary guarantee objects.

In the context of executing the Fiduciary Guarantee, the Fiduciary Giver is obliged to submit the object which is the object of the Fiduciary Guarantee (Article 30 of the Fiduciary Guarantee Law).

The Fiduciary Guarantee Execution Auction is one of the execution auctions as referred to in Article 3 letter I of the Regulation of the Minister of Finance concerning Auction Implementation Guidelines.

4. Research Method

The research method used is socio legal. In this case, literature research and field research will be carried out to find out and analyze the execution of fiduciary guarantees through auctions as well as legal protection for buyers of fiduciary guarantee objects in execution through auctions. Literature research was conducted to obtain secondary data using literature study techniques. Field research was conducted to obtain primary data. Interviews were conducted with informants, namely the Ministry of Law and Human Rights and the National Legal Development Agency. Data testing is done by triangulation technique.

5. Discussion

5.1. Background Execution of Fiduciary Guarantee Objects by Auction

In a loan agreement to obtain funds from other parties, it will lead to an agreement between the borrower and the party lending the funds. In this engagement, the debtor must repay the loan in accordance with the agreement. If the agreement is carried out as agreed, it will not cause problems for the parties. Conversely, if the debtor does not carry out his obligations, it will cause problems. In the event that the borrower's obligations are not fulfilled, a default will occur.

In order for creditors' receivables to be safe, creditors generally need collateral. Collateral can prevent a high risk of default on the borrower (Zhang et al., 2022). Article 1131 of the Civil Code states that "all debtor assets become collateral for all debtor engagements to creditors." From these provisions, it can be seen that all debtor engagements are guaranteed by general guarantees, namely all property belonging to the debtor. In this case, the creditor's position as a concurrent creditor, so that he does not get legal protection. Therefore, creditors usually ask for special guarantees. One of them is collateral in the form of fiduciary guarantees. The position of the creditor in this case is the preferred creditor. In Article 1132 of the Civil Code it is stated that "all property belonging to the debtor as stated in Article 1131 of the Civil Code is a mutual guarantee for creditors and the distribution is balanced according to the size of their respective receivables, unless there is a reason to prioritize one receivable over another.

In an agreement guaranteed by a fiduciary guarantee, if the debtor defaults, then the creditor does not need to file a lawsuit to the court, but can sell the object of the guarantee. In the event that there is a fiduciary guarantee, the creditor's position is also different, not as a concurrent creditor but as a preferred creditor (Achmad Yusuf Sutarjo, 2018).

As a consequence of the existence of collateral, if the debtor defaults, the creditor can sell the object of the guarantee. Likewise, in an agreement that is guaranteed by a fiduciary guarantee, in the event of a debtor's default, the creditor can sell the object of the fiduciary guarantee to pay off the creditor's receivables.

Based on Article 29 of the Fiduciary Guarantee Law, the sale of the object of the Fiduciary Guarantee can be carried out in the following ways:
a. execution of the executorial title by the Fiduciary Recipient;
b. sale of Objects that become the object of Fiduciary Guarantee on the authority of the Fiduciary Recipient himself through a public auction and take the settlement of his receivables from the proceeds of the sale;
c. underhand sales made based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained that benefits the parties.

Thus, the sale of the object of a fiduciary guarantee in the event the debtor is in default can be carried out by auction or by selling under the hands. The execution of the fiduciary guarantee is based on the executorial title as well as on the authority of the fiduciary recipient to sell the object of the fiduciary guarantee if the debtor defaults through an auction.

The results of the study indicate that the default settlement process carried out by financial institutions generally uses several methods, namely through: 1) a direct approach; 2) Giving warning letters; 3) Novation; and 4) confiscation and auction of collateral objects (Fajri, 2021). Execution of the object of fiduciary security through auction is usually carried out as the last alternative for settlement of default after other efforts have failed.

5.2. Legal Protection for Buyers of Fiduciary Guarantee Objects in Execution by Auction

The Bidder who has been ratified as a Buyer is fully responsible for the settlement of the obligation to pay the auction and other official fees based on the laws and regulations, even though in the bidding he acts as the proxy of a person, company, or legal entity/business entity. The buyer who does not fulfill the obligation to pay the auction in accordance with the provisions/default, then on the next working day his ratification as a Buyer is canceled in writing by the Auction Officer, without regard to the provisions as referred to in Article 1266 and Article 1267 of the Civil Code and can be sued for compensation by the Seller.

The buyer is not allowed to take the goods he bought before fulfilling the auction payment obligations. If the Buyer violates this provision, it is considered to have committed a crime that can be prosecuted by the authorities. The goods that have been sold at this auction are the rights and responsibilities of the Buyer and must immediately take care of the goods. The buyer will be given a Minutes of Auction Quotation for the purpose of renaming after showing a receipt for payment of auction payment.

The legal protection of the buyer of the object of the fiduciary guarantee in the context of carrying out the execution is carried out in a preventive or repressive manner. Preventively, by arranging the auction of the execution of fiduciary guarantees in the event that the debtor defaults, namely in Articles 29-34 of the Fiduciary Guarantee Law as well as in the regulation of the Minister of Finance regarding Auction Implementation Guidelines.

Article 29 of the Fiduciary Guarantee Law gives the fiduciary recipient the right to execute the fiduciary guarantee if the debtor defaults. One way is by auction. Furthermore, in Article 30 of the Fiduciary Guarantee Law, it is expressly stated that "in the context of carrying out the execution of fiduciary guarantees, the fiduciary giver is obliged to submit the object of the fiduciary guarantee." If the fiduciary provider does not want to submit voluntarily, the creditor can ask for help from the authorities. This is because the object of the fiduciary guarantee is in the control of the fiduciary giver. By submitting the object of the fiduciary guarantee in the execution, the buyer of the object of the fiduciary guarantee object will obtain legal protection.

Article 31 of the Fiduciary Guarantee Law states that "In the event that the object that is the object of the Fiduciary Guarantee consists of trading objects or securities that can be sold on the market or on the stock exchange, the sale can be made at those places in accordance with the applicable laws and regulations." Furthermore, in Article 32 of the Fiduciary Guarantee Law it is stated that "Any promise to carry out the execution of the object that is the object of the Fiduciary Guarantee in a manner that is contrary to the provisions as referred to in Article 29 and Article 31, is null and void by law." Article 33 Any promise that authorizes the

Fiduciary Giver to own the object which is the object of the Fiduciary Guarantee if the debtor is in breach of contract, is null and void by law. This is to provide legal protection to the fiduciary giver, because there is a possibility that the value of the object of the fiduciary guarantee object is much higher than the debtor's debt. In this regard, Article 34 Paragraph (1) of the Fiduciary Guarantee Law states that "In the event that the result of the execution exceeds the value of the guarantee, the Fiduciary Recipient is obliged to return the excess to the Fiduciary Giver." On the other hand, to protect fiduciary creditors, Article 34 Paragraph (2) stipulates that "If the results of the execution are not sufficient to pay off the debt, the debtor is still responsible for the outstanding debt." In this case, even though the debt has not been paid off, with the execution of the fiduciary guarantee, the fiduciary guarantee has ended. This is a form of legal protection for buyers of fiduciary guarantee objects through the execution of fiduciary guarantees. One of the executions is through the auction of fiduciary guarantee objects.

Repressive legal protection is legal protection against risks that arise after the auction, auction buyers can take legal action against verzet, deden verzet and file a claim for compensation for the auction buyer to the seller or creditor to the Court.

6. Conclusion

1. The execution of the object of fiduciary security through auction is carried out in the event that the debtor is in default. This auction is carried out in terms of the execution of the fiduciary guarantee object by basing the executorial title on the fiduciary guarantee certificate or based on the power of the fiduciary recipient to sell the fiduciary guarantee object.
2. There are two kinds of legal protection for buyers of fiduciary guarantee objects in the execution of fiduciary guarantees, namely preventive and repressive legal protection.

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Implementation of Restorative Justice in Criminal Cases in Indonesia

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Abstract
Restorative justice has received attention in settlement of criminal cases in Indonesia. The settlement of cases in restorative justice has not been regulated in the Criminal Code and the Criminal Procedure Code. This concept is only regulated through regulations set by law enforcement agencies in the criminal justice system. The question of this research is how to implement restorative justice in solving cases in Indonesia? What is the model of restorative justice in the regulations and applied to customary law communities in Indonesia? This research is a doctrinal or normative legal research method. Restorative justice has been implemented in indigenous peoples in various parts of Indonesia, such as the Balinese indigenous peoples, the Bajawa indigenous peoples, Flores East Nusa Tenggara, the Lampung indigenous peoples and the Karo Batak indigenous peoples. The model of restorative justice that the Indonesian people have practiced is known as the Safeguard System. A model designed to handle case resolution through a restorative approach. Communities have various restoration programs as the primary means of dealing with various problems. The concept of restorative justice, applied in investigation, prosecution and court, adheres to a dual-track system model. This model is an alternative companion to the criminal justice system. The conflicting parties will be given the freedom to choose how to settle criminal cases. If the efforts through the restorative approach are successful, the settlement through the criminal justice system will be abolished.

Keywords: Restorative Justice and Criminal Cases

1. Introduction

Restorative justice has received attention in settlement of criminal cases in Indonesia. The concept of case settlement in restorative justice has not been regulated in the Criminal Code and the Criminal Procedure Code. The concept of restorative justice has been regulated in Law Number 11 of 2012 concerning the Criminal Justice System against children. This law has implications for the settlement of children's cases with a peace agreement from the parties, namely the perpetrators, victims and the community. Regulations on restorative justice for ordinary crimes have begun to be accommodated at the level of investigation, prosecution, and court regulations in the criminal justice system.

Restorative justice at the investigation level is regulated through the Letter of the Chief of the Indonesian National Police Number.pol.B/3022/XII/2009/SDEops, dated 4 December 2009 regarding Case Handling Through Alternative Dispute Resolution (A.D.R.). Then it was followed up through the Letter of the Head of the Criminal

Investigation Agency of the Republic of Indonesia Number. ST110/V/2011 dated 11 May 2011 concerning Guidelines for the Implementation of Alternative Dispute Resolutions in the Criminal Investigation Division of the Indonesian National Police. Furthermore, the Letter of the Head of the Criminal Investigation Agency Number. STR/583/VIII/2012 dated 12 August 2012 concerning the Concept of Restorative Justice and Circular Letter SE/8/VII/2018 dated 27 July 2018 concerning the Application of Restorative Justice in settlement of Criminal Cases. In 2019, the National Police of the Republic of Indonesia stipulated Regulation of the Chief of the Indonesian National Police (P.E.R.K.A.P.) No. 6 of 2019 concerning Criminal Investigations, which regulates restorative justice (Poeloengan, 2021).

Regulation on restorative justice at the prosecution level through the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on restorative justice. While at the court level through the Decree, the Supreme Court Director-General of the Republic of Indonesia Np.1691/D.J.U./PK.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice.

2. Problem Statement

Although there have been provisions for the concept of restorative justice for ordinary crimes, not all crimes can be resolved with restorative justice. The research results from the Indonesian Central Statistics Agency show the high number of criminal case settlements in the 33 Regional Police in Indonesia, in 2017 of 62.99%, in 2018, of 64.94% and 2019 an increase of 68.17%. (https://www.bps.go.id, 2021) Pujiyono, (2019) in his professorship inauguration speech, proposed to find a model of settlement with restorative justice in the criminal justice system in Indonesia. Based on the description above, the problems in this research are; How is the implementation of restorative justice in solving cases in Indonesia? Furthermore, what is the model of restorative justice that is in the regulations and applied to indigenous peoples in Indonesia?

3. Research Objectives

The object of the study is the legal reality in the form of Regulation of the Chief of Police of the Republic of Indonesia Number .6 of 2019 concerning Criminal Investigation and Regulation of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and Decree of the Director-General of the Supreme Court of the Republic of Indonesia Np.1691/DJU/ PK.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice.

4. Literature Review

Braithwait (2002) argues that the concept of justice has developed and been practised in the traditions of ancient Arab, Greek, and Roman civilizations that accept a restorative approach to solving problems even to the crime of murder. The term used is not restorative justice but if this concept has been put into practice. The history of civilization also shows that a restorative approach was also practiced by Indian Hinduism and the Buddhist, Taoist and Confucian traditions that North Asia influenced. The famous motto is "he who atones is forgiven." It means he who redeems is forgiven. (Braithwait, 2002).

Albert Eglash is a psychologist who first initiated restorative justice in 1977 (James Dignan, 2005). Eglash argues, there are three (3) categories of the criminal justice system. The first is concerned with "retributive justice," in which the primary emphasis is on punishing offenders for what they have done. The second relates to what he called "distributive justice," in which the primary emphasis is on the rehabilitation of the offender. The third is concerned with "restorative justice," which he broadly equals with the principle of restitution (James Dignan, 2005). If interpreted, the main emphasis of "retributive justice" is to punish the perpetrators for what they have done. The main emphasis of "distributive justice" is on the rehabilitation of perpetrators. Whereas "restorative justice" is broadly equated with the principle of restitution.

Joshua Drassler (2002) emphasized that restorative justice emphasizes the importance of the role of crime victims and community members, holding offenders directly accountable to the people they have violated. Restoring victims' emotional and material losses and providing a range of opportunities for dialogue, negotiation, and problem-solving can lead to a greater sense of community safety, conflict resolution, and closure for all involved (Joshua Drassler, 2002). Dressler's concept of restorative justice is the importance of the role of victims and community members to encourage perpetrators to be responsible to victims, restore emotional and material losses to victims, encourage dialogue or negotiations to resolve problems that have occurred to save communities from prolonged conflicts.

The concept of restorative justice is in line with Braithwaite's reintegrative Shaming proposed by the idea that reintegrative Shaming is that disapproval is communicated within a continuum of respect for the offender. A fundamental way to show respect is to be fair, listen, empower others with process control, and refrain from bias based on age, sex, or race. More broadly, procedural justice communicates respect (John Braithwaite, 2002). Reintegrative Shaming can be interpreted as disapproval or rejection, which is then communicated with full respect to the perpetrator for the violation he has committed. The key to showing respect is fairness, listening, empowering others by monitoring the process and refraining from age, gender or race bias. More broadly, procedural fairness is communicating respect.

Howard Zehr, known as the architect of the development of restorative justice, stated that restorative justice is a process to involve the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible (Muladi and Sulistyani, 2010). Restorative justice is a process to involve, as far as possible, those who have an interest in a particular offense and to identify and address the harm collectively, need, and liability, to heal and put things in the best possible way.

Merkel Meadow (2007) stated that restorative justice is the name given to various practices, including apologies, restitution, and acknowledgments of harm and injury and other efforts to heal and reintegrate offenders into their communities, with or without additional punishments. Restorative justice usually involves direct communication, often with a facilitator of victims and offenders, often some or complete representation of the relevant affected community (Meadow, 2007). Restorative justice is a concept practiced in many different ways, including apologies, restitution and confession of guilt, and efforts to heal and reintegrate perpetrators into society again with or without additional punishment. Restorative justice usually involves direct parties in the community with facilitators, victims, perpetrators and some representatives of the community or society as a whole affected.

5. Methodology

This scientific paper is doctrinal legal research, which conceptualizes law as a norm with a scope, ius constituendum, ius continuum and judge-made law (Wignyosoebroto, 2002; Suteki, 2017). This legal research is descriptive-analytical, which uses secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials, as binding legal materials, consist of regulations regarding restorative justice established by law enforcement agencies. Secondary legal materials consist of textbooks, expert opinions, research results, and seminar results. At the same time, tertiary legal materials are legal materials that support primary and secondary legal materials, including print media, online media, encyclopedias and other tertiary legal materials. All data are collected, processed, and then analyzed qualitatively to find hidden meanings behind the object to be studied.

6. Data Analysis

The list of criminal acts in 2017-2021 successfully pursued by restorative justice in the Police, Prosecutors and Courts is shown in the following table.

No	Origin of the case	Number of Cases	Types of criminal acts or laws violated	Restorative Justice Settlement
1	Gorontalo High Court	4 cases	Violation of Article 80 paragraph (1), Article 82 paragraph (1) of the Child Protection Act, Article 170 paragraph (1) of the 2nd Criminal Code, and Article 351 paragraph (1) of the Criminal Code	Two (2) cases were successfully diverted at the investigation level, 1 case was successfully diverted at the court level, and 1 case was S.K.P.P.
2	Lebak State Prosecutor	1 case	Article 80 paragraph (1) of the Child Protection Act	Successfully resolved with restorative justice
3	Bangka Belitung High Court	9 cases	Traffic accidents, criminal acts of abuse, criminal acts of child abuse, unpleasant acts and fiduciary crimes	Successfully resolved the case with restorative justice at the District Attorney's level
4	Manokwari State Prosecutor	1 case	The crime of theft in the family	Successfully resolved the case with restorative justice at the District Attorney's level
5	Dairi District Attorney, North Sumatra	1 case	The crime of defamation	Successfully resolved the case with restorative justice at the District Attorney's level .

The author from tertiary legal materials processes the data source.

The table above shows the application of restorative justice at the level of investigation, prosecution and court examination. This study found 16 (sixteen) criminal acts, both criminal acts by child perpetrators with child victims and ordinary crimes in which the perpetrators were adults with children as victims and adults. Based on this number, there are 2 (two) criminal acts that have been successfully implemented by restorative justice at the investigation level. A total of 13 (thirteen) criminal acts have been successfully implemented by restorative justice at the prosecution level. Meanwhile, 1 (one) criminal act was successfully implemented by restorative justice at the court level.

Restorative justice is applied to several criminal acts regulated in the Criminal Code and the Child Protection Act. The types of criminal acts consist of; the crime of theft in the family, the crime of defamation, the crime of traffic accidents, the crime of ordinary molestation, the crime of torture resulting in serious injuries, the crime of violence against children and the crime of molestation against children.

7. Discussion and Conclusion

7.1. Implementation of Restorative Justice in Case Resolution in Indonesia

Restorative justice has been applied to resolve the problem of a brawl between two (2) Vocational High Schools in Tasikmalaya. The mechanism for resolving problems is through the Deliberation and Peace Forum by the Al Fatah Islamic Boarding School and the Islamic Boarding School Silahturahmi Forum based on the principles of Islam taught in Islam (2006). The concept of restorative justice is not a new right in the history of the Indonesian nation. This concept has long been practised through the application of customary law. Its application is to solve problems in society so that harmony and balance are maintained in society. In the indigenous Bajawa community, Flores, East Nusa Tenggara, it has long been known that settlement through an institution called “Babho" (Djawa, 2003; Wangga, 2016). This institution has roles such as the police, prosecutors, and judges in resolving criminal and non-criminal cases, whether the perpetrators are children or adults (Djawa, 2003). The vision promoted by this institution is peace, nurturing, impartiality, embracing all community members, and solving problems thoroughly (Djawa, 2003).

The implementation of restorative justice is also seen in the traditional Balinese community in resolving disputes between residents outside of criminal justice, both between residents (krama) of one Banjar or between different Banjar krama (Natangsa Surbakti. 2012). The concept of restorative justice is also applied in the Lampung Menggala community. The mechanism for resolving disputes among community members is known as the "inherited" customary institution. This institution adheres to a comprehensive settlement scheme for a dispute marked by the agreement of the two disputing parties to forgive each other, forgetting past disputes, make repairs for the losses incurred and the agreement of both parties to acknowledge and consider both parties as brothers (Natangsa Surbakti. 2012).

The Karo Batak community, Langkat Regency, North Sumatra, also has a dispute resolution institution known as "*purpur sage*" (Natangsa Surbakti. 2012). The mechanism for resolving disputes between fellow citizens occurs in a special ceremony accompanied by relatives of each disputing party. An apology marks *Purpur Sage*, a statement of regret and a pledge to improve oneself and not repeat the disgraceful act of the party who has committed the offence. *Purpur Sage* will be achieved when the parties have agreed, reconciled and considered the dispute resolved. The main essence of *Purpur sage* is repairing the damage (restoration) and the realization of the restoration of relations between the two parties (Natangsa Surbakti. 2012).

7.2. Restorative Justice Models in Indonesian Regulations

Various communities in Indonesia have applied restorative justice that has been described in the previous section. In its development, law enforcement agencies in Indonesia began to regulate restorative justice at the stage of Investigation, Public Prosecutors and Courts. Restorative justice at the investigation level is regulated through the Chief of the Indonesian National Police Number 6 of 2019 concerning Criminal Investigations. This regulation regulates several materials and formal requirements to apply restorative justice at the investigation and investigation level. The material requirements consist of; does not cause public unrest, does not result in social conflict, there is a statement from all parties involved to object and relinquish the right to demand it and has a limiting principle.[1]While the formal requirements include; a letter of request for reconciliation by both parties (the reporting party and the reported party), a statement of reconciliation (*akte dading*) and the settlement of disputes between the litigants (the reporting party and the reporting party's family, the reported party and the reported family and representatives of community leaders) are known to the investigator's superiors. Other requirements are minutes of additional examination of the litigating parties, after the settlement of the case through restorative justice, recommendation of a particular case title that approves the completion of restorative justice and the perpetrator does not object and is carried out voluntarily responsibility and compensation.

The concept of restorative justice at the prosecution level is regulated through the Chief of the Indonesian National Police Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.[2]This regulation regulates several considerations that should be considered in terminating prosecutions based on restorative justice, namely; subject, object, category and threat of crime, the background of the crime, level of disgrace, loss or consequences arising from the crime, costs and benefits of handling cases, restoration to its original state and peace between the victim and the suspect. The conditions that must be met so that criminal cases[3]can be closed for the sake of law and have their prosecution terminated based on restorative justice are; the suspect has committed a crime for the first time, the crime is only threatened with a fine or is threatened with imprisonment of not more than 5 (five) years, the crime is committed with the value of the evidence or the value of the loss caused as a result of the crime not more than Rp2. 500,000, - (five million five hundred rupiah), there has been a restoration to its

[1]The limiting principle consists of; a) on the perpetrator, namely the level of error of the perpetrator is relatively light, namely the error in the form of intentional and the perpetrator is not a recidivist; b) on criminal acts in progress; investigation and investigation before the order for the start of the investigation is sent to the public prosecutor.
[2]Termination of prosecution based on restorative justice is carried out by considering several things, including; the interests of victims and other protected legal interests, avoidance of negative stigma, avoidance of retaliation, response and community harmony and obedience, decency and public order.
[3]For criminal acts related to property, it is necessary to have criteria or circumstances that are casuistic according to the considerations of the public prosecutor with the approval of the Head of the District Prosecutor's Office for restorative justice to be carried out. Meanwhile, criminal acts committed against persons, bodies, lives, and independence and crimes committed due to negligence are excluded from restorative justice.

original state carried out by the suspect employing[4]A peace agreement between the victim and the suspect and the community responds positively. Some criminal cases that cannot be carried out by restorative justice are criminal acts against state security, the dignity of the President and Vice President, friendly countries, heads of friendly countries and their representatives, public order and morality. Besides that, the criminal case acts threatened with a minimum criminal threat, narcotics crimes, environmental crimes and crimes committed by corporations are also covered. If the victim and the suspect reject the peace effort through restorative justice, the public prosecutor will do that, namely, including in the minutes of the non-achievement of peace efforts, make a memorandum of opinion that the case is transferred to the court by stating the reasons and submitting the case file to the court.

The court institution stipulates the Decree of the Director-General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Restorative Justice Guidelines. Restorative justice as an alternative for resolving criminal cases which in the mechanism of criminal justice procedures focuses on punishment which is converted into a process of dialogue and mediation involving perpetrators, victims, families of perpetrators/victims and other related parties to create an agreement on the settlement of criminal cases jointly fair and balanced for the victims and perpetrators by prioritizing the restoration to its original state and restoring the pattern of good relations in society. The concept of restorative justice outlined in this guideline is for minor crimes, child crimes, women's crimes, and narcotics cases. During the trial, the judge will seek peace and prioritize restorative justice in his decision.

Observing the concept of restorative justice that has been practised by the Indonesian people even though it is only based on customary law, it is a model of restorative justice which Van Ness calls the Safeguard System (Pujiyono, 2016). A model designed to deal with case resolution through a restorative approach, in which restoration programs are used as the primary means of dealing with various problems. The concept of restorative justice, regulated at investigation, prosecution, and court, adopts a dual-track system model (Pujiyono, 2016). Van Ness explained that the dual-track system is an alternative companion to the criminal justice system. The conflicting parties will be given the freedom to choose how to settle criminal cases. If efforts through a restorative approach are successful, settlement through the criminal justice system will be abolished (Pujiyono, 2016). For the future, so there is a common concept of restorative justice in law enforcement agencies, it is necessary to establish laws and regulations that can apply at the investigation, prosecution and court levels.

8. Conclusion

Restorative justice has received attention in settlement of criminal cases in Indonesia. The settlement of cases in restorative justice has not been regulated in the Criminal Code and the Criminal Procedure Code. This concept is only regulated through regulations set by law enforcement agencies in the criminal justice system. Restorative justice at the investigation level is regulated through the Chief of the Indonesian National Police Number 6 of 2019 concerning Criminal Investigations. The concept of restorative justice at the prosecution level is regulated through the Chief of the Indonesian National Police Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The court institution stipulates the Decree of the Director-General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Restorative Justice Guidelines. Restorative justice has been implemented in indigenous peoples in various parts of Indonesia, such as the Balinese indigenous peoples, the Bajawa indigenous peoples, Flores East Nusa Tenggara, the Lampung indigenous peoples and the Karo Batak indigenous peoples. The model of restorative justice that the Indonesian people have practised is known as the Safeguard System. A model designed to handle case resolution through a restorative approach. Communities have various restoration programs as the primary means of dealing with various problems. The concept of restorative justice, applied in investigation, prosecution and court, adheres to a dual-track system model. This model is an alternative companion to the criminal justice system. The conflicting parties will be given the freedom to choose how to settle criminal cases. If the efforts through the restorative approach are successful, the settlement through the criminal justice system will be abolished

[4]Return the goods obtained from the crime to the victim, replace the victim's loss, replace the costs incurred due to the criminal act, and repair the damage caused by the criminal act.

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Limited Dual Citizenship Age Limit

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Abstract
As a result of mixed marriages, children born based on their parents' descendants (the principle of ius sanguinis), or the nationality obtained based on where a child is born (the principle of ius soli) depends on the principle adopted by each country, giving implications for the existence of children who have dual nationality. This also creates the problem of a limited citizenship age limit for choosing citizenship, causing problems with a child's citizenship status, because the regulations regarding the age limit for children to choose citizenship also differ from one country to another. The research method used is normative juridical. The results showed that to answer to the needs of society, especially for children who have dual citizenship, the ideal age to choose citizenship should be limit to 25 years so that the person concerned has completed his education in higher education so that changes need to be made to the Citizenship Law, especially the article regarding the age limit for dual citizenship.

Keywords: Citizenship, Dual, Limit, Age

1. Introduction

Every child born into the world certainly can never choose which part of the world to be born in or from whose descendants. A child may be born to a mixed marriage or parents of different nationalities who are in fact subject to different laws. The birth event certainly raises the issue of citizenship for the Child, if the child is born in countries that adhere to the *principle of Ius Soli* or *law in soil* which determines the status of citizenship based on the place of birth, then the status of the child becomes a citizen of the State where he was born, while if the child is born to parents who have citizenship status from countries that adhere to *ius sanguinis* or *Law in Blood,* the child's citizenship status follows his parents regardless of the place where he was born.

In the Indonesian context, based on Law Nomr 12 of 2016 concerning Citizenship, it is stated that children from intermarriage are granted Dual Citizenship on a limited basis. The limited Dual Citizenship status adopted in the Citizenship Law is a breakthrough to overcome the problems that arise in mixed marriages and after the breakup of mixed marriages where there are differences in citizenship between parents and children resulting from the marriage. Along with the attachment of Dual Citizenship limited to children resulting from mixed marriages, the child is subject to two jurisdictions of two countries (the citizenship of his parents) (Eka Martiana Wulansari: 2015, p. 1).

After the age of 18 years, the child must declare choosing one of his nationalities no later than 3 (three) years after the child is 18 (eighteen) years old or married. The provision of a 21-year-old age limit to choose citizenship for a child resulting from intermarriage is considered a difficult thing to do, especially for a child whose one of the foreign parents is from an *ius soli-adopting state,* the age limit is also the age at which the child is studying at a college in the country of origin of his foreign parents. Usually, some countries of origin of foreign parents generally get educational scholarships, so it is not possible to choose Indonesian citizens, because they will lose all educational benefits for these children (Ahyar Ari Gayo, 2019, p. 276)

2. Research Method

The research method used is the normative juridical legal research method. The approach used with the statutory approach, the search system used by the *library research* method (Peter Mahmud Marzuki, 2011, p. 15).

The statutory approach is carried out to review regulations related to the legal issues discussed (Eka NAM Sihombing, Cynthia Hadita, 2022, p. 48). So in the issue of the age limit of citizenship if there are still shortcomings in its naming, a legal answer can be found so that it is regulated comprehensively and ideally.

3. Discussion

3.1. Limited Dual Citizenship Age Limit

In principle, the citizenship law is a manifestation of protection provided by the State to realize welfare for all Indonesian citizens. In fact, In Indonesia, adheres to the principle of single citizenship, while the granting of Dual Citizenship to children resulting from intermarriage is limited to the age outlined in the Citizenship Law. Conceptually Dual Citizenship can be interpreted narrowly and broadly. In a narrow society, Dual Citizenship refers to the concept of *dual citizenship (nationality*) on the status of a person who has two nationalities from two different countries. In a broad sense, dual citizenship is expanded not only to be limited to Dual Citizenship, but also more than multiple citizenships (*nationality*) (Supriyadi A Arief, 2020).

Dual Citizenship in general can arise due to the application of the principles of citizenship in terms of mutual birth (*interplay*), between the principle of *ius sanguinis* and *ius soli* or the naturalization of a citizen of one country to another country (Supriyadi A Arief, 2020).

Related to the application of the principles of citizenship several general principles of citizenship should always be embraced in the law of citizenship in various countries. According to Bagir Manan, the general principles of citizenship consist of: (Supriyadi A Arief, 2020).

1. The principle of *ius sanguinis* (*law of the blood*) is the principle that determines a person's nationality based on ancestry, not based on the country of birth.
2. The principle of *ius soli* (*law of the soil*) in a limited way is the principle that determines a person's nationality based on the country of birth, which is applied limited to children by the provisions stipulated in the citizenship law.
3. The principle of limited dual citizenship is the principle that determines dual citizenship for children by the provisions stipulated in the citizenship law.

Currently, in the era of globalization where technology makes a world without borders, it contributes to the increase in intermarriage in the world, including in Indonesia. Although the presence of Law Number 12 of 2006 is a step forward for the citizenship system in Indonesia, the provisions relating to Dual Citizenship are limited, and not spared from criticism. Based on the results of Ahyar Ari Gayo's research, shows that there is a strong

desire from the intermarriage community so that the Dual Citizenship of children resulting from intermarriage can be applied forever (Ahyar Ari Gayo, [1]2019, p. 275) and (Ahmad Jazuli, 2017, p. 100).

This is also in line with the interviews conducted by the author with several perpetrators of intermarriage in the city of Medan (Interview, 2022). The necessity of choosing citizenship for children resulting from intermarriage at the age of 18 years to 21 years raises very complicated administrative problems, especially for children whose parents are from the State who adhere to the principle of *ius soli* which is commonly practiced in States with few citizens. (Supriyadi A Arief, 2020).[1]

In addition to these problems, when the age limit range has to choose citizenship, generally the child is still studying at the college where the foreign parents come from. Some countries provide scholarship facilities for their citizens so that when the child releases citizenship from his foreign parents, he will lose various educational facilities such as scholarships and so on. For this reason, I agree with Ahyar Ari Gayo to be able to consider changing the age limit for dual citizenship, from 18-21 years to 25 years, considering that at that age the child resulting from intermarriage has completed his higher education.

3.2 Dual Citizenship Age Limit between Indonesia, Philippines and Portugal

3.2.1. Philippines

Legal certainty regarding citizenship in the Philippines has been provided for in the Philippine Constitution in *Section 1*: The following are Filipino citizens: Those who were citizens of the Philippines at the time of adoption of this Constitution; Those whose fathers or mothers are Filipino citizens; Those born before January 17, 1973, to a Filipino mother, who chose Filipino citizenship after reaching the age of majority; and Those who are naturalized by the law. Children under the age of 18 may be included as dependents for the application of RA 9225. Requirements: Perform a Checklist of required documents either from the Public Information and Assistance Unit (PIAU) at BI G/F Head Office or from the BI Official Website. Then go to the Notes Section to provide a copy of the document. Submit the documents for pre-screening to the *Central Receiving Unit* (CRU) to process them. Get an Order of Payment Slip (OPS) to increase the required fees. Verify the status of the application and whether it is approved or not. If approved, claim a Certificate of Retention/Requisition of Filipino Citizenship, Order of Approval, and Oath of Allegiance (Republic of The Philippines, 2022).

Republic of the Philippines Act No. 9225, also known as the Dual Citizenship Act allows a former Filipino to regain or retain his or her Filipino citizenship. Law of the Republic of the Philippines No. 9225 provides that naturally born Filipino citizens who become citizens of other countries do not lose their Filipino citizenship. Former Filipinos only need to apply to regain or retain their Filipino citizenship and take the oath of allegiance. (This includes former Filipinos who, after Republic Act No. 9225 began to acquire the citizenship of another country; in this case, former Filipinos must apply to retain their Filipino citizenship). Let's explore how this is done for a person who is interested in obtaining citizenship by descent. In the Philippines, a person who is eighteen years of age or older, and born to at least one parent who was Filipino at the time of their birth can be recognized as a dual citizen. A person born before January 17, 1973, to a Filipino mother who chose Filipino citizenship when they were eighteen years old is also recognized as a citizen[1] (The Identity Strategist, 2022).

The conditions that can be submitted by the applicant for citizenship are: Original and photocopies of the following documents: Birth Certificate from the Office of National Statistics (NSO)/Philippine Statistical Authority (PSA), Certificate of Foreign Naturalization, or a combination of two documents from the Philippines and one document from the foreign country. The following are acceptable Filipino Documents: Old Filipino Passport Philippine Birth Certificate Id Philippine Marriage Certificate issued by a Philippine Government Agency with your photo, full name, date of birth, and nationality indicated (eg. LTO Driver's License and Postal ID) While the following are acceptable Foreign Documents: Foreign Passport with Explanatory Affidavit for not submitting a Certificate of Naturalization. Completed Dual Citizenship Application Form. A total of Three (3) 2X2 COLOR ID Photos on a WHITE Background without glasses or colored contact lenses were taken within six months of application. The

Consular Officer has the right to request additional documents from the applicant. What are the Requirements for Filipino Derivative Dual Citizenship in 2019? For those applying for inherited dual citizenship, the following documents must be present for each applicant's child under 18 years of age: Child Birth Certificate; Foreign Passport of Child, and Three (3) Photo of 2X2 COLOR ID of Child on WHITE Background without glasses or colored contact lenses took within 6 months of application. It may also be applied to children under 18 years of age born naturally who are eligible for derivative dual citizenship (Renzo Claros, 2022)

Dual citizenship under RA 9225 is reserved for former Filipinos born naturally. As defined by the 1987 Constitution, Filipinos born naturally are People who, at the time of his birth, had at least one Filipino parent People born to a Filipino mother before January 17, 1973, who chose Filipino citizenship after reaching the age of majority (21 years) (Michelle Abad, 2022).

Just like in Indonesia, the Philippines also strengthens the principle of ius sanguinis and there is an equal age limit for choosing dual citizenship of 21 years, even in the Philippines children under 18 years old born naturally who are eligible for dual citizenship derivatives can apply for citizenship. However, this is not the ideal age, because a child does not yet have the maturity of thinking to independently choose citizens who are of their own choice without intervention from the environment, family, etc.

3.2.2. Portugal

The Portuguese Citizenship Act of 1981, accommodates the principle of ius sanguinis (heredity) and limits the practice of ius soli (place of birth) which is the basis for obtaining citizenship. Portugal allows dual citizenship, which means that foreigners can obtain Portuguese citizenship without having to renounce the citizenship of their home country. However, on condition that the country in question also allows dual citizenship. In some cases, the country of origin does not require to renounce citizenship before allowing a child with dual citizenship to choose Portuguese citizenship. The naturalization route can be taken if a person is domiciled for more than 5 years in Portugal. This is down from six years in 2018. Since then, the number of applications for Portuguese citizenship has increased. The government has granted 149,157 citizenships in 2020. Citizenship is an alternative to permanent residence in Portugal. Despite the similarities between the two, Portuguese citizenship comes with additional benefits such as the right to vote in the right to a Portuguese passport, and a citizen card (in Portuguese). However, being a citizen is more difficult, and may have to renounce existing citizenship if the country of origin does not allow dual citizenship (Gary Buswell, 2022).

To become a Portuguese citizen is after staying in Portugal for only 5 years, after which the person will not be required to submit another passport. The possibility of dual citizenship, combined with the speed at which a child of dual nationality is eligible, many prospective citizens have made Portugal a very popular destination for second passport seekers, especially from the US, UK, Canada, and India (James Cave, 2022)

Portugal's nationality is an interesting one, allowing dual citizenship and having a minimum residency requirement where citizens can live anywhere in the world without ever losing their citizenship. Portuguese citizenship also allows a person to have the right to vote and hold the rights of another Portuguese person (Lara Silva, 2022).

Descendants or Births can obtain citizenship in Portuguese if a child: from Portuguese parents born in Portuguese territory, from Portuguese parents born abroad, from Portuguese mothers or fathers born abroad if their birth is registered in the Portuguese civil registry or alternatively if they declare they want to be Portuguese, who were born in portuguese territory to foreign parents if at least one parent was born in Portugal and lived in Portugal at the time of birth, who was born in Portuguese territory to foreign parents if they declared they wanted to be Portuguese and if one parent had lived in Portugal for at least 5 years at the time of birth, born in a Portuguese territory that has no other nationality, born in portuguese territory or abroad to parents who got Portuguese citizenship after the birth of the child, with at least one Portuguese grandparent who is quite familiar with Portuguese, born in Portuguese territory to foreign parents if the child has lived in Portugal for 10 years (Lara Silva, 2022).

Dual Citizenship, except: Portuguese nationals who obtained second citizenship before October 1981 lost their Portuguese citizenship under the previous Citizenship Act #2098, dated July 1959. After the adoption of the new law, such persons may petition for the return of their Portuguese citizenship. Unlike naturalization in Portuguese, citizenship can be obtained after meeting the following requirements: People are at least 21 years old. The person has lived in Portugal for at least six years if it is from a Portuguese-speaking country or for 10 years for a citizen of another country. A person has a working knowledge of the Portuguese language. A person has a good moral character and a civil record. A person has a decent means of support (https://www.multiplecitizenship.com/wscl/ws_PORTUGAL.html).

Just like in Indonesia and the Philippines, the deadline for applying for citizenship status for Portuguese people who have dual citizenship is 21 years, but the difference is that the application of the principle of ius sanguinis in Portugal applies if the child of a foreign parent born in Portugal is domiciled in Portugal for 10 years or if one of the parents of the child born in Portugal is a citizen of Portugal and domiciled in Portugal for 5 years.

4. Conclusion

The current legal dynamics want changes in various provisions of laws and regulations that are considered inconsistent with the legal needs of the people in Indonesia, changes to the limited citizenship age limit that has been determined in Law Number 12 of 2006 concerning Citizenship is a necessity. The Age Limit for Dual Citizenship of 25 years is the ideal age for children from intermarriage to choose their citizenship, at which age the person concerned has completed his education in college. To realize this, it is necessary to make changes to the Citizenship Law, especially the provisions governing the dual Citizenship Age limit. In essence, Indonesian citizens who have dual citizenship who are 18 years old have a time limit of 3 years to be precise until a child with dual nationality is 21 years old to make the choice of citizen he wants, the same age limit as the Philippines and Portugal children with dual nationality can determine their choice when the child has dual nationality is 21 years old, but slightly different practice in the Philippines if a child with dual nationality under the age of 18 who meets the requirements can apply for citizenship, Whereas in Portuguese a child with dual nationality who is under 21 years old but from his birth is domiciled in Portuguese for 10 years can become a Portuguese citizen. From the comparison of age limits to obtain citizenship between Indonesia, the Philippines, and Portugal, it is still necessary to have a more mature age for children with dual nationality to determine for themselves which country will be their choice, ideally the age of 25 years for children with dual nationality to choose their citizenship considering that the child has finished their education in higher education needs to be constructed in each country, in addition, it is also necessary to have a common age limit so that there is no opportunity for children with dual nationality to choose which country first has the opportunity to meet the age limit for them to choose their citizenship

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The Role of the WTO in Making a Trips Agreement as part of International Economic Law Sources

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Abstract
This research is a cross-border economic study that explains the role of the international trade organization, better known as the WTO. The WTO was officially established on January 1, 1995, with GATT's pioneer. At that time, the existence of GATT was still temporary. The framework for trade liberalization appears in the form of the WTO Agreement, which accommodates general provisions relating to trade. In the WTO Agreement agreed upon by the member countries, there are several additional agreements, such as the Agreement on Agriculture and TRIPs Agreement. In this study, we will discuss further the impact of the additional TRIPs Agreement made by the WTO and how it affects the global economy, accompanied by examples. Then it will be explained further how TRIPs minimize the negative impact of the agreement.

Keywords: Intellectual Property Rights, TRIPs Agreement, WTO

1. Introduction

A good introduction answers these questions in just a few pages and, by summarizing the relevant arguments and the past evidence, gives the reader a firm sense of What was done and why (Beck & Sales 2001). When referring to the membership of the United Nations (UN), there are 193-member states, and there are two members with limited authority, namely Palestine and the Vatican. With so many countries, it is impossible for one country with another country to have the same characteristics. These different characteristics result in the potential of each country being different from one another. There are countries that excel in agriculture, some countries also excel in animal husbandry, fisheries, and several other countries excel in technology and industry. The dynamic needs of society, limited resources, technological advances and differences in the advantages of commodities between countries are the forerunners of business transactions between countries. The customs of countries to conduct business transactions require a regulation. This is one of the reasons for the formation of the World Trade Organization or WTO (hereinafter referred to as WTO).

WTO as one of the only international organizations that specifically regulates issues in world trade, as well as being a forum for countries to make an agreement related to cross-border trade. The agreement to establish the WTO is a manifestation of the realization of the old ideals when negotiating the GATT for the first time. As the principles of international law, namely the legal principles that have been recognized by the majority of countries will become customary law for other countries. So, a collection of trade arrangements that were agreed upon and

then followed by other countries became a form of WTO rules and regulations. The decision of the Uruguay Round brought its participants to a very influential agreement in international trade. The results of the negotiated countries' agreements are then inscribed in the WTO Agreement or WTO Agreement (hereinafter referred to as the WTO Agreement). The member countries at that time signed the Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations in 1994. The agreement between member countries is a binding agreement for its members because in signing the Final Act, the state agreed to sign the WTO. Agreement and attachments therein. The governments of the member countries concerned must comply with the agreement in carrying out matters relating to their trade. It should be noted that the existence of the WTO Agreement is not the only source of law owned by the WTO, there is a WTO Case Law which is another source of law for WTO law.

WTO Agreements related to trade are Agreement on Agriculture, Agreement on Textiles and Clothing, The General Agreement on Trade in Service, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade, Trade Related Intellectual Property Rights and so on. One of the international agreements made by the WTO that has attracted the author's interest is the Trade Related Intellectual Property Rights or TRIPs Agreement (hereinafter referred to as the TRIPs Agreement).

In general, the TRIPs Agreement contains juridical norms that must be complied with and implemented in the IPR sector, in addition to regulations regarding the prohibition of trading on goods resulting from infringement. The WTO agreement on Intellectual Property Rights related to this trade includes 5 (five) things, namely:

1. The basic principles of the trading system and the approval of the IPR field
2. Adequate protection of intellectual property rights
3. Law enforcement in the field of intellectual property rights
4. Dispute resolution
5. Special arrangements imposed during the transition period

The TRIPs Agreement is a minimum standard set internationally in providing intellectual property rights protection. The provisions contained in the TRIPs Agreement must be implemented in all member countries. The emergence of IPR in international trade when it was initially formed caused debate and was rejected by various parties because it was considered inappropriate and led to protectionism. It further strengthened the monopolistic existence of industrialized countries in international trade.

Intellectual Property Rights are rights that arise from the intellectual abilities possessed by humans, which are naturally considered property rights of the legal subject of the creator. Intellectual Property Rights is intended to give respect to intellectual property. However, because developed countries more widely anticipate technological advances, it raises the notion that the TRIPs Agreement is more inclined toward developed countries' interests than developing countries.

Because of this assumption, a protective article known as The TRIPs Agreement Safeguards was born. The TRIPs Safeguard Agreement is contained in Article 8 of the TRIPs Agreement, which allows states to formulate and amend regulations, adopt measures to protect public health and nutrition, and promote public interest in important socio-economic and technological development sectors. This article is necessary to overcome the negative impacts of protecting intellectual property rights in the TRIPs Agreement.

Based on the background described above, the authors are interested in analyzing the WTO international economic organization with its role in the formation of sources of international economic law in the form of international agreements and put it in the form of a paper entitled "The Role of the WTO in Making the TRIPs Agreement as Part of the Source of Economic Law. International"

2. Method

The type of research used by the author in this study is a normative juridical approach. This normative juridical approach examines and interprets theoretical matters concerning principles, conceptions, doctrines, and legal norms. This type of research uses secondary data. Secondary data is obtained from official documents, books

related to the research object, and research results in the form of reports, theses, dissertations, and laws and regulations. This data is then used as supporting data in analyzing the international economic organization, namely the WTO, in making sources of international economic law, namely the WTO Agreement (TRIPs Agreement).*2.1 Identify Subsections*

2.1 Identify Subsections

The research specification used in this research is descriptive-analytical, namely explaining, describing, and describing by related conditions closely related to the research that the author is doing so that the research objectives can be achieved as expected.

2.2 Sampling Procedures

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

- Primary Legal Material
  Primary legal materials consist of legislation, official records or minutes in legislation making, and judges' decisions. The primary legal materials supporting this research are:
  - World Trade Organization (WTO)
  - WTO Agreement
  - Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs Agreement)
- Secondary Legal Material
  Secondary legal materials are legal materials to clarify primary legal materials. In this study, the authors take several publications on the law that are not official documents, namely books, legal journals, and the results of previous research, as secondary legal materials.
- Tertiary Legal Materials

Tertiary legal materials provide instructions or explanations for primary and secondary legal materials, such as legal dictionaries, encyclopedias, cumulative indexes, and so on.

3. Results

3.1 International Economic Law

3.1.1 Understanding International Economic Law

According to experts, there are several limitations to the scope of international economic law. One of them is, according to Schmitthoff, who is a scholar of international trade law, explaining that the scope of the study in the field of law is limited to two issues, namely:
a. Sources of international economic law are international agreements, both multilateral and bilateral;
b. International institutions or organizations in the economic field.

According to Prof. Huala Adolf, the division of the scope of international economic law needs to have relatively clear boundaries. It is said to be relatively clear because there may be an expansion of the boundaries given the increasing expansion and development of transactions in the international economy.

It can be said that international economic law is a branch of international law that regulates economic activities between countries that are not civil. The object of study in the field of law is very broad, covering legal subjects and legal sources, the rights and obligations of the state in the state economy, human rights in the economy, and dispute resolution in the economic field.

3.1.2. Characteristics of International Economic Law

In his book, Prof Huala Adolf describes several characteristics of the field of international economic law, including: First, international economic law is a branch of public international law. So it contains the basic principles and rules of public international law that apply in international economic law; Second, several distinct characteristics of international economic and public international law exist. International economic law contains little about customary norms, while international economic law is generally based on international agreements produced by international organizations; Third, international economic law contains quite several bilateral agreements compared to public international law; Fourth, interdisciplinary and transnational approaches to studying international economic law exist. Fifth, there is an important relationship between international economic law and applicable national law because international economic law will be effective depending on the implementation of the rule of law in a country.

3.2 International Economic Organization

According to Petermann, the International Economic Organization is an association of countries formed by countries through an agreement and has permanent organs and autonomous powers, functions, and common economic goals to be achieved by cooperating among its member countries. The International Economic Organization, as a subject of international economic law, plays an important role in the formulation of sources of international economic law.

There are two major categories of international organizational forms. The first is international economic organizations that specifically have the authority to regulate certain international economic relations, for example, the International Monetary Fund, The World Bank, World Trade Organization, and so on; and the second is international economic organizations within the United Nations (UN) organizational system that have competence in regulating international economic activities and other fields, for example, the United Nations Conference on Trade and Development, the Economic and Social Council, and so on.

In terms of stages of economic integration, it is divided into five different stages, namely organizations that aim only to establish a multilateral preferential tariff system, free trade areas, customs unions, common markets, and full economic integration.

3.3 International Agreement

International treaties are the main and most important source of international law in people's lives. The arrangements regarding this International Agreement are regulated in the 1969 Vienna Convention, which contains International Agreements.

An international agreement is a juridical instrument that accommodates the will and then puts it in the form of an agreement to achieve a common goal. The collective agreement that has been formulated in the agreement becomes the basis of international law to regulate the activities of the state and other subjects of international law.

International treaties not only create rights and obligations between states but also between states and international organizations because indirectly international agreements also regulate the relationship (economic) of individuals and their countries.

3.4 World Trade Organization (WTO)

The WTO is a world trade organization which came into force on January 1, 1995. Its main task is to encourage the flow of Trade between countries by removing some existing barriers related to goods and services and to become a negotiating forum for its members in fields related to multilateral Trade (because in the past international trade negotiations took a long time), dispute resolution forums (considering that trade relations often resulted in conflicts of interest) and carried out a review of trade policies.

There are basic principles that underlie all forms of agreements in the WTO, namely Trade without discrimination (the principle of non-discrimination in Trade): (a) Most favored nation (MFN): treating other people equally, (b) National treatment; Free Trade: gradually, through negotiation (reaching free Trade gradually through negotiation; Predictable); Promoting fair competition (encouraging fair trade competition); Encouraging development and economic reform (encouraging development and economic renewal for poor and developing countries).

The agreement and the principles of trade regulation that exist in it can be called the international trade constitution, which shows that the WTO Agreement is the highest basic rule regarding international Trade. Agreements made in all countries in the world, whether bilateral, multilateral, or regional, must not conflict with the principles contained in the WTO agreement.

3.5 WTO Agreement

The WTO Agreement is an international legal document in the form of a multi-text agreement, which was adopted from the results of the Uruguay Rounds covering goods, services, and intellectual property. Here are described the principles of liberalization and the exceptions allowed.

The WTO Agreement begins with broad principles such as GATT for goods, GATS for services, and TRIPs for intellectual property, which derives several other international agreements as annexes, for example, the Agreement on Agriculture and the General Agreement on Trade and Services; then there is a list detailed commitment made by each country that allows certain foreign products to access their markets.

3.6 TRIPs Agreement

TRIPs stand for Trade-Related Aspects of Intellectual Property Rights, which is Annex IC of the Agreement Establishing the World Trade Organization.

The TRIPs Agreement is the result of the Uruguay Rounds, which has also adopted two major international conventions in the field of industrial property and copyright, namely the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.

The TRIPs Agreement is not a rule regarding the protection of IPR specifically, but the TRIPs Agreement is part of the WTO Agreement signed by its member countries which becomes a general reference to then make rules regarding IPR in their respective countries according to the needs of the country concerned.

4. Discussion

4.1 The Role of the WTO as an International Economic Organization in Making Sources of International Economic Law

The forerunner of the presence of the WTO was the GATT which at that time was temporary. In the GATT, there has been agreement on non-tariff barriers and interprets that there have been thoughts about it in the previous era.

The change from GATT to the WTO has a broad impact on the field of international trade because the WTO accommodates several areas of regulation that are more complex because they regulate services, intellectual property rights, investment, the environment, and so on, not only tariffs and goods as GATT in the past.

The WTO has an important goal in international trade, namely to encourage the flow of trade between countries by reducing and removing various obstacles that can disrupt the smooth flow of trade in goods and services. In addition, there are facilities for negotiations by providing a permanent negotiation forum.

Although there are so many agreements in the WTO that are used as sources of international law, they still contain several principles that form the basis of the multilateral trading system. These principles include:
1. The Principle of Non-Discrimination, Based on the MFN principle in the WTO agreement, all countries are treated equally and must not discriminate against their trading partners; there should be no difference in treatment for better or worse.
2. Principles of National Treatment, A country must give equal treatment to domestic and foreign production.
3. The Principle of Transparency, There needs to be an open attitude regarding trade policies to make it easier for business actors to carry out trading activities. Member countries need to notify policies related to trade in goods, services, and intellectual property.
4. The Principle of Reciprocity, This principle requires reciprocal treatment among WTO member countries in international trade policy

It can be said that the presence of the WTO in the international trade arena greatly contributes to development; the agreements in the WTO also contain general principles that must be applied by WTO members and provide flexibility for countries to apply these WTO rules.

The WTO makes it easier for countries, even underdeveloped countries, to receive special assistance from trade concessions such as the GATT regulations. The sources of law made by the WTO in the form of international agreements are very accommodating and help the running of free trade and encourage free, open, fair, and healthy competition.

4.2 The Role of the TRIPs Agreement in Smooth International Trade

The TRIPs Agreement is part of the new integration of the WTO system that applies to all WTO members. These members must design the highest level of intellectual property protection and enforce the highest protection. The TRIPs Agreement, if read continuously with other WTO Agreements, can be enforced by WTO members through the imposition of trade sanctions. There should be no reservations to the WTO Agreement/TRIPs so that here it can be seen that there is a very clear relationship between Intellectual Property Rights and international trade.

The TRIPs Agreement was concluded seven years after the Uruguay Round negotiations. As one of the major multilateral trade agreements, the TRIPs Agreement plays a new and important role in the world's international economic system. Trips are intended to end the era of global intellectual property under the auspices of WIPO, which are related to the interests of the OECD industry, and are deemed not strong enough; a new era must be initiated for joint competency improvement.

Several attentions were paid, especially to the interests of developing countries in the negotiation process of this TRIPs Agreement. The OECD promotes protecting IPR goods for developing countries because if developing countries do not adopt high IPR, scientists and inventors will leave because their innovations are not reciprocated. If there is no high IPR too, IPR holders from industrialized countries will not want to transfer technology to them. For example, US investors refuse to transfer data to developing countries because they do so by not recognizing their patent rights. After developing countries agree to patent protection, US investors start transferring their technology there. With this, it can be concluded that the TRIPs Agreement plays an important role in the global economy, it looks very small, but the welfare benefits related to IPR are real.

In addition, this TRIPs Agreement increases the economic benefits of LPR capital holders. Before the TRIPs Agreement, a capital of 100dollars was an unsafe nominal and could be lost quickly, but now it is safer, which is an economic advantage.
Undeniably, there is a risk that higher IPR protection will lead to stratification of IPR ownership in OECD country-based companies with public consequences for both developing and industrialized countries. Public policymakers will need to turn to the other side of the TRIPs Agreement so that trade can run better.

4.3 Forms of Protection of the TRIPs Agreement Against Negative Impacts Due to the Protection of Intellectual Property Rights It Provides

As mentioned earlier, many parties claim that the WTO Agreement was made to defend the interests of developed countries. The interests of developing countries are not given much attention; in fact, TRIPs are sufficient to accommodate the interests of developing country groups.

But in fact, TRIPs have moved one step forward in accommodating this problem. The TRIPs Safeguards in Article IX is a form of flexibility deliberately provided by the TRIPs to prevent the adverse effects arising from the birth of this TRIPs Agreement. Based on this provision, the state can take protective measures, both tariff and non-tariff, if there is a sudden and substantial increase in imports due to reducing tariffs. For example, patent protection, its existence is very strict.

The TRIPs Safeguards are a form of violation of the exclusive rights of patent holders, but if examined further, the purpose of granting exclusive rights (patent rights) is also based on public interest because that is the initial goal. The public interest in protecting IPR does not eliminate the interests of IPR owners but places them in an equal position.

Protection of the exclusive rights of patent holders must be balanced by considering the public interest, in this case, the interests of the people of other WTO member countries.

Without the TRIPs Safeguards, it is very difficult to be in the current condition, namely the fight against a pandemic, because this flexibility allows developing countries to provide access to medicines for people stricken with the disease. If a country is being stricken by an epidemic of disease and the medicine is still under patent protection, then the drug will inflate in price in the world of commerce. The high drug prices limit access to the necessary medicines, harming the country's national health.

Acknowledgments

The WTO has an important goal in international trade: to encourage trade flow between countries by reducing and removing various obstacles that can disrupt the smooth flow of trade in goods and services. In addition, there are facilities for negotiations by providing a permanent negotiation forum. The WTO has several international agreements in the form of the WTO Agreement, which was made during the Uruguay Rounds at the beginning of the formation of the WTO. The agreement accommodates equal treatment, national treatment, transparency, and reciprocity. The international agreement made by the WTO is used as a source of international economic law, which is a reference but remains flexible.

The TRIPs Agreement plays a new and important role in the world's international economic system. Trips are intended to end the era of global intellectual property under the auspices of WIPO, which are related to the interests of the OECD industry, and are deemed not strong enough; a new era must be initiated for joint competency improvement. For example, the US will only transfer its technology if there is already patent protection. With this, it can be concluded that the TRIPs Agreement plays an important role in the global economy, it looks very small, but the welfare benefits related to IPR are real.

The WTO Agreement is considered to be made to defend the interests of developed countries. The interests of developing countries are not given much attention, in TRIPs, it is sufficient to accommodate the interests of developing country groups with the existence of The TRIPs Safeguards. Without the existence of The TRIPs Safeguards, it is possible that many negative impacts arise and are not handled properly.

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The Repatriated Ibori Loot and the Claim of Ownership by the Federal Government and the Counter-Claim by the Delta State Government: On whose side is Law and Equity?

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Abstract
One of the Holy books has the record of the experience of a corrupt tax collector who, upon an encounter with the Savior, admitted to his guilt of the crime of corruption and offered to restore in four folds whatever he had taken unjustly from his victims as a demonstration of restorative justice. Justice is said to be a three-way traffic-justice for the defendant accused of a heinous crime; justice for the victim of the crime and finally justice for society at large. Justice served without a reflection of the interest of these three beneficiaries will fail to meet the minimum threshold. The recent signing of a Memorandum of Understanding (MoU) between the Attorney-General of the Federation for the Federal Government of Nigeria and the Officials of the British Government to pave the way for the legitimate repatriation of part of the funds looted but forfeited, upon his conviction in the UK, by James Ibori , a former Governor of Delta State, and his associates while in government, has generated so many comments from Lawyers, politicians, and analysts, all proffering various reasons why the funds, when repatriated, should either be held by the Federal Government or transferred to the Delta State Government. The validity of both arguments must derive legitimacy from the concept of ownership as recognized by law and equity as the highest interest or right a person can exercise, over anything capable of being owned, including resources. This right of ownership entitles the person, in whom it vests, the absolute power to utilize or apply the subject matter according to his or her whims and caprices, without any form of interference or hindrance from any quarters. It is in the light of the above that this paper seeks to add a perspective to the debate derived from the concept of ownership in law and equity.

Keywords: Restorative Justice and Criminal Cases

1. Introduction

Ownership as a right may be derived from custom, law or equity depending on the facts and circumstances of each case. It confers a legal right over the subject matter on the person it vests in. The Supreme Court in the case of *Hon. Francis Aluu Oko v Hon. Attorney-General of Ebonyi State* (2021) stated the nature of a legal right thus: 'A legal right is a right recognizable in law. It means a right recognized by law and capable of being enforced by the plaintiff. It is a right of a party recognized and protected by a rule of law, the violation of which would be a legal wrong done to the interest of the plaintiff, even though no action is taken. The determination of the

existence of a legal right is not whether the action will succeed at the trial but whether the action denotes such a right by reference to the enabling law in respect of the commencement of the action'.
Sometimes both the law and equity may support a party's claim of ownership, in which case his exercise of the right is without qualification (absolute). There are also circumstances where law and equity in relation to a claim of ownership may not be on the same page or on the same person or entity (e.g. in cases of trust), in which case the legitimate exercise of the right becomes subject to the rule of priority as between the dictates of law and the demands of equity bearing in mind the facts and circumstances of each case.

The general rule of priority between a legal and an equitable right of ownership is that the legal right prevails and takes priority over the equitable right in the face of any conflict between the two, however, there are recognized exceptions to this general rule of priority where circumstances may permit an equitable right to defeat and prevail over a legal right in appropriate situations. The principle of 'proprietary estoppel' has this effect. The principle derives from the operation of estoppel by conduct, the effect of which has been restated by Ogunwumiju, JSC, in the recent case of *Bank of Industry Ltd v Ebenezer Obeya* (2022) as follows: 'I agree with the court below that where a representation intended to induce a course of conduct is made, an act or omission resulting from the representation will be to the disadvantage of the person who made such representation as a consequence of the act or omission'.
Once a legal right or interest over a thing is defeated by any equitable interest or consideration the legal right will then confer no recognizable or legally enforceable claim on the holder and the equitable right will override the legal right in such situations. These circumstances will be examined in greater details in the body of this paper.

The constitution, as the ground norm, recognizes and guarantees this right of ownership as well as puts in place mechanism for the enforcement of the right when violated or threatened. The various powers, duties, and responsibilities of both the Federal and State Government are well set out in the constitution. It has been stated that '[a] Constitution is usually the basic norm that establishes the organs and institutions of government, and thereby confers legitimacy on the exercise of governmental powers, establishes the organs and institutions of government, sets the scope and limits of governance and governmental powers, guarantees the basic fundamental rights of the citizens, and regulates the relationships between the organs and institutions of government among themselves, and with the citizens. The constitution is therefore not only the *fons et origo* for all other norms, but the "basic manual" for governmental exercise of powers in juxtaposition to the rights of the citizens, in a constitutional democracy. It is no longer just a "power map" of the society but also an instrument for addressing pressing social economic questions as well as "embodiment of consensus and constitutionalism'' (Shifji, 1988). The formula for sharing the revenue accruing to the Nation is equally provided for by the Constitution.

The ownership of any resources shared in line with the prescription of the Constitution between the tiers of government and the manner of application of each state's share by that State Government is not ordinarily subject to the control or directives of the Federal Government, provided there is in place a budgetary framework enabled by the appropriation Laws enacted by the respective States Houses of Assembly.

This state of affairs does not derogate from the power of the agencies of the Federal Government, in the exercise of their statutory and constitutional powers to intervene, vide the instrumentality of the existing anti-corruption bodies to ensure proper application of the funds in the manner appropriated by the Houses of Assembly of the various States and to properly assume control and ownership in situations of penalties or forfeiture [1]. Furthermore, the Federal Government can also intervene by reason of existing regulations, conventions and treaties it has with other Nations in a bid to tackle corruption in whatever form or guise.

There are legal instruments put in place to ensure that state actors who have access and control over state resources do not take advantage of their position of trust to plunder these resources. According to Sorace, & Torricelli, (2010) '[t]here are a variety of mechanism through which the government can be called to account for its policies, decisions and actions between elections. Such may, on the one hand, include external accountability mechanisms, such as legislative law-making procedures and oversight, judicial review/scrutiny in court, financial scrutiny by auditors, including queries from the office of the Auditor-General, and response to questions by the media, the public, political parties and politicians, and non-governmental organizations; and on the other hand, such internal accountability mechanism such as legislative frameworks and procedures for the

day-to-day business of government, hierarchical command and responsibility of civil and public servant/officers, administrative, adjudication procedures, and executive leadership and oversight over the administration among others'.[2] But where, in flagrant disobedience to these laws, a state actor unjustly enriches himself in abuse of his position of trust, as in the Ibori's case, there are laws that prescribe punishments for such corrupt practices.[3] These laws equally make provisions for how assets or funds recovered from such persons, after all due process of the law is complied with, should be applied. These legal structures emplaced by the law to prevent corruption by public officers are not insulated from the general inefficiencies and weaknesses that have undermined their capacities to deliver on their statutory mandates.

It is important to state that the trial and conviction leading to the forfeiture of the sum of money, which is the subject of the controversy between the Federal Government and the Delta State Government, was not under any local law in Nigeria. Therefore, the prescription of our local laws relating to how forfeitures of assets made pursuant to these Laws should be disposed may, arguably, be said to be inapplicable. For instance, the EFCC Act circumscribes the powers of the Attorney-General of the Federation to make rules and regulations relating to forfeited assets to those forfeited pursuant to the Act.

Nation States recognizing the devastating effects of corruption have collaborated to ensure that illicit financial advantages derived by politically exposed persons are not retained to the disadvantage of the country from where the dubious acquisitions were made. It is the manifestation of this collaborative effort that has led to the agreement by the British Government to repatriate the recovered proceeds of corrupt enrichment by James Ibori and his associates to Nigeria.

This paper examines the established principles of law and equity to conclude that the Delta state Government has sufficient basis, legal and equitable, to lay justifiable claim to the ownership of the repatriated funds.

2. Background

James Ibori was elected Governor of Delta State on the return of the country to democratic governance, on the platform of the Peoples Democratic Party (PDP), in 1999 for his first term and got reelected, on the same political platform in 2003 for a second term of four years. His electoral fortunes were despite the controversy surrounding his eligibility to contest on the ground that he was alleged to be an ex-convict by reason of his purported earlier trial and conviction by a Federal Capital territory, Upper Area Court, sitting in Bwari, in 1995.[4]

At the end of his tenure of office, the Economic and Financial Crimes Commission (EFCC) went after him on the allegation of corruption. He was charged and prosecuted for corrupt practices, but he picked his way through our criminal justice system and was eventually let off on technical grounds. He continued to enjoy his freedom until he found his way to Dubai from where the International network against criminals was activated leading to his arrest and with the support of the Federal Government of Nigeria, he was taken to the UK to answer for the corrupt practices he perpetrated in Nigeria and funneled the proceeds to locations in the UK against the British Laws, while he was in office as the Governor of Delta State.

At the conclusion of his trial he was convicted and sentenced to 13 years jail term for fraud and the looted fund and assets acquired from the proceeds of the corrupt practices were forfeited. During the trial the Federal Government was accused of not keeping to her obligation to render legal assistance tothe UK Government, in breach of the provisions of the Mutual Legal Assistance Treaty. In a similar non-cooperative stance the Government of Delta state claimed that nothing was taking out of the fund meant for the State by James Ibori while he was the Governor.

He eventually served out his prison term and returned to a heroic welcome and reception by the people and Government of Delta State, who despite the order of forfeiture made against the fund and assets traced to James Ibori and his associates as proceeds of crime committed against the State, made no request or asserted any claim of entitlement to it, to the Federal Government of Nigeria or to the British authorities. This fact may constitute estoppel by conduct. The Supreme Court restated the application of this equitable doctrine in the case of, *Attorney- General, Rivers State v Attorney-General Akwa-Ibom State* (2011) as follows, ' the doctrine of

estoppels by conduct, though a common law principle has been enacted into our body of laws as section 151 of the Evidence Act. It is in these terms: when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and act upon such belief, neither he nor his representative in interest shall be allowed in any proceedings between himself and such person or person's representative in interest, to deny the truth of that thing… Also called estoppel in pais… forbids a person from leading his opponent from believing in and acting upon a state of affairs, only for the former to turn around and disclaim his act or omission. Both the common law and statutory law do not permit this conduct…'

In fact the present State actors were nudged on to the assert a claim to ownership of the forfeited fund by reason of the memorandum of understanding executed between the British authorities and the Nigerian Government, containing specifications as to when repatriation would be made and how the funds should be applied.

The above facts represent the basis for the agitation by the Delta State Government on the one hand and the Federal Government of Nigeria on the other with each side asserting its right to the fund.

3. Are Plateau and Bayelsa States Experiences Not Precedents?

The very distinguished and erudite Femi Falana, SAN, has argued eloquently that the Plateau and Bayelsa States experiences when repatriated looted funds, retrieved vide the operations of the UK laws, were handed over to the officials of both States, are binding precedents upon which he argued in favour of the claim of entitlement by the Delta State Government over the funds[5]. He argued further that the signed Memorandum of Understanding cannot override the Constitutional prohibition against discrimination in the face of the similarity in the experiences of Plateau and Bayelsa States and that any variation in the treatment of Delta State will amount to discriminating against the Government and people of Delta State.

The Delta State Government is equally anchoring her demand for the fund on the basis of the precedents in Bayelsa and Plateau States. According to a statement credited to an official of the state '[t]here have been precedents. When such funds were recovered for Plateau and Bayelsa, they were given to the two States, so the same rule should apply in Delta's case'.

There is no doubt that the Bayelsa and Plateau States experiences share so many similarities with the present situation relating to Delta State. First the funds and assets were all trapped in the UK whose Government, in obedience to its obligation arising from the UN Convention, repatriated the funds to Nigeria.

Secondly, all the concerned actors from whom the funds and assets were confiscated were Governors within the same period, that is, 1999 to 2003. This makes it safe to conclude that the corrupt practices were perpetrated within the same period. They also won re-elections for their second terms in office as Governors in their respective States in 2003 under the same political party, the PDP. Furthermore, the PDP on whose platform they won and held offices as respective Governors of their States was the dominant political party at the Federal level as at that time.

Despite the above similarities there are some radical differences between the Plateau and Bayelsa States experiences. While the Joshua Dariye and DSP Alameyeseigha, the then Governors of Plateau and Bayelsa States respectively, fugitively returned to Nigeria after their arrest by the British authorities before proper commencement of criminal proceedings, leaving behind the assets and funds which were confiscated and later repatriated to Nigeria, James Ibori, on the other hand was arrested outside the UK but brought to that country where proper criminal processes were issued leading to a full trial, conviction, sentencing and forfeiture of the funds and assets recovered.

Furthermore, Joshua Dariye and DSP Alameyeseigha were both impeached following their inglorious escape to Nigeria after their arrest in the UK, James Ibori, on the other hand, served out his second term without suffering the same fate. The implication of the impeachment of both Dariye and Alameyeseigha are clear pointers to the fact that the constitutional machinery prescribed for the sanctioning of the nature of misconduct perpetrated by them was fully activated by the respective Houses of Assembly of Plateau and Bayelsa States. That is to say, the States never offered any form of support to their conduct. In the case of Ibori, even though the EFCC came after him following the expiration of his tenure of office, the Delta State Government mounted legal hurdles on the

way of the EFCC claiming that no money belonging to the Delta State Government was traceable to Ibori. That denial by the Delta State Government is the main plank of a counter-affidavit filed by the State against the trial of Ibori by the EFCC for allegedly offering a bribe of fifteen million US dollars to Nuhu Ribadu the then Chairman of the EFCC. The denial offered by the Delta State Government was absolute and without any form of qualification.

Another point to note is that the fact of the impeachments of Dariye and Alameyeseigha through the legitimate channel of the Houses of Assemblies of Plateau and Bayelsa was in a bid to remove the toga of immunity from them and leave them vulnerable to the application of all laws that sanction their conduct within and outside the country. This can be interpreted to mean lending support within the sphere of influence of their respective States apparatus to any punitive action initiated against them locally or on the International stage where the two states lack the competence to act.

The above factual analysis show that much as there are similarities in the Plateau and Bayelsa States experiences to support the argument of the learned silk, Femi Falana, supporting the claim of Delta State to the funds, there are equally very potent and radical distinctions as well, but utilitarian and other equitable considerations canvassed in this paper, we submit, are sufficient to justify the application of the Plateau and Bayelsa States experiences in the treatment of the present Delta State situation, as eloquently canvassed by the erudite Silk.

We shall now focus our attention on the position of the law and equity in the circumstances of the facts of this present case involving the looted funds by James Ibori and his associates that have been reportedly repatriated.

4. Legal Ownership and Its Attributes in the Context of the Repatriated Ibori Loot

The law has set a template for the way and manner resources accruing to the country are shared amongst the three tiers of Government in Nigeria. Once shared the various States have absolute control over how their resources are deployed. Other than the statutory disbursements to the States, Federal funds may get into state coffers for purposes of counterpart contribution to fund joint projects between the Federal and the States Government. These issues of joint projects funding are usually in the areas of the Universal Basic Education and the Primary Health Care sectors. Such counterpart funds provided by the Federal Government are managed by the States.

So, while it may be valid argument to postulate that all funds constituting the Delta State share from the Federation account belongs absolutely to the State Government, it will be fallacious to extend the same argument to such funds, in the coffers of the State, provided by the Federal Government to meet its obligation to counterpart funded projects between the Federal Government and the Delta State Government. Thus, the funds over which James Ibori superintended as then Governor of Delta State between 1999 and 2007 undoubtedly belong to the Delta State Government and, to the extent of counterpart contribution by the Federal Government for joint projects, to the Federal Government in trust for the execution of such projects.

In the context of the mixed-bag nature of the funds standing to the credit of the Delta State Government within the period under consideration, unless and until there is express evidence of sorting or complete exhaustion of such counterpart funds provided by the Federal Government within the period, also in the same coffers of the Delta State Government, it will be illogical to argue that all the funds available and accessible to James Ibori when he was in the saddle as Governor of Delta State, were all funds wholly belonging to the Delta State Government. But since there is no public record of any counter- part funded project, within the tenure of Ibori, that was abandoned and the Federal Government's discharged financial commitment embezzled, it is safe to argue that, *prima facie*, the looted funds were monies standing to the credit of Delta State Government.

There is also an argument that equates the repatriated funds to donor funds due to the fact that neither the Delta State Government nor the Federal Government was responsible for the prosecution of Ibori leading to his

conviction, and in any event the order of forfeiture was made in favour of the British Government and not the Federal Government nor the Delta State Government.

Prof. Ojukwu (2021), equating the repatriated funds to donor funds argued that Nigeria and not Delta State should take benefit of the fund and apply it strictly on the terms of the memorandum executed between the Federal Government and the British Government, stating further that any deviation from the agreed purpose for the return of the fund may give rise to some consequences. He states:

Donor funds must be utilized according to the donor's instructions, otherwise the done runs the risk of a refund or blacklist from future donations. At the time of the agreement with the Federal Government, 4.2 million was not Nigeria's money or Delta State money but UK money.

While the argument may be correct, because the forfeiture order was made in favour of the British Government and not the Delta State Government or the Federal Government, it will, in our opinion, be unjust for the British Government to have retained the money when the real victim of the crime can be traced. The victim in this circumstance is the Delta State Government as there is no record of the ex-convict ever serving at the federal level of Government that would have exposed him to funds belonging to the Federal Government.

It is important to note that by the terms of the memorandum of understanding, the repatriated fund is meant to be applied towards the completion of the second Niger Bridge, Abuja-Kano road, and Lagos-Ibadan Express road. These projects clearly indicate the desire of the British Government to have the fund applied towards improving key infrastructure in Nigeria. This charitable inclination of the British Government could still be realized if the money if returned to Delta State Government to be specifically committed to key infrastructure like road, health care, education which will positively impact on the lives of the residents of the State.

5. Equitable Interest in the Fund

The intervention of equity in appropriate cases to support a proprietary claim has been very well articulated in the following argument by, Webb, C. and Akkough, T. (2008):

'A proprietary claim is an assertion of some proprietary interest in an asset held by the defendant. In its most basic form it amounts to saying "that thing is mine". So, a claim that a particular asset in the defendant's hand is held on trust for you is equivalent to pointing to that asset and asserting that it is (beneficially, and in equity) yours. The courts give effect to that claim be recognizing your interest and allowing you to call for the defendant to transfer it to you. Anything that can be held on trust, i.e. anything the law recognizes as property, can be the subject matter of a proprietary claim. This therefore includes both tangible (e.g. cars, houses, notes and coins) and intangible (e.g. shares, bank accounts and other debts) assets.'

From the above it is clear that equity's ingenious device of trust can be applied in a number of different factual situations, as we seek to do in this paper. The learned authors, Keeting and Sheridan, were quoted as stating the general nature of trust thus, '[a] trust… is the relationship which arises wherever a person called a trustee is compelled in equity to hold property… for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust'.

The trust dimension to this debate, no doubt, cannot be founded on any express trust anchored on the intention of the settlor, as there was never any such express intention on the part of either the Federal Government or the Delta State Government. But implied trust in the nature of constructive trust can be arguably invoked. The basis for the invocation of constructive trust, in appropriate situations, has been stated by Cardozo, J, in the case of *Beatty v Guggenheim Exploration Co (1919)*, as follows:

'The constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee'.

It is possible to argue that in view of the earlier astute denial of any act of financial impropriety by Ibori, when he held office as Governor of Delta State, by the Delta State Government, constructive trust will not avail her. But the equitable concept of 'proprietary inertia' may operate to negative the effect of that denial. Simon Gardner, explaining the effect of the concept of proprietary inertia, states, 'whenever the transferor has not demonstrably chosen to give his property away and succeeded in doing so, he should remain its owner'[6].

Gardner went on to give the following illustration of the possibility of constructive trust arising from proprietary inertia as follows:

'The other situation in which constructive trust arises on account of proprietary inertia is where I transfer property to you unintentionally, but in circumstances where my intention is flawed, say because I acted mistakenly, or under duress or undue influence. The flawed quality of my intention is recognized by a rule allowing me to rescind the transfer, i.e. reverse its effect. If I do so, proprietary inertia logic becomes applicable, as the intention underpinning your acquisition of the property has now been removed. So, although you for the moment still hold the legal title to the transferred property, you hold it on constructive trust for me. And that trust appears to operate retrospectively, so that you are treated as having held it on trust for me from the outset'.

On the footing of the above it may be argued that the earlier denial of any financial impropriety or economic and financial crimes on the part of Ibori by the Delta State Government is predicated on political duress or undue influence which flawed the process and effect of the denial, thus making the application of proprietary inertia ideal in the circumstance.

The validity of this argument of constructive trust arising from proprietary inertia is reinforced by utilitarian considerations, which posits:

'Utilitarianism demands a consideration of the question whether a trust does better than harm, and proposes that the settlor be permitted to make it if, but only if, the answer is yes. It is possible to be selective about the kinds of factors to be included in the calculus of good and harm, but at its widest it involves taking account, on the one side, of the general utility of according rights to private property, the more specific social advantages of the trust device in general, and more specifically still the benefits of the particular type of trust in question; and on the other, of any hurt done to the trust's beneficiaries, to particular other people outside the trust, and to society in general'.

In this circumstance the social advantages that the people of Delta State stands to benefit (in terms of the provision of basic amenities of good health care delivery system, pipe borne water, basic school infrastructure, etc) from the imputation of constructive trust on the Federal Government, in relation to the repatriated looted funds, far outweigh any hurt or harm that may befall other Nigerians, in general, living in other parts of Nigeria, outside of Delta State, if the trust is imputed.

A Lawyer arguing in favour of Delta State Ownership of the repatriated funds canonically stated thus:

The starting point in analyzing this issue would be to identify the owner of the monies stolen and siphoned by the ex-Governor. Indeed, it is the owner of the stolen monies that is the victim of the theft and is entitled to the repatriated funds. See *David v Federal Republic of Nigeria* (2008) LPELR- 43679(CA).

In pointedly concluding that the ownership of the repatriated fund vest in the Delta State Government as trustee for the residents of Delta state, the Lawyer argued further that:

[a]nother way to view the issue is to answer the question, [h]ad the ex-Governor not embezzled, stolen or siphoned the monies, who would have taken benefit of the monies? Certainly, the monies would have been available to the benefit of the people of Delta State exclusively. It is my view therefore, that the repatriated funds be paid exclusively to the Delta State Government.

As we stated earlier justice is three-way traffic. The interest of the victim must never be compromised under any guise as doing so would amount to perpetuating injustice against him. Delta State been the victim here, must be properly restituted for the loss it suffered as a result of the criminal conduct of the ex-Governor.

6. Conclusion

The ownership of Delta State to her share of any fund distributed from the Federation Account is secured, guaranteed, and protected by the Constitution, which is the groundnorm. This right cannot be taken away by the provisions of the Economic and Financial Crimes Commission Act, the Money Laundering Prohibition Act or any other enactment. In the case of *Attorney-General of Abia State &Ors v Attorney-General of the Federation* (2002), the Supreme Court held: 'The Constitution is what is called the groundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the constitution. By the provisions of the constitution, the laws made by the National Assembly come next to the constitution; followed by those made by the House of Assembly of a State. By virtue of section1(1) of the constitution, the provisions of the constitution take precedence over any law enacted by the National Assembly even though the National Assembly has the power to amend the constitution itself'.

The right of ownership constitutionally vested in Delta State Government, over resources accruing to it cannot validly be taken away under the guise of forfeiture. The peculiarity of this repatriated fund should give rise to a resulting trust in respect of the funds in favour of Delta State residents thereby occasioning a constructive trust on the Federal Government with respect to the fund.

Furthermore, the Delta State residents, as direct victims of the crime giving rise to the repatriated fund, deserve to be restituted in the provision of basic infrastructure much more than the Federal Government. This is particularly so in view of the popular maxim of equity that 'equity will not suffer a wrong to be without a remedy'.

Even if the money is to be properly viewed as donor fund to be administered or applied in line with the directive of the British Government in the manner stated in the memorandum of understanding, there is a proposed list of similar projects forwarded by the Delta State Government to the Federal Government, the listed projects are ' the Asaba-Illah-Ibaja Highway, the deplorable Benin-warri section of the East-West road and the Agbor-Abraka-Sapele Highway', that the fund can be directed towards for the benefit of residents of Delta State and other South-South States and not the Lagos-Ibadan Express way or any of the other projects stated in the memorandum of understanding that will have no direct impact or benefit to the people of Delta State.

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At the global level there is the United Nations Convention against Corruption (UNCAC), which is a globally applicable anti-corruption treaty, Nigeria ratified this convention in December 2004. At the regional level there is the African Union Convention on Prevention and Combating Corruption (AUCPCC), Nigeria ratified this convention in September 2006. At the sub-regional level there is the Economic Community of West African States Protocol on the Fight against Corruption. ; See also, The Asset Tracing, Recovery and Management Regulation, 2019 (which created the Federal Government of Nigeria Asset Recovery

Account, domiciled in the Central Bank of Nigeria). By the prescription of the Regulation all proceeds from the final forfeited assets should be paid into the said account.

Attorney- General, Rivers State v Attorney-General Akwa-Ibom State (2011)vol.196 LRCN p.23 at 54-55.

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S.162 CFRN

S.44 (2) (b) CFRN, (which provide justification for compulsory acquisition of property by way of punishment, or forfeiture arising from any breach of law, civil or criminal).; S.30 Economic and Financial Crimes Commission(Establishment, etc) Act, 2004, which provides, 'where a person is convicted of an offence under this Act, the Commission or any authorized officer shall apply to the court for the order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtained as a result of the crime subject to an interim order under this Act.

S.6 CFRN

See for instance 31(3) EFCC Act, which provides: ' where any part of the property included in a final order is money in a bank account or in the possession of any person, the commission shall cause a copy of the order to be produced and served on the manager or any person in control of the head office or branch of the bank concerned and the manager or person shall forthwith pay over the money to the commission without any further assurance than this Act and the commission shall pay the money received into the Consolidated Revenue Account of the Federation'.

See S.43 of the 1999 constitution of the Federal Republic of Nigeria,1999 (hereinafter referred to as 'CFRN')

See the case of *Attorney-General of Abia State &Ors v Attorney-General of the Federation* (2002) 6 NWLR (pt.763) p.264 at 479-480 where the Supreme Court held: 'The Constitution is what is called the groundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the constitution. By the provisions of the constitution, the laws made by the National Assembly come next to the constitution; followed by those made by the House of Assembly of a State. By virtue of section1(1) of the constitution, the provisions of the constitution take precedence over any law enacted by the National Assembly even though the National Assembly has the power to amend the constitution itself'.

See the various oaths provided for in the 7th schedule to the CFRN; see also the prescribed code of conduct for public officers contained in the 5th schedule to the CFRN; Sorace, D. and Torricelli, A. Monitoring and Guidance in the Administration of Public Contracts. In Noguellou, R. and Stelkens, U.(Eds) (2010) *Comparative Law on Public Contracts* (pp 212-213) cited in O. Oyewo, O. *op cit* n.3. pp 17-18; see also Ss. 88 and 128 CFRN.

Shivji, I.(1998).Problems of Constitution-Making as a Consensus-Building: The Tanzanian Experience. In O. Sichone (Ed), *The State and Constitutionalism in Southern Africa* (SAPS Books, Harare, 1998) cited in O. Oyewo, Law, Democratisation and Social Change in Nigeria, O. Oyewo and E. Ojomo (Eds),(2012) Law, Democratisation and Social Change', NALT Conference Proceedings, 2012., p. 43 (Stating that, ' [a] Constitution is usually the basic norm that establishes the organs and institutions of government, and thereby confers legitimacy on the exercise of governmental powers, establishes the organs and institutions of government, sets the scope and limits of governance and governmental powers, guarantees the basic fundamental rights of the citizens, and regulates the relationships between the organs and institutions of government among themselves, and with the citizens. The constitution is therefore not only the *fons et origo* for all other norms, but the "basic manual" for governmental exercise of powers in juxtaposition to the rights of the citizens, in a constitutional democracy. It is no longer just a "power map" of the society but

also an instrument for addressing pressing social economic questions as well as " embodiment of consensus and constitutionalism")

The Guardian Newspaper (2012, April 17) Former Nigeria State Governor James Ibori Receives 13-year Sentence. < available at https://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced> retrieved on 9 August 2022

The Guardian Newspaper (2009,December 18) Court Clears Ibori of Graft Charges, EFCC Kicks.< available at https://guardian.ng/news/nigeria/national/court-clears-ibori-of-graft-charges-efcc-kicks/> retrieved on 9 August 2022.

The Money Laundering (Prohibition) Act, 2011.; S. 46 Economic and Financial Crimes Commission Act, which defines 'Economic and financial crimes' as follows: '… the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited good, etc.' Independent Corrupt Practices Commission Act.

Unini C. (2021, March 10) 4.2m Repatriated From UK Belongs to Delta State Govt-Falana, SAN', available at <https://thenigerialawyer.com/4.2m-repatriated-from-uk-belongs-to-delta-state-govt-falana-san/

Unini, C. (2021, June 16)' Delta Awaits 4.2m Ibori-Linked Loot, Lists Six Projects' available at https://thenigerialawyer.com/delta-awaits-4-2m-ibori-linked-loot-lists-six-projects/ accessed on 16 June 2021

Webb, C & Akkough, T *Trusts Laws*, (Palgrave Macmillan, New York 2008) pp. 358-359.

Wikipedia. (2021, August 17) https://en.m.wikipedia.org/wiki/jamesibori