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Contemporary Challenges in Law and Governance towards 100 years of Indonesian Legal Education

Proceedings of the International Conference on Law and Governance in a Global Context (icLave) 2023

Editors:
Gratianus Prikasetya Putra
Heru Susetyo

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ISBN: 978-623-333-835-6
e-ISBN: 978-623-333-836-3 (PDF)

Published by
UI Publishing
Jalan Salemba Raya No. 4, Jakarta Pusat 10430

Preface

It is with great pleasure that I present the "Proceedings of the 5th International Conference on Law and Governance in a Global Context (icLave) 2023." This conference, held in Balige, North Sumatera, brought together scholars, practitioners, and students from various parts of the world to engage in meaningful discussions on the pressing issues of law and governance in our globalized society. The exchange of ideas and research findings at this conference underscores the importance of collaborative efforts in addressing the multifaceted challenges that confront us today.

This conference was held in 2023 as an introductory event for our faculty's centennial anniversary in 2024. The institution's anniversary marks the establishment of the Dutch colonial law school for the indigenous (*Rechthogeschool*), which signifies the inception of higher legal education in the Indonesian archipelago. This volume captures the contemporary development of legal science and demonstrates the extent to which the field has evolved since the *Rechthogeschool* years.

The Faculty of Law at Universitas Indonesia is proud to have played a pivotal role in organizing this esteemed conference. Our commitment to fostering academic excellence and facilitating a platform for intellectual exchange is reflected in the diverse range of topics covered in these proceedings. From international trade law to human rights and legal governance, the papers presented here provide valuable insights and contribute significantly to the body of knowledge in the field of law and governance.

I would like to extend my heartfelt gratitude to the conference organizers, contributors, and participants who made this event a resounding success. Their dedication and hard work have not only enriched the discussions at the conference but have also ensured the high quality of the papers included in this volume. Special thanks are due to our esteemed keynote

speakers whose expertise and perspectives have greatly enhanced the depth of our understanding of contemporary legal and governance issues.

As we navigate the complexities of a rapidly changing world, the themes explored in this conference serve as a reminder of the critical role that law and governance play in shaping a just and equitable society. It is my hope that the insights and knowledge gained from this conference will inspire further research, dialogue, and collaboration among scholars and practitioners. I am confident that the proceedings of icLave 2023 will serve as a valuable resource for anyone interested in the dynamic interplay between law and governance in a global context.

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Faculty of Law Universitas Indonesia

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Law, Justice, and The Law School Towards 100 Years of Legal Education in Indonesia

Gratianus Prikasetya Putra
Chairman of the 5th International Conference on Law and Governance in a Global Context (icLave) 2023
Faculty of Law, Universitas Indonesia

Abstract

Indonesian legal scholars will commemorate 100 years of the existence of legal education in Indonesia in 2024. Several adjustments have been made to adapt its original Dutch version to the Indonesian context. The disruption of law both in theory and practice is inevitable along the development. A reflective academic discourse on law, justice, and law school is urgently needed in welcoming 100 years of legal education in Indonesia.

Keywords: Indonesia, legal education, Rechthogeschool

I. A Short Brief of Legal Higher Education in Indonesia

On October 28th, 1928, the Dutch Colonial Government officially established the first Law School in Batavia (*Rechthogeschool te Batavia* abbreviated as "RHS"). It was regulated under *Hooger Onderwijs Wet* 1924 *Ordonnantie* 9 October 1924 No. 1 (*Staatblad* No 457/1924). The establishment of RHS was the solution to resolve the need for university-graduate jurists in the Netherland East Indies ("Indonesia" today) which could not be fulfilled by the current law school. Before establishing RHS, the Dutch Colonial Government had founded *Batavia Rechtsschool* (law school) in 1909.[1] The school was intended to produce native *rechtskundige* (jurists) to assist Dutch-colonial government matters. After the Independence Day of the Republic of Indonesia, RHS was restructured and currently become the Faculty of Law Universitas Indonesia ("FHUI").

[1] Upik Djalins, "Re-examining Subject Making in the Netherlands East Indies Legal Education: Pedagogy, Curriculum, and Colonial State Formation," *Itinerario* 37, no. 2 (August 2013): 123.

Since that day, many other law schools have been established in Indonesia but still put FHUI as the national reference for Indonesian legal education.

As the Dutch-initiated institution, the replication of The Dutch legal curriculum was inevitable. The theories, courses, and approaches provided by Indonesian law schools were still influenced by the Dutch system. It was Paul Scholten who was assigned by the Netherlands to establish RHS in Batavia.[2] He had several principles in constructing the curriculum of the law school as follows: 1) equivalency with the legal education in the Netherlands; 2) the subjects provided must be accorded to the needs; 3) social sciences correlated with the law must be provided to the students; 4) focus on the law in force in the Indies; and 5) the pedagogical approach must be following "from easy to difficult" and "from bondage to freedom" principle.[3]

Scholten's principles have reflected the similarity of the curriculum provided in RHS with Dutch law school. The early days of these courses were led by A.H.M.J. van Kan and J.H.J. Schapper.[4] They are known for their competencies in Dutch legal education and practice. The assignment of the lecturers signified the influence of the Dutch legal system in the RHS curriculum.

II. The significances of the Dutch legal system in Indonesia

Many doctrines in the Indonesian legal system today are still referred to the Dutch legal system such as *onrechtmatigedaad* (tort). The doctrine of tort in Indonesia is primarily based on Article 1365 *Burgerlijk Wetboek* ("Indonesian Civil Code"). Besides the civil code, the interpretation of tort in Indonesia relied on *Arrest Hogeraad* (The Supreme Court of The Netherlands) on 31 January 1919. It was Lindenbaum vs Cohen, the landmark decision of The Supreme Court of the Netherlands commonly applied as the precedent to expand the interpretation of tort.[5]

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[2] *Ibid,* 133.

[3] Upik Djalins, "Paul Scholten and the Founding of the Batavia Rechthogeschool," *DPSP Annual* 1 (2020): 170.

[4] Djalins, "Subject Making in the Netherlands East Indies Legal Education."

[5] Rosa Agustina, "Perbuatan Melawan Hukum," in *Hukum Perikatan (Law of Obligation)*, edited by Rosa Agustina et al. (Denpasar: Pusaka Larasan, 2012), 7.

In the law enforcement sector, the Indonesian legal system recognizes the retrial procedure of the court judgment known as *upaya hukum peninjauan kembali.* The origin of the prodecure is the practice of *herziening van arresten en vonissen* or *herziening.*[6] It was regulated under *Het Reglement op de Strafvordering* to be implemented by *Raad van Justitie.* Today this procedure is still enforceable, run by the Supreme Court of the Republic of Indonesia.[7]

Besides doctrines implementation, the Dutch legal system has played a significant role as the fundamental approach of legal reasoning in Indonesia. Every Indonesian law students are still introduced to *rechtsvinding* approach. In practice, *rechtsvinding* is usually been applied by the judges in the law-making process.[8] Historically, *rechtsvinding* was the middle way between the legistic and *freie-rechtsbewegung* approach recognized by legal scholars after the enactment of the French Civil Code. Based on this approach, Indonesian judges do not have any obligation to follow previous judgments in creating new decisions.[9] On the contrary, many countries keep using previous court judgments as the highest source of law (stare decisis doctrine).

Dutch legal system including its education has signified the alienation of the law enforcement process from the morality aspect in Indonesia. Moral discourses are avoided in the Indonesian legal system.[10] It was the consequence of Germanic law inherited by the Dutch.[11] Compared with the United States, American law schools provide legal theories as non-mandatory courses for students. They put more emphasis

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[6] Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, dan Peninjauan Kembali)* (Jakarta: Kencana, 2009), 644.

[7] Indonesia, Undang-undang tentang Hukum Acara Pidana (The Law on Criminal Procedure), Art 263.

[8] Sudikno Mertokusumo and A Pitlo, *Bab-Bab tentang Penemuan Hukum* (Bandung: Citra Aditya Bakti, 1993), 4.

[9] L.J. van Apeldoorn, *Pengantar Ilmu Hukum (Introdution to Law)* (Jakarta: Pradnya Paramita, 1975).

[10] Thomas Lundmark, *Charting the Divide between Common Law and Civil Law,* (New York: Oxford University Press, 2012), 128.

[11] Djalins, "Subject Making in the Netherlands East Indies Legal Education," 130.

on learning previous court judgments to be applied to certain legal issues.[12] In terms of morality, they still use policy-based standards manifested in previous court judgments. The most fundamental difference is implemented in the Swedish legal system. The Swedish judges can develop their laws in areas not covered by the legislation.[13] The system stresses the importance of substantive interpretation besides the legalistic aspect of the law. That comparison shows the diversity of law enforcement practices and approaches needs to be understood by law students, particularly in facing today's disruptive era.

III. The contribution of legal education in facing disruptive period

Finally, globalization has forced the current legal education to be more adaptive. The fundamental purpose of legal education must be reviewed. The stakeholders must be able to determine the direction of Indonesian legal education whether to produce legal generalists or legal professionals.[14] This problem has occurred since the establishment of RHS as a more generalist legal education institution than *Rechtschool*. To produce competitive lawyers, Indonesian law schools have to be more willing to provide deeper approaches to the students. If doctrinal is considered as the absolute approach of law, it must be internalized correctly.[15]

Indonesian law schools play a central role in creating and educating legal experts. Besides, the Law School has also contributed to determining the direction of the national legal system. The changes and adaptations of the Indonesian legal system are also becoming the task of law schools. The 5th International Conference on Law and Governance ("icLave") is the fifth international conference held by the Faculty of Law, Universitas

[12] Lundmark, *the Divide between Common Law and Civil Law*, 129.

[13] *Ibid*, 130.

[14] Adriaan Bedner and Jacqueline Vel, "Legal Education in Indonesia," in *The Indonesian Journal of Socio-Legal Studies* 1, no. 1 (2021): 5.

[15] *Ibid*, 6. According to Bedner and Val, the doctrinal approach to law is not just something for legal professionals, but also for generalists, as a necessary prerequisite for undertaking any other type of analysis of law (such as socio-legal, economics, and comparative).

Indonesia. This is also becoming the preparation towards 100 years of legal education in Indonesia which will be commemorated in October 2024. This conference is specifically aimed to contribute to the reflection on law and government by highlighting the current development, progress, achievement, and challenges faced in research and studies in the legal sector. Especially to be correlated with the role of Law School in the realm of law and justice towards 100 years of legal education in Indonesia.

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5th icLave

Enlightened Self-interest:
Nash Equilibrium for Business and Human Rights

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Abstract

This paper presents a conceptual framework integrating Nash Equilibrium, a fundamental concept in game theory, to elucidate enlightened self-interest in the realm of business and human rights. Central to this framework is a game theory matrix designed to navigate the complex dynamics of corporate decision-making in relation to human rights considerations. Based on the Nash Equilibrium theorem, the matrix offers a structured analysis of cooperative and non-cooperative scenarios, providing a nuanced understanding of business conduct. Utilizing 4 different case studies, this study illustrates how the matrix can portray various real-world scenarios, offering insights into the potential outcomes of business practices. The case studies serve as practical examples, demonstrating the matrix's efficacy in capturing the interplay between business interests and human rights concerns. This matrix is a valuable tool for businesses to proactively address human rights violations, fostering a symbiotic relationship that benefits both corporate entities and the broader community.

Keywords: Enlightened Self-Interest; Game Theory; Business; Human Rights; Nash Equilibrium.

I. Introduction

In the intricate tapestry of global commerce, businesses wield a double-edged sword, capable of both uplifting and undermining the very fabric of human rights. From the rubble of the Rana Plaza collapse[1], where corporate negligence cost over a thousand lives, to the blossoming Fair Trade movement championing fair wages[2], the stark contrasts in business

[1] Salil Tripathi, "Rana Plaza 10 Years on - Lessons for Human Rights and Business," *Institute for Human Rights and Business*, April 21, 2023.
https://www.ihrb.org/other/supply-chains/briefing-rana-plaza-lessons-for-human-rights-business.

[2] Katharina Krumbiegel, Miet Maertens, and Meike Wollni. "The Role of Fairtrade Certification for Wages and Job Satisfaction of Plantation Workers." *Global Food Discussion Papers*, no. 89 (2016), https://www.econstor.eu/bitstream/10419/147028/1/870938444.pdf.

impacts on human rights beckon scholars to navigate the delicate intersection of profit and ethical responsibility. As a result, the United Nations Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the United Nations Human Rights Council in 20113. They were also incorporated into the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises in the same year[4]. The UNGPs rapidly became a universal standard for responsible corporate behavior, emphasizing the overarching responsibility of businesses to respect human rights beyond national legal compliance[5].

Despite the existence of the UNGPs, the World Benchmarking Alliance revealed that companies have made slow progress in improving their human rights scores, although the benchmarking process has increased accountability[6]. One of the reasons behind the companies' lag in translating commitments to stakeholder engagement into tangible actions is that they often take a hands-off approach to human rights in their supply chains which are established through complex relationships with not only their own workers and local communities but also suppliers, service providers, and joint-venture partners[7]. More importantly, businesses are not traditionally considered duty-bearers under international human rights law[8], and they are 'self-interest' seeking entities by nature[9]. Based on

[3] Nicola Jägers, "UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?" *Netherlands Quarterly of Human Rights* 29, no. 2 (2011): 159–163.

[4] Organization for Economic Cooperation and Development, "OECD Guidelines for Multinational Enterprises" (2011), http://dx.doi.org/10.1787/9789264115415-en.

[5] Elisa G. Diggs, Mitt Regan, and Beatrice Parance, "Business and Human Rights as a Galaxy of Norms," *Georgetown Journal of International Law* 50, no. 2 (2019): 309-362.

[6] World Benchmarking Alliance, "2023 Corporate Human Rights Benchmark," 2023, https://www.worldbenchmarkingalliance.org/publication/chrb/.

[7] World Benchmarking Alliance, "2023 Corporate Human Rights Benchmark"; Claire M. O'Brien, "Business and Human Rights: A Handbook for Legal Practitioners," *Council of Europe*, 2019, https://rm.coe.int/business-and-human-rights-a-handbook-of-legal-practitioners/168092323f.

[8] O'Brien, "Business and Human Rights," 11.

[9] Robert Simons, "Self-interest: The Economist's Straitjacket." *Harvard Business School Working Paper,* no. 16-045, 2019,

the rational choice theory, self-interest of business executives drives them to influence regulatory rules to secure economic advantages for their firms, leading to failures of governance, environmental degradation, climate change, and poverty[10]. Therefore, recognized for their impact on human rights, they are obliged to evolve their norms and mechanisms for human rights protection. This evolution pushes forward the rise of "enlightened self-interest[11]" in the business sector[12].

Short-sighted economic self-interest not only harms the environment, which is vital for the stability of life and resources, but it also endangers the very resources it values due to their interdependence with the overall system, emphasizing the need to prioritize the well-being of the broader community and future generations[13]. Moral philosophers have long grappled with establishing a positive link between self-interest and morality. A notable example is the 18th-century philosopher Francis Hutcheson who introduced the term "secret chain" to denote the supposed connection between individual interest and moral concerns[14]. The concept of enlightened shareholder value (ESV) which advocates for corporations to prioritize sustainable growth and profits by considering the full spectrum of stakeholder interests, challenging the short-term focus on share prices and demonstrating alignment with corporate social responsibility (CSR)[15]. In the foreword for the book *Responsible*

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https://www.hbs.edu/ris/Publication%20Files/16-045_1a5b155a-ca64-4c69-8f8a-f43ca63188b4.pdf

[10] Simons, "Self-interest," 15-16.

[11] Leo Baas, Dick Magnusson, and Santiago Mejía-Dugand, Emerging Selective Enlightened Self-interest Trends in Society: Consequences for Demand and Supply of Renewable Energy (Linköping, Sweden: Linköping University, 2014), 15.

[12] Nicole Diaz, "How to Build an Ethical Company [entire talk]," *Stanford eCorner*, 2021, https://ecorner.stanford.edu/wp-content/uploads/sites/2/2021/10/how-to-build-an-ethical-company-entire-talk-transcript.pdf

[13] Bartlomiej A. Lenart, "A Wholesome Anthropocentrism: Reconceptualizing the Value of Nature within the Framework of an Enlightened Self-interest," *Ethics & The Environment* 25, no. 2 (2020): 97–117.

[14] Stephen G. Morris, "Deciphering the Secret Chain: An Evolutionary Perspective on Enlightened Self-interest" (PhD diss., Florida State University, 2004), iii.

[15] David Millon, "Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law," *Washington & Lee Legal Studies Paper*, no. 2010-11 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750

Leadership[16], Sir Robert Wilson similarly brought the concept of "enlightened self-interest" to light. Based on his idea, companies can pursue their self-interest by leveraging their influence to respond to attacks on civic freedoms, human rights defenders, and civil society organizations, guided by the normative framework, especially the UN Guiding Principles, and moral considerations[17].

Game theory, rooted in rational choice theory, guides strategic decision-making in interactions with rational actors[18]. Enlightened self-interest, emphasizing the alignment of personal and societal interests, resonates within business game theory, particularly in Nash Equilibrium. While maximizing their interests, businesses can contribute positively to society[19]. In this article, I explore enlightened self-interest within the context of business and human rights, employing a game theory framework centered on Nash Equilibrium. The application of a game theory matrix illustrates four scenarios showcasing the interplay between business interests and human rights concerns. The contributions of this article lie in bridging theoretical concepts, offering insights for businesses and stakeholders to enhance their practices in a manner that fosters responsible investment and upholds human rights principles in a global context.

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[16] Mark Moody-Stuart, *Responsible Leadership: Lessons from the Front Line of Sustainability and Ethics* (London: Routledge, 2017), 6-8.

[17] Bennett Freeman, Sif Thorgeirsson, Adele Barzelay, and Brooks Reed, "Shared Space under Pressure: Business Support for Civic Freedoms and Human Rights Defenders," *Business Network on Civic Freedoms and Human Rights Defender*, 2018, https://media.business-humanrights.org/media/documents/3e0f36fc20b47da5465a230beeb34e5ee084f30c.pdf

[18] Richard J. Ormerod, "OR as Rational Choice: A Decision and Game Theory Perspective," *Journal of the Operational Research Society* 61 (2010): 1761-1776.

[19] Samuel Bowles and Herbert Gintis, "Beyond Enlightened Self-interest: Social Norms, Other-regarding Preferences, and Cooperative Behavior," in *Games, Groups, and the Global Good*, ed. Simon A. Levin (London: Springer-Verlag Berlin Heidelberg, 2009), 57-78.

II. Theoretical Framework

A. Game Theory and Nash Equilibrium

First developed by mathematicians like Ernst Zermelo and John von Neumann in the early 20th century and significantly advanced through Nobel Prize-winner John Nash's contributions, game theory has had a profound impact on economics and various other social sciences[20] such as criminology[21]. It focuses on the maximization of utility based on preferences and information in which a "game" is a formal representation of situations where multiple "players," which can vary based on context (e.g., individuals, groups, firms, associations), make decisions and actions that are governed by predefined rules, resulting in interdependence among the players[22]. Grounded on rational choice theory, games are theoretically classified based on information levels, ranging from complete and perfect information to partial or imperfect information[23].

Generally speaking, game theory is a versatile mathematical model used for analyzing competitive or cooperative situations involving multiple players, particularly in scenarios with conflicting interests and zero-sum games where one player's gain equals another's loss[24]. In reality, however, many conflicts result in non-zero-sum games where players' gains and losses aren't directly linked. In such cases, finding an optimal solution is about maximizing each player's own expectations, and John Nash introduced the

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[20] Giacomo Bonanno, *Game Theory (2nd Edition)* (Washington: Kindle Direct Publishing, 2018), 17-18.

[21] Robert L. Birmingham, "Model of Criminal Process Game Theory and Law," *Cornell Law Review* 56 (1970): 57-73.

[22] Bonanno, *Game Theory*, 11-12 ; Heiko Hotz, "A Short Introduction to Game Theory," Ludwig-Maximilians-Universitat Munchen, 2006, https://www.theorie.physik.uni-muenchen.de/lsfrey/teaching/archiv/sose_06/softmatter/talks/Heiko_Hotz-Spieltheorie-Handout.pdf

[23] Harris V. Georgiou, "Elements of Game Theory – Part I: Foundations, Acts and Mechanisms," *The Frontier* (2015): 1-37, https://arxiv.org/pdf/1506.05148.pdf.

[24] Nguyen D. Duong, Mihaela A. Nistor, and Michael Kozlov, "Zero-sum and Other Statistical Games," *WorldQuant*, 2019, https://www.researchgate.net/publication/340923078_Zero-Sum_and_Other_Statistical_Games_Game_theory_offers_insights_into_the_strategies_and_decisions_of_human_contestants_engaged_in_competitive_situations

concept of Nash equilibrium to address these situations, where players reach stable outcomes after competitive rounds, but finding a closed-form solution for nonzero-sum games remains challenging due to their algorithmic complexity[25]. Game theory offers an alternative framework for conflict resolution and mediation[26]. The Nash Equilibrium takes the idea of mutually beneficial outcomes to a point where parties recognize the need to reach an agreement to enhance their prospects of achieving positive results by considering each other's decisions. To illustrate, if X and Y are in a Nash Equilibrium, it means that X is making the optimal decision while considering Y's choice, and likewise, Y is making their best decision while considering X's choice.

Nash equilibrium is a fundamental concept in game theory where, in a strategic interaction, each participant makes the best decision for themselves, given the choices of the others[27]. For instance, in the classic example of the Prisoner's Dilemma[28] (see **Table 1**), two suspects individually choosing to confess (betray) is a Nash equilibrium, as neither can improve their outcome by changing their decision, even though both would be better off if they both stayed silent. It illustrates the concept that rational self-interest often leads to suboptimal collective outcomes, as each player's choice depends on the choices of others, resulting in a less favorable outcome for all involved. This dilemma can be extended to a group of individuals, so-called the N-Player Prisoner's Dilemma[29]. In this

[25] Georgiou, "Elements of Game Theory," 4.

[26] Nitin Walia, "Game Theory and the Law (Alternative Dispute Resolution - Mediation)," *LinkedIn*, June 3, 2021, https://www.linkedin.com/pulse/game-theory-law-alternative-dispute-resolution-mediation-walia/

[27] Bonanno, *Game Theory,* 42.

[28] In a scenario involving two arrested individuals, the police offer both prisoners the same deal: if one confesses to a serious crime while the other remains silent, the confessor's sentence is suspended while the silent one serves 6 years. If both confess, they each serve 4 years. If neither confesses, they both serve 2 years for a minor offense.

[29] Colm O'Riordan and Humphrey Sorensen, "Stable Cooperation in the N-player Prisoner's Dilemma: The Importance of Community Structure," in *Adaptive Agents and Multi-agent Systems III. Adaptation and Multi-agent Learning*, eds. Karl Tuyls, Ann Nowe, Zahia Guessoum, and Daniel Kudenko (London: Springer-Verlag Berlin Heidelberg, 2008), 157–168; Miklos N. Szilagyi, "An Investigation of N-person Prisoners' Dilemmas," *Complex Systems* 14 (2003): 155–174.

scenario, each player faces the choice of cooperation or betrayal, resulting in complex and diverse outcomes. Analyzing and solving N-Player dilemmas becomes increasingly challenging as the number of players grows, and achieving cooperation among all participants requires higher thresholds.

Table 1 Prisoner's Dilemma

		Suspect B: Not Confess	Suspect B: Confess
Suspect A	Not Confess	-2,-2	-6,0
	Confess	0,-6	-4,-4

Source: Adapted from Vassili N. Kolokoltsov and Oleg A. Malafeyev, Understanding Game theory: Introduction to the Analysis of Many Agent Systems with Competition and Cooperation (2nd Edition) (Singapore: World Scientific, 2020).

B. Enlightened Self-interest

Many scholars[30] have similarly defined "enlightened self-interest" as a decision-making approach where individuals prioritize long-term benefits over short-term gains while adhering to ethical principles, ultimately benefiting both themselves and the larger group. With a limited normative nature, it does not concern what individuals desire to do but rather what choices they would make if they possessed improved knowledge, or "information" in rational choice theory[31], about the world and the lasting

[30] Baas et al., *Emerging Selective Enlightened Self-interest Trends*, 15; Steven Suranovic, "Distinguishing Self-interest from Greed: Ethical Constraints and Economic Efficiency," *Institute for International Economic Policy Working Paper Series*, no. 2019-17, 2019, https://www2.gwu.edu/~iiep/assets/docs/papers/2019WP/SuranovicIIEP2019-17.pdf

[31] Maude Beaudry-Cyr, "Rational Choice Theory," in *The Encyclopedia of Crime and Punishment*, eds. Wesley G. Jennings, George E. Higgins, Mildred M. Maldonado-Molina, and David N. Khey (Malden, MA: Wiley Blackwell, 2016), 1-3.

effects of their actions[32]. According to Alexis de Tocqueville[33], a famous philosopher in the 19th century, what serves as the link between different individuals and organizations is "interest," and enlightened self-interest is rooted in the pursuit of individual and collective well-being, driven by the motivation of interest, which encompasses an understanding of the public dimension of private rights and reflects a tradition of covenantal bonds that transcend material desires.

Despite ongoing debates about its legitimacy and changes in tax incentives in the 1980s, enlightened self-interest has been widely recognized in diverse business contexts[34]. In the corporate context, it involves practicing socially responsible behaviors like philanthropy, anticipating long-term advantages such as increased employee motivation, customer loyalty, and favorable treatment[35]. Business executives, driven by enlightened self-interest, have a moral responsibility to support the capitalist system by actively engaging with legislative and regulatory rules and aligning their actions with the broader national interest, addressing the traditional principal-agent problem[36]. This perspective highlights the need for executives to balance self-interest with a broader societal responsibility. Beyond that, in the context of corporate social responsibility, enlightened self-interest involves businesses recognizing the evolving societal expectations of their social roles and responsibilities[37].

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[32] Carlo Burelli, "Solidarity, Stability and Enlightened Self-interest in the EU," *Social Policies* 3 (2018): 449-464.

[33] As cited in Barbara Allen, "Alexis de Tocqueville on Civic Virtue and Self-interest Rightly Understood in American Democracy," prepared for the *1998 Annual Meeting of the American Political Science Association Meetings Boston*, September 2-6, 1998, https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/599/Allen,_Barbara~Alexis-de-Tocqueville-on-civic-virtue-and-self-interest~american-democracy.pdf?sequence=1

[34] Edward J. Stendardi Jr., "Corporate Philanthropy: The Redefinition of Enlightened Self-Interest," *The Social Science Journal* 29, no. 1 (1992): 21-30; Wesley Cragg, "Ethics, Enlightened Self-interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework," *Business Ethics Quarterly* 22, no. 1 (2012): 9-36.

[35] Stendardi Jr., "Corporate Philanthropy," 22-23.

[36] Simons, "Self-interest," 17.

[37] Stendardi Jr., "Corporate Philanthropy," 22; Lance Moir, "What Do We Mean by Corporate Social Responsibility?" *Corporate Governance* 1, no. 2 (2001): 16-22.

Enlightened self-interest, when viewed through the lens of game theory and its connection to Nash Equilibrium, refers to a perspective where individuals, while acting in their rational self-interest, can make decisions that lead to cooperative and mutually beneficial outcomes over time[38]. Based on the perspective of Ken Binmore, a famous game theorist, enlightened self-interest aligns with neoclassical economics, where individuals primarily act in their self-interest, which is in line with Hobbesian belief in the ultimate self-benefit of voluntary human actions[39]. Game theory, as explored by Ken Binmore, offers insights into how individuals can cooperate without the need for external enforcement[40]. In repeated games, the "folk theorem[41]" in game theory suggests that as long as players are patient and expect ongoing interactions, they can act in their self-interest to achieve cooperative results. Nash Equilibrium, in this context, means that any outcome in a repeated game, even those beyond the scope of the one-shot game's Nash Equilibrium, can be maintained as equilibrium, provided that each player's payoff equals or exceeds their minimax payoff from the one-shot game[42]. In addition, acknowledging trade-offs is also essential as it recognizes the challenges and constraints organizations face in aligning self-interest with human rights and ethics[43].

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[38] Dan Crăciun, "Could "Enlightened Self-interest" Make a Case for Ethical Business?" *Cogito* 6, no. 4 (2014): 117-128.

[39] John E. Hare, "Moral Motivation," in *Games, Groups, and the Global Good*, ed. Simon A. Levin (London: Springer-Verlag Berlin Heidelberg, 2009), 181-193.

[40] Andreas Ortmann, "Review: Game Theory and the Social Contract, Volume 1: Playing Fair Ken Binmore," *Southern Economic Journal* 62, no. 4 (1996): 1120-1122.

[41] The Folk Theorem in game theory states that in repeated interactions, players can sustain a wide range of outcomes through cooperation, retaliation, and communication, leading to mutually beneficial results over time. It extends Nash Equilibrium to account for stable outcomes in repeated games by allowing for cooperative strategies that go beyond one-shot Nash Equilibria; Drew Fudenberg and Eric Maskin, "The Folk Theorem in Repeated Games with Discounting or with Incomplete Information," *Econometrica* 54, no. 3 (1986): 533-554.

[42] Ken Binmore, "The Origins of Fair Play," *Papers on Economics and Evolution, Evolutionary Economics Group*, MPI Jena, 2006, http://www.evoecon.mpg.de/fileadmin/user_upload/Paper/2006-14.pdf

[43] Markus Beckmann, Stefan Hielscher, and Ingo Pies, "Commitment Strategies for

Sustainability: How Business Firms Can Transform Trade-offs into Win–Win Outcomes," *Business Strategy and the Environment* 23 (2014): 18–37.

The overall concept highlights the interplay between rational self-interest, cooperation, and the sustainability of equitable outcomes in game theory scenarios, aligning with enlightened self-interest.

III. Conceptual Framework: Nash Equilibrium Human Rights Matrix

The development of the matrix integrating Nash Equilibrium is a crucial aspect of understanding the strategic dynamics between the business sector and the affected parties in the context of human rights. Based on the theoretical framework discussed in the previous section, I developed a matrix assuming that both the business sector and the affected parties engage in strategic decision-making, aiming to maximize their utility while recognizing the interdependence of their choices (see **Table 2**). By applying Nash Equilibrium principles, the matrix serves as a valuable tool to encourage cooperation and enhance human rights protection in the business sector while understanding the equilibrium points where both parties act in their rational self-interest while considering the actions of the other.

Table 2 Nash Equilibrium Human Rights Matrix

		Affected Party *Y*	
		Cooperate	Compete
Business *X*	Cooperate	Win-Win (P > Y; P > T)	Lose-Win (P < T; P > T)
	Compete	Win-Lose (P > T; P < T)	Lose-Lose (P < T; P < T)

Source: Developed by Author

A. Parameters and Variables

The matrix incorporates several parameters and variables to capture the complexities of the interactions between the business sector and the affected parties. These parameters include "payoffs," which represent the

outcomes or benefits to each player based on their chosen strategies, and "trade-offs" which represent the compromises and sacrifices needed to achieve mutually beneficial outcomes, reflecting the complexities of decision-making in balancing business interests and ethical values. Variables reflect the strategic choices of both players, such as "Business Sector Cooperate," "Business Sector Compete," "Affected Parties Cooperate," and "Affected Parties Compete." The payoffs in each cell of the matrix are determined by the selected strategies, offering a quantitative representation of the consequences of these strategic decisions.

B. Cooperative and Non-cooperative Scenarios

The matrix represents both cooperative and non-cooperative scenarios in the context of human rights and corporate abuses. According to Crăciun (2014, 121), it is more appropriate to use the terms 'cooperate' and 'compete' when applying the prisoner's dilemma matrix to the concept of enlightened self-interest. The cooperative scenarios are reflected when both the business sector and the affected parties choose to cooperate, resulting in mutually beneficial outcomes. In contrast, non-cooperative scenarios arise when one or both parties decide to compete, potentially leading to suboptimal collective results. The four scenarios include "win-win" which refers to when the payoffs are higher than trade-offs on both sides; "win-lose" which represents the situation where the payoffs of the business are higher than trade-offs, but the payoffs of the affected parties are lower than trade-offs; "lose-win" which is the opposite situation to the win-lose scenario, and "lose-lose" where the payoffs are lower than trade-offs on both sides.

It is possible to develop a matrix for N-Player Nash Equilibrium human rights as illustrated in **Table 3**. This matrix is more suitable for representing the case of disputes occurring within a global supply chain where multiple parties are involved. Keep in mind that the complexity of the matrix increases significantly with each added player. Creating and interpreting an N-player matrix can be quite challenging and may require the use of specialized software for more advanced analysis with a large number of players. Therefore, in this article, we will apply only the 2-party matrix to present the case studies in the next section.

Table 3 N-Player Nash Equilibrium Human Rights Matrix

	Player A	Player B	Player C	...	Player N
Player A	(Outcome)	(Outcome)	(Outcome)		(Outcome)
Player B	(Outcome)	(Outcome)	(Outcome)		(Outcome)
Player C	(Outcome)	(Outcome)	(Outcome)		(Outcome)
...	...	...	...		...
Player N	(Outcome)	(Outcome)	(Outcome)		(Outcome)

Source: Developed by Author

IV. Application of Nash Equilibrium in Business and Human Rights

In this section, I have employed the developed Nash Equilibrium Human Rights Matrix (see **Table 2**) to depict four distinct case studies that exemplify potential outcomes of business practices on human rights. The first case study illustrates a win-win scenario between a company and the affected parties, while the second, third, and fourth cases demonstrate win-lose, lose-win, and lose-lose situations, respectively.

A. Win-Win: Fairtrade and International Cocoa Industry

Fairtrade is an international network that links farmers and laborers in sourcing nations with consumers and enterprises globally, aiming to transform trade practices for the greater good. As part of its supply chain priorities, Fairtrade places a significant focus on cocoa[44]. A study[45] found that the international cocoa trade industry has long been characterized by a power imbalance, with large multinational corporations exerting significant influence over prices and conditions. In this context, Fairtrade's approach to cocoa sourcing and certification stands out as a potential win-win solution. Its process, which seeks corrective action plans from audited

[44] Fairtrade International, "Delivering Impact for Farmers and Workers through Outcome-based Programmes," 2023, https://files.fairtrade.net/Fairtrade_Outcome_Based_Programmes_brochure_2023_04.pdf

[45] Jessica Rocha, Tytti Nahi, and Meri Hyrske-Fischer, "How Does Fairtrade Mitigate Human Rights Violations in Global Supply Chains?" *Fairtrade*, 2021, https://www.fairtrade.ie/wp-content/uploads/2021/04/Fairtrade-Human-Rights-and-the-Environment-What-next....pdf

organizations rather than immediately severing business relationships, allows for continuous improvement and preserves partnerships[46]. Fairtrade's steps, including raising minimum cocoa prices and advocating for Living Income Reference Prices, exemplify their commitment to making a positive impact beyond auditing[47]. However, as highlighted by the UN Guiding Principles on Business and Human Rights (UNGPs), there is the need for true collaboration throughout the supply chain. Large retailers and manufacturers must move beyond transactional relationships and provide long-term purchasing commitments to producers, acknowledging that addressing human rights grievances is a shared responsibility[48].

Applying the Nash Equilibrium Human Rights Matrix to the international cocoa trade and Fairtrade case demonstrates a win-win situation in the making. The business sector, consisting of large multinational corporations, stands to gain from this scenario by fostering more collaborative, long-term partnerships with cocoa producers, leading to a stable supply of high-quality cocoa and benefiting the industry's sustainability and reputation. However, it's crucial to consider the trade-offs involved, such as increased costs and heightened market competition for these corporations. On the other side, the affected parties, represented by small-scale cocoa farmers, experience improved working conditions and fairer prices, addressing their fundamental human rights concerns. Nevertheless, they must navigate trade-offs like the transition to Fairtrade practices and market dependence on multinational corporations. Despite these trade-offs, this case signifies a win-win outcome, aligning business interests with human rights considerations, as envisioned by the UNGPs, with the benefits appearing to outweigh the costs or challenges, making it a mutually beneficial arrangement.

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[46] James A. Rodríguez, "Fairtrade standard for small-scale producer organizations," *Fairtrade,* 2019, https://files.fairtrade.net/standards/SPO_EN.pdf

[47] Rocha et al., "How Does Fairtrade Mitigate Human Rights Violations," 9.

[48] Edwin Koster, Jane Hwang, and Craig Moss, "United Nations guiding principles on business and human rights: A six-step approach to supply chain implementation," *Social Accountability International (SAI)*, 2012, https://sa-intl.org/wp-content/uploads/2020/02/SAI-ICCO-UNGP-Handbook.pdf

Table 4 Payoffs and Trade-offs (Win-Win)

	Business	Affected Parties
Payoffs	stable supply of high-quality cocoa; sustainability and reputation	working conditions and fairer prices
Trade-offs	increased costs and heightened market competition	transition to Fairtrade practices and market dependence on multinational corporations

Source: Developed by Author

B. Win-Lose: Economic Gains in Xinjiang, China

The human rights crisis in Xinjiang, China, is a deeply troubling situation that presents a win-lose dynamic involving multiple stakeholders. The People's Republic of China (PRC) government, despite international condemnation and allegations of severe human rights abuses, particularly against Uyghurs and ethnic minorities, appears to be reaping economic benefits from these actions[49]. These alleged human rights abuses include widespread forced labor, intrusive surveillance, forced population control measures, family separations, mass detentions, and other violations, which amount to an ongoing genocide and crimes against humanity[50].

At the heart of this issue are allegations that local entities, particularly state-owned enterprises such as the Xinjiang Production and Construction Corps, are profiting from the use of forced labor and from detainees held in re-education camps[51]. These practices create a low-cost

[49] Office of the United Nations High Commissioner for Human Rights, "OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China," 2022, https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf

[50] US Department of State, "Xinjiang Supply Chain Business Advisory Addendum," 2023, https://www.state.gov/wp-content/uploads/2023/09/Xinjiang-Business-Advisory-Addendum-July-2023-FINAL-Accessible-09.26.2023.pdf

[51] Alexander Kriebitz and Raphael Max, "The Xinjiang Case and Its Implications from a

Business Ethics Perspective," *Human Rights Review* 21 (2020): 243–265.

labor force that enhances the financial capacities of these state-owned enterprises. In addition, the cheap labor in Xinjiang makes exports more lucrative, which benefits various businesses involved in the region. International companies, including well-known brands, have faced scrutiny for their potential involvement in this supply chain, raising ethical and legal concerns. Meanwhile, local people, particularly Uighur residents and the Turkic population, have endured forced disappearances, family separations, and human rights abuses, with adults detained and children placed in state-controlled institutions that seek to erase their cultural and ethnic identity, often leading to a lack of communication and the tragic news of family members' well-being or demise[52].

The situation underscores the critical need to address this complex win-lose dynamic. On one side, the PRC government and state-owned enterprises appear to benefit economically from alleged human rights abuses, particularly forced labor and re-education camps. These practices create a low-cost labor force, enhancing financial capacities. However, the trade-offs come in the form of severe international condemnation, legal scrutiny, and potential damage to the reputation of these entities. International companies involved in the Xinjiang region's supply chain are facing ethical and legal concerns. However, despite the trade-offs encompassing reputational risks and potential legal consequences, business continues to be involved in human rights violations in the region, and the local people are endlessly abused and disappearing. This case reveals a complex interplay of trade-offs, illustrating the multifaceted nature of win-lose scenarios within the context of human rights and business.

Table 5 Payoffs and Trade-offs (Win-Lose)

	Business	Affected Parties

[52] Maya Wang, "China's 'beautiful Xinjiang' continues to oppress Uighurs," *Aljazeera*,

September 12, 2023, https://www.aljazeera.com/opinions/2023/9/12/chinas-beautiful-xinjiang-continues-to-oppress-uighurs

Payoffs	extremely low-cost labor force	N/A
Trade-offs	international condemnation, legal scrutiny, and potential damage to the reputation	alleged human rights abuses, particularly forced labor and re-education camps

Source: Developed by Author

C. Lose-Win: Oil Companies in California, United States

The state of California has taken legal action against major oil companies, including Exxon Mobil, Shell, BP, ConocoPhillips, and Chevron, and the American Petroleum Institute[53], claiming that their actions have resulted in tens of billions of dollars in damages related to climate change and that they have deliberately misled the public by downplaying the risks associated with fossil fuels[54]. The lawsuit, filed by California's attorney general, alleges that these companies have knowingly suppressed information about the harmful consequences of fossil fuels since the 1950s, resulting in significant societal and environmental costs. Consequently, the civil case seeks to establish an abatement fund to address future climate-related damages within the state, making it one of the most substantial legal challenges against the fossil fuel industry[55].

This case represents a lose-win situation with human rights and environmental implications. On one hand, the affected parties, including the state of California and the public, have won the lawsuit against the oil companies, but they were already affected by substantial environmental and economic losses and had to spend time and money to sue the business. On the other hand, the oil companies find themselves confronted with significant legal and financial consequences, highlighting the trade-off

[53] Caroll Alvarado, "California Sues 5 Major Oil Companies, Accuses Them of Deceiving Public over the Risks of Fossil Fuel Use," *CNN*, September 16, 2023, https://edition.cnn.com/2023/09/16/us/california-lawsuit-oil-companies/index.html

[54] Office of Governor Gavin Newsom, "People of the State of California v. Big Oil," September 16, 2023, https://www.gov.ca.gov/2023/09/16/people-of-the-state-of-california-v-big-oil/

[55] David Gelles, "California Sues Giant Oil Companies, Citing Decades of Deception," *New York Times*, September 15, 2023, https://www.nytimes.com/2023/09/15/business/california-oil-lawsuit-newsom.html

between short-term profits and potential long-term legal liabilities. This case underscores how legal actions against corporations for environmental and human rights abuses can lead to accountability, creating incentives for businesses to transition to more sustainable practices while shedding light on the complex trade-offs inherent in addressing environmental and human rights concerns through litigation.

Table 6 Payoffs and Trade-offs (Lose-Win)

	Business	Affected Parties
Payoffs	business gains	winning the lawsuit; compensation
Trade-offs	long-term legal liabilities; financial consequences	legal and financial costs

Source: Developed by Author

D. Lose-Lose: Gold Mining Company in Thailand

The Akara gold mine, spanning across Phichit, Phitsanulok, and Phetchabun provinces, resumed operations in 2023 after a six-year suspension initiated by the National Council for Peace and Order in 2017[56]. This delay in operation not only had severe economic repercussions for Akara Resources Plc but also raised environmental concerns and highlighted the need for effective oversight and cooperation to balance the interests of the business sector and the affected parties, as the mine has faced allegations of leaking toxic waste, causing adverse environmental and health effects on local communities and local workers[57]. For the local people, the environmentally harmful business in their homeland did not only damage their health but also took away their job opportunities that could be found in the eco-friendlier industries.

[56] Bangkok Post, "Mine Faces Big Test," March 3, 2023. https://www.bangkokpost.com/opinion/opinion/2534299/mine-faces-big-test

[57] Transnational Institute, "Destructive Mining Trumps Local Health and Environment: Kingsgate VS Thailand," 2019, https://www.tni.org/files/kingsgate-vs-thailand.pdf; Bangkok Post, "Rights Commission Supports End to Gold Mining," May 13, 2016, https://www.bangkokpost.com/thailand/general/971621

During the mining suspension period, many became unemployed if they chose to stay. Still, those who had been compensated and relocated lost their homes, while some were attacked by strategic lawsuits against public participation (SLAPPs)[58].

The compensation dispute between Kingsgate Consolidated, the parent company of Akara Resources Plc, and the Thai government remains unresolved, despite ongoing negotiations and an imminent decision from the arbitral tribunal. The company should receive over $82 million in compensation after the Thai government's illegal expropriation in 2016, including a $4.93 million contribution to the Thailand-Australia Free Trade Agreement (TAFTA) by insurers[59]. However, the uncertainty surrounding the outcome has resulted in substantial time and energy invested in the case, which may appear wasteful until a final resolution is reached.

Applying the Nash Equilibrium Human Rights Matrix to this scenario, it becomes evident that the Akara gold mine's case falls into the category of a lose-lose situation for both the business sector (Akara Resources Plc) and the affected parties (local communities and environmental activists). For the business sector, the suspension and compensation dispute have resulted in considerable financial losses, representing the trade-off between short-term financial gains and long-term financial stability. On the other side, the affected parties are grappling with environmental and health concerns, reflecting the trade-off between their well-being and the potential economic benefits associated with the mine's operations. This case highlights the complex trade-offs in situations where environmental and human rights issues intersect with business interests and underscores the need for cooperative solutions that consider the diverse interests of all stakeholders while addressing these trade-offs.

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[58] Kannikar Petchkaew, "Thai Gold Mine Blamed for Sickening Local Villagers is Set to Reopen," *Hard Stories*, 2022, https://hardstories.org/stories/environmental-justice/chatree-mine-to-reopen.

[59] Thailand Arbitration Center, "Updates! Dispute between the Thai Government and Kingsgate is a Nearly Ending Saga," 2021, https://thac.or.th/updates-dispute-between-the-thai-government-and-kingsgate-is-a-nearly-ending-saga/

The lose-lose situation, therefore, emphasizes the importance of collaborative efforts and government oversight. For instance, collaborative efforts might involve the business sector investing in advanced and environmentally friendly mining technologies, while government oversight could ensure stricter compliance with environmental regulations. Cooperative solutions may include establishing a joint committee with representatives from both the business sector and the affected parties to address environmental concerns and health issues collectively.

Table 7 Payoffs and Trade-offs (Lose-Lose)

	Business	Affected Parties
Payoffs	business gains	employment; compensation
Trade-offs	financial losses; business suspension; opportunity costs; hampered operations	environmental and health concerns; unemployment; SLAPPs; relocation

Source: Developed by Author

V. Conclusion

This paper introduces a conceptual framework that employs Nash Equilibrium and a game theory matrix to explore the intersection of enlightened self-interest, business, and human rights, using four case studies to demonstrate its applicability in analyzing real-world scenarios. The four case studies, namely Win-Win with Fairtrade, Win-Lose in Xinjiang, Lose-Win in California, and Lose-Lose in a Thai gold mine, reveal various patterns and trends in the application of enlightened self-interest in the context of human rights and business. These cases not only shed light on the potential for win-win scenarios, where businesses align their interests with human rights concerns, but also underscore the trade-offs and complexities inherent in these intersections.

In the Win-Win scenario with Fairtrade, enlightened self-interest is evident as companies cooperate with Fairtrade to secure a stable supply of high-quality cocoa while providing fair compensation to farmers. This mutually beneficial approach underscores that economic gains and

responsible business practices can harmoniously coexist. Conversely, in the Win-Lose situation in Xinjiang, state-owned enterprises prioritized their economic interests at the expense of human rights, a stark illustration of the dangers of prioritizing profit over people. The Lose-Win case study of California's oil companies demonstrates the need for enlightened self-interest to avoid legal actions compelling businesses to address environmental concerns. Finally, the Lose-Lose scenario in Thai gold mining signifies the absence of enlightened self-interest, as neither the mining company nor the affected communities have distinctly benefited, reflecting the dire consequences of neglecting cooperative approaches in addressing human rights and environmental issues.

These case studies offer valuable insights for businesses seeking to integrate enlightened self-interest into their practices. First, using the Nash Equilibrium framework as demonstrated in these case studies, companies can better evaluate the potential outcomes of their decisions concerning human rights and corporate interests. By considering how their actions impact other stakeholders, businesses can strategically align their interests with broader societal and environmental goals. Second, strategies for fostering enlightened self-interest should involve ongoing dialogues, partnerships, and cooperation with stakeholders like human rights organizations, local communities, and government bodies. This approach is illustrated in the Fairtrade case, where collaboration is the foundation for sustainable and ethical business practices. Implementing transparency, ethical supply chain management, and responsible resource utilization can help companies navigate the complexities of the modern global marketplace while preserving human rights and the environment. These practical implications highlight that the future of business lies in striking a balance between economic interests and the welfare of all stakeholders, ultimately reflecting the principles of enlightened self-interest.

This paper significantly contributes to global investment governance, as it allows for a comprehensive analysis of the intersection between enlightened self-interest, business practices, and human rights. However, while the Nash Equilibrium Human Rights Matrix provides a valuable framework for analyzing scenarios where enlightened self-interest intersects with human rights and business, it is not without potential

shortcomings. One notable challenge lies in the assumption of complete and accurate information, a concern that resonates with the rational choice theory's distinction between perfect and impartial information.[60] Real-world scenarios often involve uncertainties, information gaps, and varying perspectives, making it challenging to precisely predict the decisions and responses of all stakeholders. The conditions for Nash equilibrium in a multiplayer game are determined by what the players know and believe about the game and each other's actions. In specific scenarios, these conditions imply that the guesses or assumptions made by the players about each other's strategies, in the context of imperfect information, form a Nash equilibrium.[61] Therefore, the Nash Equilibrium Human Rights Matrix, when applied to multiple firms as a collective business sector, should be applied to industries with firms sharing similar business strategies and resources. This limitation shows that firms may assess their strategies in the context of human rights by considering what each firm knows and believes about the others' actions in the industry. It is more relevant in industries where competition and cooperation among firms have implications for human rights.

Furthermore, the 2-player matrix does not account for the dynamic nature of stakeholder relationships in global supply chains. Future studies may apply the N-player matrix to understand more complex scenarios or relationships. For example, it is possible to apply the N-player matrix to the fourth case study because the party that needs to pay the compensation to the political insurer is the Thai government. As shown in the second case study, it is also evident that the state is a key stakeholder in the situation of Xinjiang Region. Both cases show that the government can affect and be affected by the business and victims of human rights violations. Therefore, it should be treated as another player in the matrix. Since business environments continue to evolve, the matrix may need to adapt

[60] Gianluca Manzo, "Is Rational Choice Theory still a Rational Choice of Theory?: A Response to Opp." *Social Science Information* 52, no. 3 (2013): 361-382.

[61] Robert Aumann and Adam Brandenburger, "Epistemic Conditions for Nash Equilibrium." *Econometrica* 63, no. 5 (1995): 1161-1180.

to new variables and considerations, highlighting the need for ongoing refinement and expansion.

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Contemporary Challenges in Law and Governance towards
100 years of Indonesian Legal Education
Proceedings of the International Conference on
Law and Governance in a Global Context (icLave) 2023

5th icLave

Central Bank Digital Currency as a State Sovereignty:
Bank Indonesia as the Sole Currency Issuer Authority in Indonesia

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Abstract

Bank Indonesia plans to issue a central bank digital currency to support public needs in carrying out financial transactions in the digitalization era. The issuance of a central bank digital currency is expected to become the answer to the public needs for a digital legal tender and safe means of payment. Central bank digital currency will be directly issued by and under authority of Bank Indonesia as the central bank of the Republic of Indonesia. This paper is exploring the legality of issuing central bank digital currency in Indonesia. Second focus of this paper is to prove that the issuance of a central bank digital currency is part of maintaining state sovereignty. Library research and literature review on digital currencies and digital Rupiah will be applied in this paper. This paper research concluded that the issuance of the central bank digital currency in Indonesia is legal. Second finding of this paper is that the issuance of a central bank digital currency is part of maintaining state sovereignty. Suggestions based on the paper conclusions are the need for broader and in-depth research on the form and mechanism for issuing Digital Rupiah as the digital currency of the Republic of Indonesia. Further research regarding Digital Rupiah is urgently needed in order to support a fast, easy, cheap, safe, and reliable cross-border payment system, so it will contribute to the legal certainty regarding the use of digital currency as well to Indonesia's economic recovery, furthermore the global economic recovery.

Keywords: Central Bank Digital Currency, CBDC, digital currency, central bank

I. Introduction

The use of the internet has become a necessity in almost every aspect of people's lives.[1] Based on Indonesia Internet Service Provider

[1] Vanessa Stefanny and Beby Tiara, "Overview Perbandingan Jumlah User Fintech (Peer-to-Peer Lending) dengan Jumlah Pengguna Internet di Indonesia pada Masa Pandemi COVID-19," *Jurnal IPSIKOM Insan Pembangunan Sistem Informasi dan Komputer* 9, no. 1 (June 2021).

Association (Asosiasi Penyelenggara Jasa Internet Indonesia or APJII), more than 210 million of 272 million Indonesia's population have obtained and used internet facilities since 2021.[2] In 2023, it is increasing up to 215 million.[3] According to We are Social and Hootsuite Report in 2021, Indonesia's internet users who access the internet from their mobile phones has reached 98.3%. This number indicated that Indonesia is ready for digital transformation. Public are able to independently perform their own economic and financial activities through their devices.[4]

The progress of technological development shows how it encourages the state through its government to facilitate public needs.[5] The rapid development of technology also touches the financial sector as financial technology. CoronaVirus Disease (COVID-19) pandemic also plays a role in boosting the acceleration of financial technology. To prevent and suppress the potential spread of the COVID-19 pandemic in the community, the government issued policies on public mobility restriction.[6] This Restriction is as a part of Indonesia Government Program in handling COVID-19 pandemic and to protect public health.[7]

The Government Program on public mobility restriction has greatly contributed to the technology development in order to support the

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[2] Muhammad Adisurya Pratama, "Inklusi Keuangan Digital Dorong Pertumbuhan Ekonomi," accessed 30 November 2023, https://www.bi.go.id/id/bi-institute/BI-Epsilon/Pages/Inklusi-Keuangan-Digital-Dorong-Pertumbuhan-Ekonomi.aspx.

[3] Asosiasi Penyelenggara Internet Indonesia, Survey Internet Indonesia Tahap I Tahun 2023. https://survei.apjii.or.id/.

[4] Otoritas Jasa Keuangan, *Cetak Biru Transformasi Digital Perbankan* (Jakarta: Departemen Penelitian dan Pengaturan Perbankan Otoritas Jasa Keuangan, 2021), 37.

[5] Syafira Nurulia, "Menggagas Pengaturan dan Penerapan Central Bank Digital Currency di Indonesia: Bingkai Ius Constituendum," *Journal of Judicial Review* 23, no. 2 (December 2021): 276-290. DOI: http://dx.doi.org/10.37253/jjr.v.23i2.5014.

[6] Muhammad Faniawan Asriansyah, "Pandemi COVID-19 dan Upaya Pencegahan", https://www.djkn.kemenkeu.go.id/artikel/baca/15799/Pandemi-Covid-19-dan-Upaya-Pencegahan.html

[7] Kementerian Koordinator Bidang Perekonomian Republik Indonesia, *Berisikan Lini Masa Kebijakan dan Dinamika Penanganan Pandemi, Pemerintah Luncurkan Buku Vaksinasi Covid-19*, https://ekon.go.id/publikasi/detail/4437/berisikan-lini-masa-kebijakan-dan-dinamika-penanganan-pandemi-pemerintah-luncurkan-buku-vaksinasi-covid-19#:~:text=Dalam%20penanganan%20pandemi%2C%20Pemerintah%20melakukan,menjaga%20jarak)%2C%20dan%20vaksinasi.

continuity of public activity in pandemic situations as in non pandemic situations. The urgent need for this support has pushed rapidly the development of technology. This development includes technology on payment systems to facilitate the public financial transaction. The payment system in financial transaction coverage the payment instruments and non-cash payment transactions. The COVID-19 pandemic has changed public financial transaction mechanisms and behavior. Public are no longer depends on financial transaction assistance by bank employees, at the bank offices, and during the bank office operating hours. Independently carrying out their financial transactions, it makes it easier for the public to fulfill their needs.[8]

The development of financial technology is also in line with the development of the payment system that is managed by the central bank. The central bank is facing two choices. The choices are whether to continue running the current stagnant payment system or developing it to accelerate with technology development in order to support the implementation of digital finance.[9] Until the time of this article published, while the COVID-19 Pandemic situation has continued to decline, the public continues to use financial technology development in order to fulfill their financial transaction activities. Public is also demanding easier, comfortable, faster, reliable, and safe technology facilities to support their financial transactions. This new public behavior is walking aside along with the decreasing public tendency to carry out financial transactions in cash as their main payment method.[10]The development of information

[8] Muhammad Adisurya Pratama, "Inklusi Keuangan Digital Dorong Pertumbuhan Ekonomi", https://www.bi.go.id/id/bi-institute/BI-Epsilon/Pages/Inklusi-Keuangan-Digital-Dorong-Pertumbuhan-Ekonomi.aspx

[9] Nurulia, "Menggagas Pengaturan dan Penerapan ...": 276-290.

[10] Allam Z, "The Forceful Reevaluation of Cash-Based Transactions by COVID-19 and Its Opportunities to Transition to Cashless Systems in Digital Urban Networks", in *Surveying the Covid-19 Pandemic and its Implications: Urban Health, Data Technology and Political Economy* (Elsevier, 2020), 107-117. DOI: 10.1016/B978-0-12-824313-8.00008-5, Epub 2020 Jul 24, PMCID: PMC7378511, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7378511/.

technology in financial transaction activities has developed the consideration to create digital money.[11]

Central banks all over the world are starting to conduct research on digital currencies. Some of them are planning to issue it. Few of them have even issued digital currency. The issuance of digital currency by the central bank is expected not only to fulfill the public's urge to be able to do transactions with digital currency but also to provide adequate protection in its use. The other aim of digital currency issuance is to prevent its use in criminal activities.[12]

II. Definition of Central Bank Digital Currency

Central bank money refers to money that its liability is on the central bank.[13] Central Bank Digital Currency (CBDC) is a virtual currency that is controlled by the central bank.[14] The term CBDC is used to refer to several concepts of central bank money.[15] Name of CBDC consists of components as follows. "CB" stands for central bank, "D" for digital, and "C" for currency. Moreover, a central bank means that central bank digital currency must be issued and authorized by a central bank. Digital means that central bank digital currency is issued digitally. Currency means that

[11] Agung Mulyono, "Menuju Era Uang Rupiah Digital", https://djpb.kemenkeu.go.id/portal/id/berita/lainnya/opini/3950-menuju-era-uang-rupiah-digital.html

[12] Peterson K. Ozili, "Central Bank Digital Currency Research around the World: A Review of Literature", *Journal of Money Laundering Control* 26, No. 2 (2022): 215-226. DOI: https://doi.org/10.1108/JMLC-11-2021-0126, https://www.emerald.com/insight/content/doi/10.1108/JMLC-11-2021-0126/full/html

[13] Board of Governors of the Federal Reserved System, "What is a Central Bank Digital Currency?", https://www.federalreserve.gov/faqs/what-is-a-central-bank-digital-currency.htm

[14] Fitri Handayani, et. al., "Design and Legal Aspect of Central Bank Digital Currency: A Literature Review", *Journal of Central Banking Law and Institutions* 1, No. 3 (2022): 509-536. https://doi.org/10.21098/jcli.v1i2.19

[15] Bank for International Settlements, *Central Bank Digital Currencies*, Committee on Payments & Market Infrastructure, Markets Committee. BIS, March 2018, https://www.bis.org/cpmi/publ/d174.pdf

a central bank digital currency is defined as the official means of payment of a state or monetary union and recognized by the state monetary law.[16]

Some central banks had shared their understandings of central bank digital currency. The Bank of England (BoE) defines central bank digital currency as central bank money that is issued in electronic form that could be used by households and the business sector to make payments and hold a store value.[17] The United States Federal Reserve (The Fed) similarly describes central bank digital currency as a digital form of central bank money that is widely available to the public, bearing digital liability to central banks.[18] The People's Bank of China (PBOC) defines its digital fiat currency or e-CNY as a digital version of fiat currency circulated by PBOC that is operated by authorized stakeholders.[19] Indonesia's bank central, Bank Indonesia, defines central bank digital currency as a form of central bank money in digital form. It is the liability of the central bank. This money is denominated in the national currency. It could serve as a medium of exchange, unit of account, or store of value.[20]

As it was established in 2011, Indonesia Act Number 7 Year 2011 on Currency, has not mentioned nor regulated digital currency form in Indonesia. This Act only recognized two conventional forms of currency

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[16] Wouter Bossu, et. al., *Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations*, International Monetary Fund Working Paper No. WP/20/254, November 2020, https://www.imf.org/en/Publications/WP/Issues/2020/11/20/Legal-Aspects-of-Central-Bank-Digital-Currency-Central-Bank-and-Monetary-Law-Considerations-49827

[17] Bank of England, "Discussion Paper: Central Bank Digital Currency, Opportunities, Challenges, and Design", March 2020, https://www.bankofengland.co.uk/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design-discussion-paper

[18] Fransiska Ari Indrawati, "Central Bank Digital Currency under the State Theory of Money: A Preliminary Legal Analysis," *Journal of Central Banking Law and Institutions* 1, No. 3 (2022): 371-404. https://doi.org/10.21098/jcli.v1i2.15

[19] The People's Bank of China, "Progress of Research and Development of E-CNY in China," *Working Group on E-CNY Research and Development of the People's Bank of* China, July 2021, http://www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021071614584691871.pdf.

[20] Bank Indonesia, "Project Garuda: Navigating the Architecture of Digital Rupiah," accessed 8 November 2023, https://www.bi.go.id/en/rupiah/digital-rupiah/default.aspx.

which consist of banknotes and coins.[21] In 2023 with the published of the Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector, new form of money in Indonesia is introduced. The Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector is Indonesia's omnibus law regarding financial sector. It has amended several laws in the financial sector including the Act Number 7 Year 2011 on Currency. The Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector regulate that there are three form of currency in Indonesia. They are banknotes, coin, and digital. Digital currency in Indonesia named Rupiah Digital or Digital Rupiah. Rupiah Digital is Rupiah which have a digital format.[22]

III. Purposes of Issuing Central Bank Digital Currency

Since its independence on August 17th 1945, Indonesia has implemented several currencies as a means of payment. The currencies are including De Javasche Bank money, and De Japansche Regeering money. Sjafruddin Prawiranegara proposed to the first Indonesia President Soekarno and Vice President Mohammad Hatta that Indonesia must have its own currency. His two arguments in his proposal are based on the function of currency itself. Currency is a legal medium of exchange or payment in a country. Another function of currency is as an attribute of an independent, sovereign nation. As stated by Jean Bodin, sovereignty is the highest authority. This authority is attached to the government to its citizens. One of the characteristics of sovereignty is government authority to issue state currency.[23] President Soekarno and Vice President

[21] Indonesia, *Act on Currency*, Act Number 7 Year 2011, Article 2 Clause (2). [The Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector, regulate including the Amendment to the Act Number 7 Year 2011 on Currency is established on January 12th 2023.].

[22] Bank Indonesia, "Rupiah Digital. Uang Masa depan Kita," accessed 10 November 2023, https://www.bi.go.id/id/publikasi/ruang-media/cerita-bi/Pages/Rupiah-Digital-Uang-Masa-Depan-Kita.aspx#.

[23] Padmo Wahyono, *Kuliah-Kuliah Ilmu Negara* (Jakarta: Ind Hill Co, 1996), 153-154.

Mohammad Hatta responded to Sjafruddin Prawiranegara's proposal with the issuance of the Oeang Republic of Indonesia on October 30th 1946.

The nationalization of De Javasche Bank, which then became the Bank Indonesia on July 1st 1953, transferred the function of Indonesia's central bank to Bank Indonesia. The sole right to issue Indonesia's currency, named Rupiah, is under Bank Indonesia. This right is set with the establishment of Law Number 13 Year 1968 concerning Bank Sentral.[24]

The way the public uses money is changing. For hundreds of years, banknotes and coins have been the only means of payment that the public could directly use to make payments. Along with cheques, debit cards, and credit cards are also widely used by the public.[25]

The development of digital technology, particularly the development of blockchain, has also driven the momentum of the development of financial technology. Blockchain has a significant role in the development of cryptocurrency. Cryptocurrencies are developed by the private sector. [26] Cryptocurrecies's bear both benefit and risk. The main advantage of cryptocurrencies is its anonymity. [27] Public feel comfortable with the anonymity of cryptocurrencies. Users feel comfortable because the transactions they make are privately between the parties involved. This sacrecy is similar to using cash. Other benefits of using cryptocurrencies

[24] Kementerian Keuangan Republik Indonesia, "Sejarah Oeang Republik Indonesia (ORI): Berawal dari Dekrit hingga Menjadi Bukti Fisik yang Konkrit," accessed 10 November 2023, https://visual.kemenkeu.go.id/sejarah-oeang.

[25] Bank of England, "Discussion Paper: Central Bank Digital Currency, Opportunities, Challenges, and Design", March 2020, https://www.bankofengland.co.uk/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design-discussion-paper.

[26] Maulana Ihsan Fairi, et. al. "Analisis Penerapan Central Bank Digital Currency dalam Perspektif Keamanan Nasional," *Jurnal Ekonomi Pertahanan* 7, No. 2 (2021): 221-234. https://jurnalprodi.idu.ac.id/index.php/EP/article/view/882. file:///Users/nadia/Downloads/fenyavisha23,+4.+Maulana+Ihsan+Fairi.pdf

[27] Fairi, et. al. "Analisis Penerapan Central Bank Digital Currency": 221-234.

are its speed of transaction, it is considered a low cost transaction, and it can be transacted across borders. [28]

The use of cryptocurrency as medium of exchange is forbidden di many countries, including Indonesia. The reason of the state prohibiting on cryptocurrency as a medium of payment are the risks which attached to it. Cryptocurrencies are a threat to state sovereignty and a high instrument. Regarding to the issuance of digital money which is not by government, the state does not have a monetary policy control on cryptocurrencies. Cryptocurrencies are totally controlled by the private sector through digital platforms. The market value of cryptocurrencies fluctuates. Owners and users of cryptocurrencies fully bear this risk. This fluctuating market value is another risk of cryptocurrencies.

Prohibition on crypto currency as a medium of payment is also regulated in Indonesia. Indonesia is open to the presence of cryptocurrency but not as a medium of exchange but as part of commodity tools. It is why regulation on cryptocurrency in Indonesia is not by Bank Indonesia but under the authority of Badan Pengawas Perdagangan Berjangka Komoditi (abbreviated as BAPPEBTI or the Indonesia Commodity Futures Trading Supervisory Agency / CoFTRA).

Indonesia Act Number 7 Year 2011 on Currency as amendment by Act Number 4 Year 2023 on Developing and Strengthening of the Financial Sector regulated that every payment transaction in Indonesia should using Rupiah[29]. Form Rupiah itself are banknotes, coins, and digital money.[30] Digital Rupiah itself is Rupiah in a form of digital, issued by Bank Indonesia and part of Bank Indonesia's monetary authority.[31]

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[28] Agung Mulyono, "Menuju Era Uang Rupiah Digital", https://djpb.kemenkeu.go.id/portal/id/berita/lainnya/opini/3950-menuju-era-uang-rupiah-digital.html

[29] Rupiah is Indonesian currency, issued by the Republik of Indonesia. [Indonesia, *Act on Currency*, Act Number 7 Year 2011, Article 1 Number 1.].

[30] Indonesia, *Act on Currency*, Act Number 7 Year 2011, Article 2 Clause (2) as amended by the Act Number 4 Year 2023 on Developing and Strengthening of the Financial Sector, Part Sixth: Rupiah Digital, Article 10 considering amendment on Act Number 7 Year 2011 on Currency, Part One Article 2 Clause (2).

[31] Indonesia, *Act on Currency*, Act Number 7 Year 2011, Article 2 Clause (2) as amended by the Act Number 4 Year 2023 on Developing and Strengthening of the

Bank Indonesia's intention to develop Digital Rupiah issuance as Indonesian central bank digital currency is concerning three key factors. The first factor is considering the status of Bank Indonesia itself. Bank Indonesia is the sole institution who holds the mandate to issue Indonesia's currency.[32] It's what makes Bank Indonesia conscious of the importance of taking the initiative to explore and take a deep research on central bank digital currency and its possibility to issue in Indonesia.

Second factor of Bank Indonesia's intention to develop Digital Rupiah is as part of Bank Indonesia's concern to strengthen its role on the international level.[33] Having a significant position in international level will place Bank Indonesia's standing point to be accounted for in determining international monetary policy. The third factor of Digital Rupiah development is as a major step forward to accelerating the integration of the national digital economy and finance.[34]

Central bank digital currency is introduced to encounter the utilization of cryptocurrency as a medium of payment by the public. Considering the only legal medium of exchange in Indonesia is Rupiah, issued by Bank Indonesia, utilizing cryptocurrencies as medium of exchange is a violation of the law. However, the public's demand on digital currency in their transaction, needed an immediate response.

Should Indonesia have a central bank digital currency? As have previously discussed, currency is part of state sovereignty. Also have discussed that the main aim of central bank digital currency issuance is to provide a safe digital legal tender to use in society. Considering the public needs for digital payment as a medium of exchange and the substantial risks of cryptocurrency, many centers all over the world including Indonesia, put a strong attention to the possibility of issuing central bank digital currency. The presence of central bank digital currency is expected to support the role of the central bank as the authority of currency issuance

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Financial Sector, Part Sixth: Rupiah Digital, Article 10 considering amendment on Act Number 7 Year 2011 on Currency, Part One Article 2 Clause (2), Annexes.

[32] Bank Indonesia. "Project Garuda"

[33] *Ibid.*

[34] *Ibid.*

and payment system.[35] Derived from three key factors to develop Digital Rupiah, Bank Indonesia will formulate their program to fulfill three targets. The first target is to provide legal digital currency to the Republic of Indonesia. This first target is in the form of Digital Rupiah. Digital Rupiah is a legal currency of the Republic of Indonesia along with banknotes and coins.[36]

Second target of developing Digital Rupiah is to fulfill Bank Indonesia's mandate as the sole legal currency in Indonesia by issuing central bank digital currency to make Rupiah more competitive in the digital era. Bank Indonesia achievement in issuing Digital Rupiah will place Bank Indonesia in a significant position on the international level. This position will make Bank Indonesia's perspective being valued in the international forum. Third target of developing Digital Rupiah is to position Digital Rupiah as an essential element to contribute to the development of the national financial system. The third target will also boost the integration of Indonesia's digital economy and finance.[37]

IV. Benefits and Risks of Central Bank Digital Currency

Central bank digital currency offers a number of benefits. The first benefit of a central bank digital currency is its issued by the state's central bank. If fluctuations of central bank digital currency occur, the central bank will intervene. The central bank intervention will keep the central bank digital currency's exchange rate being relatively stable then cryptocurrencies.

Other benefits of central bank digital currency are that it contributes to a more resilient payments landscape through its potential to facilitate households and the business sector to have a faster, efficient, and reliable payment system. Central bank digital currency could also provide safer

[35] Indrawati, "Central Bank Digital Currency...": 371-404.

[36] Indonesia, *Act on Currency*, Act Number 7 Year 2011, Article 2 Clause (2) as amended by the Act Number 4 Year 2023 on Developing and Strengthening of the Financial Sector, Part Sixth: Rupiah Digital, Article 10 considering amendment on Act Number 7 Year 2011 on Currency, Part One Article 2 Clause (2).

[37] Bank Indonesia. "Project Garuda."

payments services and be enabled to use as a cross-border payment. Central bank digital currency also will boost the public's financial inclusion[38].[39]

The principal focus of the issuance of central bank digital currency is it will sustain the state's sovereignty. The central bank will continue to hold its control to manage the state's monetary policy. This control is in line with Bank Indonesia's goals to achieve the stability of the Rupiah, to maintain the stability of the payment system, and to maintain the stability of the financial system. The three goals are to maintain the sustainability of Indonesia's economic growth.[40]

Though it has many advantages, on the other hand, central bank digital currency might bear several risks. The presence of central bank digital currency might impact the balance sheets of commercial banks. If the public moved their deposit in commercial banks into central bank digital currency, the amount of funds that commercial banks provide as a loan might decrease.[41]

Parties related to central bank digital currency, such as the state or the central bank as issuer and public or financial institution as holders of central bank digital currency, also might be exposed to risks such as money laundering, cyber fraud, and any legal disputes or legal risks arising from transacting using central bank digital currency. Related to the legal risk in technology, digital identification systems that might be used in central bank digital currency to ensure the legality of payments would be worth

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[38] Financial Inclusion is the availability of access to various financial institutions, products, and services. This access is in accordance with public needs and capabilities. This access's aim is to improve public welfare. [Otoritas Jasa Keuangan. Regulation on Financial Literacy and Inclusion Enhancement in the Financial Services Sector for Consumers and/or Public. Regulation Number 76 Year 2016. Article 1 Number 7.

[39] Bank of England, "Discussion Paper: Central Bank Digital Currency, Opportunities, Challenges, and Design", March 2020, https://www.bankofengland.co.uk/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design-discussion-paper

[40] Indonesia, *Act on Bank Indonesia*, Act Number 23 Year 1999, Article 7. [as amended lastly by the Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector.].

[41] Bank of England, "Discussion Paper: Central Bank Digital Currency, Opportunities, Challenges, and Design", March 2020, https://www.bankofengland.co.uk/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design-discussion-paper

exploring.[42] The central bank and government, including relevant third parties, should be able to identify any legal risks that might arise. It is also essential to provide mitigation steps for those risks. Prevention and mitigation efforts could be attempted by formulating a policy design. The design should meet (i) relevant laws and regulations which provide necessary protection, and (ii) appropriate requirements and procedures to resolve the dispute between the parties.[43]

On the subject of issuing central bank digital currency, attention should be placed on the design. It should not disrupt the financial system. Avoiding disrupting the financial system risk of central bank digital currency, the central bank digital currency design should be integrated with the financial market and payment system. It also should be fully equipped with supporting technology.[44]

V. Central Bank Digital Currency in Indonesia

Central bank digital currency is a new form of money, a digital form of money. As a new form of money, central bank digital currency will legally exist alongside banknotes that exist today that we know as a physical form of money. To be practical and attractive, central bank digital currency must be directly convertible into physical money, vice versa. Indonesia's bank central, Bank Indonesia, defined Rupiah Digital as Indonesia's central bank digital currency as digital format Rupiah.[45]

There are several legal concerns that will need to be explored related to if Indonesia decided to issue a central bank digital currency. This research will point out discussion to give explanation on the central bank

[42] The House of Lords Economic Affairs Committee, "Central Bank Digital Currencies: A Solution in Search of a Problem?", 3rd Report of Session 2021-2022, January 31, 2022, 31, https://committees.parliament.uk/committee/175/economic-affairs-committee/news/160221/central-bank-digital-currencies-a-solution-in-search-of-a-problem-report-published/.

[43] Indrawati, "Central Bank Digital Currency ...", 371-404.

[44] Handayani, et. al., "Design and Legal Aspect ... ", 509-536.

[45] Bank Indonesia, "Rupiah Digital, Uang Masa Depan Kita", https://www.bi.go.id/id/publikasi/ruang-media/cerita-bi/Pages/Rupiah-Digital-Uang-Masa-Depan-Kita.aspx.

digital currency's definition and the legality of issuing central bank digital currency in Indonesia.

Before January 12th 2023, Indonesian Currency Act stipulated that the currency of the Republic of Indonesia is limited to the "Rupiah," which consists of Rupiah banknotes and Rupiah coins. Under this provision, the law limits legal tender in Indonesia only to Rupiah banknotes and Rupiah coins, omitting electronic currency.[46] In order to be issued as a valid legal tender under Indonesian law, therefore, Indonesian Currency Act should extend the forms of Rupiah as legal tender to cover digital formats, not only in the form of banknotes and coins.[47]

January 12th 2023 with the establishment of the Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector, has amended the Act Number 7 Year 2011 on Currency. The Act Number 4 Year 2023 concerning Developing and Strengthening of the Financial Sector regulates that there are three forms of currency in Indonesia which are banknotes, coin, and digital Rupiah.[48]

VI. Concluding Remarks

First conclusion of this article is that the central bank digital currency is legal under Indonesian law. It is as mandate on Act Number 7 Year 2011 on Currency, Article 2 Clause (2) as amended by the Act Number 4 Year 2023 on Developing and Strengthening of the Financial Sector, Part Sixth: Rupiah Digital, Article 10 considering amendment on Act Number 7 Year 2011 on Currency, Part One Article 2 Clause (2). Form Rupiah are banknotes, coins, and digital money. Digital Rupiah it self is Rupiah in a form of digital, issued by Bank Indonesia and part of Bank Indonesia's monetary authority.

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[46] Indrawati, "Central Bank Digital Currency ...",

[47] *Ibid.*

[48] Indonesia, Law on Developing and Strengthening of the Financial Sector, Law Number 4 Year 2023 Article 10.

Second conclusion of this paper is that the issuance of a central bank digital currency is part of maintaining state sovereignty. The function of currency is as an attribute of an independent, sovereign nation. Sovereignty is the highest authority. This authority is attached to the government to its citizens. One of the characteristics of sovereignty is government authority to issue state currency. The principal focus of the issuance of central bank digital currency is it will sustain the state's sovereignty. The central bank will continue to hold its control to manage the state's monetary policy. This control is in line with Bank Indonesia's goals to achieve the stability of the Rupiah, to maintain the stability of the payment system, and to maintain the stability of the financial system. The three goals are to maintain the sustainability of Indonesia's economic growth.

Besides, there are several legal concerns that are addressed to Bank Indonesia and Indonesia's government. Regarding to the issuance of central bank digital currency, there should be: (i) a harmonizing on related laws and regulations; (ii) a policy on mechanism on legal arrangement between relevant parties; (iii) a supporting of technology; (iv) a prevention and mitigation policy to minimize the legal risks on central bank digital currency; and (v) an adequate consumer education.

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Textualism, Fallacies, and Implied Proportionality:
Constitutional Review concerning Right to Be Elected in Arief's Court

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Abstract

Analyzing and testing legal reasonings in the decisions of the Constitutional Court of the Republic of Indonesia (MK-RI) have significant methodological importance. This article is not focused on the content of the "*amar*" part as statements located at the end, but on how legal reasonings are formulated to rationalize the decisions. Because MK-RI is the final interpreter of the highest law (the Constitution), the substance in the legal reasoning section binds, formally, all citizens on how to apply the interpretation to constitutional issues. We, thus, need to understand the thought process of the judges before coming up with the amar for we as rational and educated humans cannot simply accept or recognize what is stated by MK-RI; what the court has stated becomes a methodological guideline for us to actualize the articles of the constitution. This analysis and test is narrowed down periodically during the Arief's Court period, which spans from 2015 to 2018. Its substance is further specified in landmark decisions related to the judicial review concerning the right to be elected. We found a tendency toward textualism, although the judges also attempted to establish strong legal reasonings by applying the proportionality test in a few cases, albeit implicitly and not comprehensively.

Keywords: Arief's Court; legal reasoning; proportionality; right to be elected; textualism.

I. Introduction

The Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi Republik Indonesia* or MK-RI), since its establishment, has one difficult authority: how to apply the articles in the Constitution to

petitions that involve constitutional issues.[1] This activity, called Testing the Constitutionality of Laws (*Pengujian Undang-Undang* or PUU) or constitutional review, which is carried out by the judges of MK-RI is a complex activity that requires rational and comprehensive reasonings. MK-RI performs three activities within PUU: (1) interpreting 1945 Constitution of the Republic of Indonesia after the Amendments ("UUD NRI 1945"); (2) interpreting reviewed laws (*Undang-Undang* or UU); and (3) linking the results in point 1 and point 2. [2]

The complexity of interpreting UUD NRI 1945, in particular, is caused by the general and vague formula formulation of its articles, especially the articles related to constitutional rights, which are used as a touchstone in most cases ("constitutional rights articles"). One example is Article 28D paragraph 1, which is one of the most frequently used touchstones, concerning equal treatment under the law.[3] At the very least, the court has to conduct extensive and restrictive interpretations simultaneously to see the extent of the coverage of the interpreted articles, in what context two or more subjects should be equated and in what context they cannot be equated. Not only that, the interpretation activity will be even better if the judges also re-read the original intent of the framers of UUD NRI 1945 in the constitutional rights articles so that the judges do not simply incorporate considerations that suit their "taste".

Furthermore, its task does not stop at the activity of interpreting UUD NRI 1945, but it has to be able to apply the results of its interpretation to answer the petitions of the applicants submitting PUU. However, the application of the interpretation results cannot be done immediately. They must also first interpret UU being reviewed, at least textually and contextually. To make it more comprehensive, the judges should also read academic texts (*Naskah Akademik*) related to the reviewed UU. This method is necessary to map more fully the compatibility or contradictions between the UUD NRI 1945 and the reviewed UU.

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[1] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, hereafter "UUD NRI 1945", Article. 24C verse (1).

[2] In this article, each activity is named Activity 1, Activity 2, and Activity 3.

[3] UUD NRI 1945, Article 28D paragraph (1).

Moreover, another difficulty that must also be faced by the court is that UUD NRI 1945 not only regulates the granting and protection of rights but also sets limitations. Questions that can be raised include: how to rationalize in Legal Considerations where the protection of rights must be prioritized over restrictions, or vice versa? The issue in Article 28J can be seen from its norm formulation, which is also vague, abstract, and open to multiple interpretations, such as "justice," "moral considerations," "religious values."[4] However, there is no specific guideline for the judges on how to deal with the apparent conflicting validities.

With the various dynamics that occur in each stage, we try to uncover how the judges deal with them. Through this article, the elaboration of the above dynamics is specifically contextualized into landmark decisions during Arief's Court, from 2015 to 2018.[5] These decisions are further narrowed down to 8 (eight) decisions related to the right to be elected ("Reviewed Decisions"). The Legal Considerations section of each of these eight landmark decisions is analyzed to obtain a description of how the judges reasoned during this period in deciding constitutional cases related to the right to be elected.

We found that in the Reviewed Decisions, the judges during this period more often directly leap into the activity of applying the constitutional article into the article of the tested UU. As a result, Activity 1 and Activity 2 are performed simply, only with a textual approach. Consequently, instead of the court being able to carry out Activity 3 well, fallacies in the form of incoherence and contradiction occur in various

[4] *Ibid*, Article 28J paragraph (2).

[5] Mahkamah Konstitusi Republik Indonesia, "Hakim," available on https://www.mkri.id/index.php?page=web.Hakim&menu=3, accessed on 25 October 2023. Arief's Court refers to the period when Arief Hidayat served as the Chief Justice of the Constitutional Court of the Republic of Indonesia from January 12, 2015, to April 2, 2018. Initially, this period consisted of the following members: (1) Arief Hidayat, (2) Patrialis Akbar, (3) M. Alim, (4) Suhartoyo, (5) Wahiduddin Adams, (6) Aswanto, (7) I Dewa Gede Palguna, (8) Maria Farida Indrati, and (9) Anwar Usman. Later, M. Alim, who had been a judge of the Constitutional Court since 2008, was replaced by Manahan Sitompul on April 28, 2015, while Patrialis Akbar, who was involved in a corruption case, was replaced by Saldi Isra on April 11, 2017.

cases. The proportionality test against the limitations imposed by the reviewed UU is also not often conducted.

II. Textual Interpretation in Legal Considerations

This article defines "textual" as an adjective in interpretation activity. If the word "text" is viewed from its etymological root (Latin), *texere* can be interpreted as to woven.[6] Weaving, commonly associated with sewing, in this sense can be visualized as the reality where text is essentially an effort to weave together thoughts that initially exist only in ideas. These interwoven thoughts are then articulated into orderly writing with a fixed arrangement of words for easy continuous reading.

The definition in the Indonesian Dictionary (*Kamus Besar Bahasa Indonesia* or KBBI) also affirms this construction of meaning, that "text" can be understood as a word or a collection of written words—not oral—on a medium that can be read.[7] This means that a speech is merely speech if it is only conveyed orally, but that speech can also be transformed into text if the speaker writes down the words on a piece of paper so that they can be read. Meanwhile, "ual" here is a suffix that turns the previously explained noun "text" into an adjective.

Thus, textual interpretation means interpreting—making something ambiguous clear—the text solely by looking at the arrangement of sentences written within the text. The text is read and understood as it is without needing to consider the context behind the text; the word "without" needs to be emphasized. Meanwhile, "context" originates from the Latin words *con* (together) and *texere* (to weave or to interweave).[8] Context is not the

[6] Oxford Learner's Dictionary, "text," available on https://www.oxfordlearnersdictionaries.com/definition/english/text_1, accessed on 25 October 2023.

[7] Badan Pengembangan dan Pembinaan Bahasa Kementerian Pendidikan dan Kebudayaan, "teks", available on https://kbbi.kemdikbud.go.id/entri/teks, accessed on 25 October 2023.

[8] Oxford Learner's Dictionary, "context," available on https://www.oxfordlearnersdictionaries.com/definition/english/context?q=context, accessed on 25 October 2023.

text itself but everything that influences or is related to the text. For example, the intended purpose of writing the text, the social and psychological conditions when the authors wrote the text, the scope covered in the text, and the factors that the text formulators believe can exempt the text, among others.

The use of this interpretation can be clearly seen in various Reviewed Decisions, whether in interpreting constitutional rights articles or articles from the reviewed UU. In the Reviewed Decisions, the constitutional rights article that is repeatedly used as a touchstone is Article 28D paragraph 1, which in text reads: *every person has the right to recognition, guarantees, protection, and legal certainty that is fair as well as equal treatment before the law*.[9] Usually, this article is juxtaposed with Article 27 paragraph 1, Article 28D paragraph 3, and Article 28I paragraph 2.[10] Essentially, this article is used as a touchstone by the applicants concerning the differentiation of treatment in the requirements to become regional heads or other elected officials.

A. Interpreting Constitutional Rights Articles

Decision No. 33/PUU-XIII/2015 concerning conflicts of interest between prospective Regional Heads and incumbents, as well as the requirement for resignation in the Regional Head Elections ("Pilkada"), can be cited as the first example. The crux of the debate in this case, among others, lies in the question: does the exception for persons with conflicts of interest with the incumbent to run for regional head positions, and only be allowed to run after completing one term, constitute a deviation from

[9] UUD NRI 1945, Article 28D paragraph (1).

[10] In Article 27 paragraph (1) of the 1945 Indonesian Constitution, it is written: "All citizens shall have equal status in law and government and shall be obliged to uphold the law and government with no exception." Meanwhile, in Article 28D paragraph (3) of the 1945 Indonesian Constitution, it is stated: "Every citizen shall have equal opportunity in government." Finally, in Article 28I paragraph (2), it is written: "Every person shall be free from discriminatory treatment on any basis and shall have the right to obtain protection against such discriminatory treatment.".

Article 27 paragraph 1, 28D paragraph 1, 28D paragraph 3, and 28I paragraph 2?[11]

In the Legal Considerations section, the court first revealed that in a democratic country, discriminatory restrictions cannot be imposed. However, they did not articulate their interpretation of the constitutional rights articles used as the touchstone; to what extent the scope included within these articles, at least extensively but limited, was not explained. Yet there was an interesting proposition stated, "not every differentiation automatically means discrimination." Nevertheless, there was still no explanation about which scope of differentiation falls outside of discrimination and which falls within it. There was also no information to examine how the framers of UUD NRI 1945 provided context to the texts in these articles. Textually, these articles were immediately understood as protection against discriminatory public policies.

The court then directly examined the provisions in the reviewed UU. The provision used as the touchstone was Article 28J paragraph (2) of the 1945 Constitution.[12] Deductively, they immediately suggested that relatives of the incumbent do not infringe upon the rights and freedoms of others, and also do not contradict moral, religious, security, or public order values; there was no interpretative explanation of Article 28J paragraph 2. This proposition was presented in the form of a heading argument without elaborating on the rationalization.[13] The conclusion was that the tested provision contradicted Article 28J paragraph 2.

In Decision No. 33/PUU-XIII/2015, there was also a legal consideration regarding the differing resignation requirements for the Indonesian National Armed Forces (TNI), Police, and Civil Servants (PNS) compared to members of the Regional Representative Council (DPR), Regional Representative Council (DPD), and Regional People's Representative Council (DPRD) in the nomination of Regional Heads or

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[11] Mahkamah Konstitusi, Putusan No.33/PUU-XIII/2015, *Adnan Purichta Ihsan (Pemohon)* (2015), p. 13-17. Mahkamah Konstitusi, *Putusan Landmark Mahkamah Konstitusi 2014-2016* (Jakarta: Mahkamah Konstitusi, 2017) (hereafter, "Putusan Landmark MK 2014-2016"), p. 357.

[12] Mahkamah Konstitusi, Putusan Landmark MK 2014-2016, p. 362.

[13] *Ibid.*, p. 361-363.

Deputy Regional Heads. For representatives, they only need to inform their superiors; while for PNS, TNI, and Police, they must resign from the moment of registration. This Legal Consideration section was applied *mutatis mutandis* to Decision No. 46/PUU-XIII/2015.[14]

The constitutional rights articles used as the touchstone were the articles related to equality before the law. In the Legal Considerations section, the court did not mention at all how they interpreted the constitutional rights articles used as the touchstone to be contextualized in the *casu quo*. An important proposition laid out at the beginning of the reasoning flow was the statement, *"However, such circumstances do not ipso facto (in fact) provide sufficient grounds to declare that provisions containing such differences are contrary to the 1945 Constitution*."[15] However, what kind of differences are contrary to the 1945 Constitution was not explained, even though the court provided a lengthy elaboration on why the requirements for DPR, DPD, and DPRD members did not need to be distinguished from those of the TNI, Police, and PNS.

Not interpreting the constitutional rights articles used as the touchstone can also be seen in the lines of Legal Considerations of Decision No. 42/PUU-XIII/2015 and Decision No. 51/PUU-XIV/2016 concerning the eligibility of former convicts to register as candidates for Regional Heads. In the first decision, the majority of judges made a leap of logic in considering that the phrase "to protect the entire Indonesian nation" in the Preamble of UUD NRI 1945 also included protection for the rights of former convicts; the justification for this proposition was not explained.[16] In the second decision, the court returned to its reasoning in the first decision, which did not explain how the interpretation of the constitutional rights article related to equality before the law was handled.[17]

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[14] Mahkamah Konstitusi, Putusan No. 46/PUU-XIII/2015, *Afdoli (Pemohon)* (2015), p. 65.

[15] Mahkamah Konstitusi, Putusan Landmark MK 2014-2016, p. 373.

[16] Mahkamah Konstitusi, Putusan No. 42/PUU-XIII/2015, *Jumanto dan Fathor Rasyid (Pemohon)* (2015), p. 69.

[17] Mahkamah Konstitusi, Putusan No. 51/PUU-XIV/2016, *Ir. H. Abdullah Pateh (Pemohon)* (2016), pp. 26-30.

In Decision No. 100/PUU-XIII/2015 regarding the election of Regional Heads with a single pair of candidates, the court provided further explanations regarding the article used as a benchmark by the petitioner, namely Article 18 paragraph (4) of UUD NRI 1945.[18] According to this article, the election of Regional Heads is conducted democratically.[19] The term "democratically" here is interpreted as an absolute procedure that cannot be exempted under any circumstances, including the reality of only one candidate pair, although this further explanation is provided without considering the context provided by the framers of UUD NRI 1945: whether this "democratic" process is an absolute procedure that cannot be postponed. The constitutional articles used as a benchmark by the petitioner are also not explained at all.

Similarly, in Decision No. 128/PUU-XIII/2015 concerning the residency requirements in the relevant village to be eligible to register as a Village Head or Village Official, the interpretation of the constitutional rights articles proposed was solely conducted textually. In this case, the applicants contested the obligation for Village Head or Village Official candidates to be registered as residents and reside in the village where they register for a minimum of one year before registration.[20] The basis was that this provision was considered contrary to the constitutional rights articles related to equality before the law. However, the only constitutional article mentioned by the judges was Article 28C paragraph 2, but it was presented textually by stating that the requirements in the regional government regime, which do not require a minimum residency period, were in line with the spirit of the article. The unanswered question, with this textual approach, was whether there should be no restrictions at all on the subject "every person" in Article 28C paragraph 2.[21]

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[18] Mahkamah Konstitusi, Putusan No. 100/PUU-XIII/2015, *Effendi Ghazali (Pemohon)* (2016), p. 39.

[19] UUD NRI 1945, Article 18 Paragraph (4).

[20] Mahkamah Konstitusi, Putusan No. 128/PUU-XIII/2015, *Holidin dkk (Pemohon)* (2015), pp. 7-8.

[21] Article 28C paragraph (2): Everyone has the right to advance themselves in fighting for their rights collectively to build their community, nation, and country.

The last interesting decision that illustrates the textual approach of the court in interpreting constitutional rights articles is Decision No. 88/PUU-XIV/2016 regarding the implicit requirement to be a male candidate for Governor or Deputy Governor of the Special Region of Yogyakarta (DIY). The Court stated that there was an element of discrimination in the article by referring to Article 28I paragraph 2 of UUD NRI 1945, also mentioning the definition of discrimination in Law No. 39 of 1999 on Human Rights.[22] However, the context not explained by the court was how to distinguish the scope of differential treatment that can be considered discrimination. Contradictorily, in the beginning, the court used Article 18B paragraph 1 of UUD NRI 1945 as a basis to appreciate the uniqueness of the political system in DIY, which eventually justified the existence of a different political system in DIY.[23] The question is: does the uniqueness in the political system in DIY constitute a form of discrimination covered by Article 28I paragraph 2 of UUD NRI 1945? The court uses two constitutional articles that, textually, yield actualizations that contradict each other.

B. Interpreting the Reviewed Articles

Meanwhile, in the context of interpreting the articles of the reviewed UU, we found that the judges also more frequently used textual interpretation rather than contextual interpretation. Two Reviewed Decisions that approached the reviewed UU with contextual interpretation were Decision 33/PUU-XIII/2015 and Decision No. 46/PUU-XIII/2015. In the context of the conflict of interest issue with the incumbent, although the judges did not directly refer to academic texts, the court considered what was conveyed by the President during the trial, that the background of the tested article was to ensure that the competing parties in the election were on an equal footing.[24] Because there are advantages possessed by those with conflicts of interest with the

[22] Mahkamah Konstitusi, Putusan No. 88/PUU-XIV/2016, *Prof. Dr. Saparinah Sadli dkk. (Pemohon)* (2016), p. 309.

[23] *Ibid.*, p. 301.

[24] Mahkamah Konstitusi, Putusan No. 33/PUU-XIII/2015, pp. 138-139.

incumbent. The court's disagreement with this proposition is more directed towards the existence of far better alternative solutions; this aspect will be explained in another section.

The court also did the same in the context of the issue of different requirements between civil servants and members of the representative assembly. They did not directly refer to academic texts but heard testimony from the lawmakers during the trial. The President viewed the differentiation of requirements from the perspective that the nature of the representative assembly's work is collective and collegiate, while civil servants, the military, and the police have individual roles. Meanwhile, the Parliament viewed the differentiation from the standpoint that the resignation mechanism of members of the representative assembly is not the same as that of the military, police, and civil servants because they are directly elected by the people (elected officials). Despite the court's view that these things could not be a strong consideration, the court still included the lawmakers' statements to see the context of the text of the reviewed article.

Another decision where the court also included statements from the lawmakers as considerations was Decision No. 60/PUU-XIII/2015 regarding the percentage requirement of individual candidates for regional heads. There were differences in the requirements between the tested article and Article 40 in the reviewed UU. In Article 40, the standard population size is the population that has the right to vote, while in the article tested related to individual candidate regional heads, the standard population size is not limited only to those who have the right to vote but everyone.[25] The court took into consideration the views of both DPR and the President. DPR believed that the threshold requirement was intended to assess the seriousness of the individual candidate, while the President only believed that such a policy was part of an open legal policy.[26] However, the court did not agree with the statements from the lawmakers.

[25] Mahkamah Konstitusi, Putusan No. 60/PUU-XIII/2015, M. Fadjroel Rachman, Saut Mangatas Sinaga, Victor Santoso Tandiasa (Pemohon) (2015), pp. 63-64.

[26] *Ibid.*, pp. 66-67.

Unlike other decisions, the court did not attempt to contextually dissect the articles of various laws in question. In case No. 42/PUU-XIII/2015 regarding the prohibition for former convicts to become Regional Heads, the testimony of DPR and the President was heard, but the rationalization of the lawmakers contained in the context of the tested article was not included in the considerations at all.[27] However, in their statements, the President conveyed that the intention behind such a requirement was to select leaders with integrity who had never committed unlawful acts. Moreover, the court has repeatedly stated that the regulation concerning Elections should be considered an open legal policy. Although this decision falls into the landmark category, the court only referred back to a similar Constitutional Court decision that had been previously made. The same can be seen in Decision No. 51/PUU-XIV/2016 regarding the requirements for former convicts as candidates for Regional Heads in Aceh.

This can also be seen in Decision No. 100/PUU-XII/2015. Although DPR has provided its statement regarding the tested article, this statement was not included in the Legal Considerations to understand the context of the reviewed article. The court even considered that the lawmakers' statements were not necessary because the basis of the petition was already clear, and the information needed was the one from the General Election Commission (KPU).[28] However, there was important information from DPR, namely that the spirit behind the reviewed UU was the existence of more than 1 candidate, although it did not see the possibility of a prolonged vacancy of elected Regional Heads.[29]

In Decision No. 128/PUU-XIII/2015, the court also did not touch at all on the rationalization of the lawmakers in including such requirements. The court did not ask for the lawmakers' statements to provide the context of the tested text. Academic texts were also not referenced. Instead, the court directly concluded that Law No. 6 of 2014 was within the context of the legal regime of regional government that did

[27] Mahkamah Konstitusi, Putusan No. 42/PUU-XIII/2015, pp. 68-73.
[28] Mahkamah Konstitusi, Putusan No. 100/PUU-XIII/2015, p. 38.
[29] *Ibid.*, p. 28-30.

not require residency in the village, without considering the context of the lawmakers in creating such specific requirements.[30]

Moreover, this textualism is very evident in Decision No. 88/PUU-XIV/2016. The Court did not uncover the rationalization or context behind the lawmakers' regulation of the requirements for Governor and Deputy Governor candidates in DIY.[31] Although the implicit requirement regarding males is a real form of the lawmakers to accommodate the uniqueness of the political system of DIY as a factual embodiment of Article 18B paragraph 1 of UUD NRI 1945. It is not surprising that the court was entangled in contradictory arguments.

III. Fallacy in Reasoning: Contradiction or Incoherence (Leaping Logic)

The term "reasoning" does not specifically refer to the activity of interpreting articles, whether constitutional or laws in question, but to the structure of arguments to answer whether the laws in question do indeed contradict the constitutional provisions used as the benchmark. The presence of a fallacy is highly correlated to the consequence of the "leap" the court took in a rush to engage in Activity 3. In various Reviewed Decisions that have been previously presented, the court more often performed Activity 1 and Activity 2 in a somewhat arbitrary manner, namely textually, and attempted to immediately move to Activity 3. However, when the first two activities were carried out in a perfunctory manner, the third activity could not be executed thoroughly.

An evident initial example of a fallacy in the reasoning of the legal considerations of the judges is in the form of contradiction. The decision that clearly contains this fallacy is Decision No. 88/PUU-XIV/2016. In this case, the petitioner questioned the use of the term "wife" in one of the requirements to become a candidate for Governor or Deputy Governor, thus narrowing down that only men could become Regional Heads in DIY.[32] The court stated that this requirement contradicted the 1945

[30] Mahkamah Konstitusi, Putusan No. 128/PUU-XIII/2015, pp. 22-24.
[31] See Mahkamah Konstitusi, Putusan No. 88/PUU-XIV/2016, pp. 296-313.
[32] *Ibid.*, p. 297.

Constitution, but its Legal Considerations contained a contradiction when closely examined.

Initially, the court stated that the lawmakers should not intervene in the procedure for filling the position of Governor and Deputy Governor of DIY.[33] The reviewed article, namely Article 18 paragraph 1 letter m of the DIY Special Autonomy Law, was deemed to be in conflict with Article 18B paragraph 1 of UUD NRI 1945. Furthermore, in the next section, the court stated that the inclusion of the term "wife" constituted discrimination.[34] However, based on the Paugeran Keraton (Royal Customs) of Yogyakarta, the throne heirs are the male lineage, which is also reflected in the history of the Sultanate of Yogyakarta.[35] Thus, the court's consideration that the narrowing of the requirement for the Head of the DIY Region to be male is an intervention, is in fact an intervention by the court into the Paugeran Keraton that has long been accommodated by the lawmakers. Moreover, the court's statement that the restriction of the position of the Head of the DIY Region to males is a form of discrimination, can be seen as "criticizing" the long-standing Paugeran. Here, there seems to be an indication that the court did not consider the context of the text of the article in the DIY law.

Furthermore, there is also a fallacy in the form of incoherence or the lack of connection and support between one line of argument and another. One example of this is Decision No. 128/PUU-XIII/2015. In the opening section, the court opens the line of argument by stating in the fourth paragraph that the State of Indonesia protects the entire Indonesian nation. Then abruptly, the Preamble of UUD NRI 1945 is considered the foundation of the Indonesian nation within the unitary state.[36] Furthermore, the court states that within the framework of the unitary state, the state still respects the uniqueness of each region, although it is

[33] *Ibid.,* p. 304.

[34] *Ibid.,* p. 312-313.

[35] See Karaton Ngayogyakarta Hadiningrat, "Raja-Raja," available on https://www.kratonjogja.id/raja-raja/, accessed on 26 October 2023. See also Nita Putri Febriani, "Telaah Konflik Pengukuhan Raja Perempuan di Keraton Yogyakarta (Dalam Tinjauan Sosiologis)," *Jurnal Studi Budaya Nusantara* 7, No. 1 (2023): 36-38.

[36] Mahkamah Konstitusi, Putusan No. 128/PUU-XIII/2015, pp. 20-21.

mentioned that homogeneity is also needed within it. Another leap occurs when the court states that the village community is also part of the regional government, so the legal regime of regional government that does not require candidates for Regional Heads to reside in the respective area is also applied in the context of village governance.[37]

The question is, when the court states the proposition that village Head candidates need to be equated with Regional Head candidates, the line of argument about the state respecting the characteristics of each region becomes contradictory. Even if the limitation of this uniqueness is the need for homogeneity, the next question is why the requirement not to reside in the legal regime of regional government is included in the scope of the intended homogeneity. This is only answered simply by stating that the village is the same as regional governance, so there is no need for differentiation. However, objections may arise by first looking at the context of the lawmakers in formulating the text, namely the expectation of emerging village leaders who truly understand the conditions of the village, making the residency requirement relevant because at least in this way, the candidate has an empirical understanding of the village conditions.[38]

This leap of reasoning is also evident in Decision 42/PUU-XIII/2015. Again, the court included the term from the Preamble of UUD NRI 1945, namely protecting the entire Indonesian nation, so "entire" here is also interpreted to include protecting the rights of former convicts. The rationalization of this coverage is not explained, and the question that can be raised is whether there are no restrictions at all related to the term "entire."

Then, the line of argument is continued by linking it to the concept of criminalization with a penitentiary orientation. Normatively, the court at least believes that a former convict who has gone through the penitentiary system has repented, so he is considered to have returned to

[37] *Ibid.*, p. 22-24.

[38] Direktorat Pemerintahan Desa dan Kelurahan, Direktorat Jenderal Pemberdayaan Masyarakat dan Desa Departemen Dalam Negeri, *Naskah Akademik: Rancangan Undang-Undang tentang Desa* (Jakarta: Kementerian Dalam Negeri, 2007), p. 25.

being a good and responsible citizen.[39] This normative statement is not further supported by concrete facts, as there are several counterarguments that can be raised, such as: whether the penitentiary system in Indonesia has factually produced former convicts like that? Although the ability of former convicts to register as candidates is limited by several specific requirements; some of them include a period of 5 (five) years after the former convict has completed their sentence, the announcement from the candidate regarding their status as a former convict, and not as a recidivist.[40] However, there is still a leap of normative and even assumptive statements, making the reasoning fragile and unconvincing.

IV. Implicit Application of Proportionality Test

From the two previous analyses, we found that the court tends to be textualist and even at times commits fallacies in reasoning. Nevertheless, we also found efforts from the court to apply the proportionality test analysis, albeit implicitly and incomprehensively in several Reviewed Decisions. As various Reviewed Decisions involve cases with competing rights issues, the court is actually required to consider justifications or the proportionality of restrictions on the right to be elected.

Briefly, the proportionality test consists of 4 (four) stages: testing the legitimacy of the intended objective (legitimate purpose); testing the rational connection between the intended objective and the imposed restriction (rational connection); the necessity test by examining whether there are no other alternatives that are equally or more effective but have lower intrusive effects (necessity test); and the proportionality test in a narrow sense. In the context of judicial review, the first three stages are applied when the court interprets the reviewed UU or Activity 2. The problem is that the court often does not perform Activity 2, except in several Reviewed Decisions.

An example of a Reviewed Decision where the Court appears to conduct a proportionality test by considering the context of the reviewed UU is Decision No. 33/PUU-XIII/2015. The lawmakers have stated that

[39] Mahkamah Konstitusi, Putusan No. 42/PUU-XIII/2015, p. 69.
[40] *Ibid.*, p. 70.

the prohibition of subjects with conflicts of interest with the incumbent is to prevent unfair competition. The court did not reject this objective and did not deny the rational connection between the tested article and the intended objective. However, the court considered that there were other alternatives that could actually solve the problem more effectively, namely that the lawmakers should impose restrictions on the incumbent.

An important question to ask is whether this alternative is indeed equally or more effective and has lower intrusive effects. We see that even this alternative does not have any intrusive effects on the subjects with conflicts of interest with the incumbent. However, a counterargument that can be raised is how the restrictions on the incumbent can concretely be implemented to prevent them from using their power to support subjects with conflicts of interest with them. Indeed, because the court only acts as a negative legislator, it chooses not to formulate such norms. But with the nullification of the tested article and as long as there are no restrictions, the opportunity for unfair competition will actually arise.

Therefore, when the comparison is between maintaining and completely removing this requirement by the court, the intrusive effect of the removal of this article is much greater for other candidates who do not have conflicts of interest with the incumbent. Moreover, we assess that the restriction provided by the lawmakers is not absolute but for one term after the incumbent no longer serves as a regional head. This restriction should also not only be seen from one perspective of the subject, namely only the incumbent, but also the candidates who intend to compete in the regional head elections.

The application of the proportionality test can also be seen when the court conducts the legitimacy test of the objective in the same Decision and Decision 46/PUU-XIII/2015 regarding the non-requirement for members of the DPR, DPD, and DPRD to resign when registering as regional head candidates. The court revealed that the reasons underlying the difference in requirements from those for civil servants, the military, and the police were not strong enough to justify the difference in treatment. Thus, without proceeding to the next stage of the test, the law article can be considered disproportionate because it lacks a legitimate

purpose. Meanwhile, other Reviewed Decisions do not depict any effort by the court to conduct this proportionality test, even implicitly.

V. Conclusion

Based on our research findings, the court actually lacks consistency in making its legal reasoning or, it can be said, does not have a method at all (groundless) in most of the Reviewed Decisions. From the beginning, it appears that a certain stance has already existed within each judge. Then, they immediately direct all lines of their deliberations towards that direction. The impression given is that the Legal Considerations are written inductively, meaning the conclusion is placed not at the beginning but at the end of the lines of Legal Considerations. Nevertheless, this induction is actually made not because of a specific method, which would produce a certain result. This can be justified by the reality that the Court does not perform Activities 1 and 2 properly, and rushes directly into Activity 3. As a result, fallacies in reasoning such as contradictions and incoherence occur.

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Contemporary Challenges in Law and Governance towards
100 years of Indonesian Legal Education
Proceedings of the International Conference on
Law and Governance in a Global Context (icLave) 2023

5th icLave

Challenges of Restitution Enforcement:
Norms vs. Implementation in the Society

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Abstract

Restitution is a term used as a form of civil obligation that must be carried out by the perpetrator to the victim who has suffered a loss. Since the issuance of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, the terminology of restitution should be recognized and implemented in accordance with the mandate of the provisions of Article 71D paragraph (2). This paper discusses the learning from community service entitled "Education and Training on Restitution Rights to Fulfill the Rights of Victims of Crime". The results of the research while carrying out the service show that (1) the terminology of restitution is not recognized as the right of child victims of crime, (2) the payment of peace money from one party to another in the settlement of a criminal case is better known than the request for restitution submitted by the victim or family at the investigation and prosecution stages, (3) the low role of Law Enforcement Officials (APH) handling criminal cases involving children as perpetrators provides information about restitution to victims of their families. The findings concluded that the implementation of restitution for child victims of criminal offenses requires participation and further steps in the form of increasing knowledge and awareness for the community and law enforcement officers regarding restitution and the application process. As recommendations, First, improve the

knowledge and skills of social workers and child advocates including staff of the Community Correction Center (BAPAS) about restitution, especially for children in conflict with the law (ABH) and their families. Second, increasing the role of the Victim Witness Protection Agency (LPSK) in collaboration with local governments such as the Office of Women's Empowerment and Child Protection (Dinas PPPA) or other nomenclature to socialize restitution as an obligation of the perpetrator and his family to the victim and his family.

Keywords: Children; BAPAS; Victims; LPSK; Communit; Restitution; Crime

I. Introduction

Restitution is a terminology used as a form of civil obligation that must be carried out by the perpetrator to the victim who suffered a loss for the suffering he experienced. Since the issuance of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, the terminology of restitution should be recognized and implemented in accordance with the mandate of the provisions of Article 71D paragraph (2). Some research has discussed this, for example Mareta and Kav who mentioned restitution as part of restorative justice. As an approach to resolving legal conflicts by mediating between victims and defendants, and sometimes also involving representatives of the community at large, restorative justice is considered a victim-centered response to crime that allows victims, offenders, families and communities to address the harm caused by crime. Likewise, restitution emphasizes the recovery of material or physical and psychological losses to victims of juvenile crime. Furthermore, Mareta and Kav stated that the handling of child criminal cases through restorative justice will be carried out optimally if accompanied by the role of law enforcement authorities. Therefore, it is necessary to have the same understanding and perception among law enforcement authorities in the settlement of juvenile criminal cases, including regarding the fulfillment of restitution for victims of juvenile crime, which includes the procedures for application to the provision of restitution.[1] The findings of the same studies mention the enforcement of

[1] J. Mareta and J. H. R. R. S. Kav, "Penerapan Restorative Justice Melalui Pemenuhan Restitusi Pada Korban Tindak Pidana Anak," *Jurnal Lex Et Societatis* 3, no.1 (2018): 104.

norms on the fulfillment of restitution for child victims of criminal acts that have legal certainty as regulated in Government Regulation No. 43/2017 on the Implementation of Restitution for Children Who Are Victims of Criminal Acts. This regulation provides an obligation to provide restitution in the application of restorative justice so that child crimes that cause loss and suffering can be subject to restitution.[2]

Research conducted by Novrianto and Zuhir mentioned that technically, the implementation of restorative justice can be carried out in any judicial process. This is based on the fact that restitution is a right for children who are victims of criminal acts. Restitution can be interpreted as a manifestation of protection for children against crimes against them. Unfortunately, the implementation of this restorative justice has not been maximized as regulated in the norm.[3] The provisions that should be a tool to ensure the protection of child victims of crime and the imposition of punishment for perpetrators of crime cannot be interpreted as the purpose of law, specifically legal certainty.[4] The expected form of protection by legal provisions that should be given after the occurrence of a criminal offense and have an impact on child victims does not yet exist.[5] Furthermore, Novrianto and Zuhir questioned about how the Implementation of Restitution Rights for children who are victims of criminal acts in the process of investigation, prosecution, and judicial verdict?

According to Mareta & Kav in their research suggested that restitution will be implemented optimally if accompanied by the role of law enforcement authorities, Novrianto and Zuhir found that the implementation of Government Regulation Number 43 of 2017 concerning the implementation of restitution for children who are victims of criminal acts, especially in the jurisdiction of South Sumatra, did not find this. The right to restitution is not conveyed to child victims in the

[2] *Ibid.*

[3] M. Novrianto and M. A. Zuhir, "Implementasi Hak Restitusi Bagi Anak Yang Menjadi Korban Tindak Pidana Dalam Proses Penyidikan, Penuntutan Dan Putusan Pengadilan," *Lex LATA* 4, no.2 (2023).

[4] *Ibid.*

[5] *Ibid.*

judicial process starting from the investigation, prosecution and judicial verdict phases. Briefly, this situation is summarized by Novrianto and Zuhir in the statement that the absence of an active role of Law Enforcement Officials (*Aparat Penegak Hukum* or APH) can be seen from the absence of child victims of criminal acts who get restitution rights due to the absence of child victims of criminal acts who apply for restitution. Furthermore, it was stated that the evidence of the absence of implementation of Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Criminal Acts is the absence of judicial verdicts in the South Sumatra jurisdiction from 2018 to 2020 which include penalties for restitution payments.[6]

The findings of Novrianto and Zuhir are in line with the findings of Rosmalinda, et. al. who conducted research on seven District Court and three High Court decisions in 2018 in North Sumatra Province, Indonesia.[7] In the research published in 2021, it was found that none of the court decisions mentioned restitution or other victims' rights despite being regulated in several regulations on child protection in Indonesia. The absence of an active role of law enforcement officials in providing information about restitution to victims in the court process starting from the investigation, prosecution and court decisions involving the police and public prosecutors is a weak point in the enforcement of restitution as a right to protection for child victims of crime.

Putri specifically discusses child victims of criminal acts in cases of rape committed by adults against minors getting a reaction among the public because of dissatisfaction with the sentencing of the perpetrators.[8] Based on the research findings of Putri it is known that victims can claim compensation or restitution to the convicted person, the fact shows that Government Regulation Number 43 of 2017 concerning the

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[6] *Ibid.*

[7] R. Rosmalinda, N. Sirait, S. Suhaidi, and E. Ikhsan, "The Right Of Restitution For Child Victims Of Sexual Violence In Indonesia," *IIUMLJ* 29, (2021): 167.

[8] M. Putri, "Pelaksanaan Restitusi Bagi Anak Yang Menjadi Korban Tindak Pidana Sebagai Bentuk Pembaruan Hukum Pidana Berdasarkan Peraturan Pemerintah Nomor 43 Tahun 2017," *Soumatera Law Review* 2, no.1 (2019): 115-134.

Implementation of Restitution for Children who are Victims of Crime is not implemented. It is further unfortunate regarding the existence of norms that regulate in detail the procedures for applying for restitution and the procedures for providing restitution for child victims of criminal acts or their heirs.[9] This finding supports the findings of research conducted by Rosmalinda et. al. and Novrianto and Zuhir which found the absence of court decisions mentioning the rights of victims in the form of restitution in the decisions of the District Court and High Court in the jurisdictions of North Sumatra and South Sumatra. Slightly different from Putri's research, M. is another finding related to Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Crime. It is stated that this government regulation does not mention substitute punishment, if the perpetrator / defendant / convict fails to implement a court decision that has permanent legal force regarding the implementation of restitution.[10] Furthermore, this research mentions that there is hope in the future that the judge's decision on the provision of restitution can be in the form of additional punishment in the verdict in addition to the main punishment, namely imprisonment and fines.[11]

The existence of Government Regulation No. 43/2017 on the Implementation of Restitution for Children who are Victims of Crime was also researched by Apriyani, M. N. which has interesting points because it is linked to the existence of the Criminal Code (KUHP).[12] He stated that the Criminal Code only focuses on punishing the perpetrators and has not considered the best legal remedies for victims of sexual violence. All Mareta & Kav, Novrianto & Zuhir, and Putri's findings are in line with the findings of Rosmalinda et. al. and Apriyani who conducted research to find out the implementation of legal provisions on restitution as the right of victims of sexual violence crimes found that the implementation of restitution provisions has not been effective. One thing that is of concern

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

[12] M. N. Apriyani, "Restitusi Sebagai Wujud Pemenuhan Hak Korban Tindak Pidana Kekerasan Seksual di Indonesia" *Risalah Hukum*, (2021): 1-10.

is related to the primary legal material used, which is the laws and regulations implemented by the Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban* or LPSK). The use of primary legal materials as a study conducted by Apriyani is interesting because it not only guarantees the fulfillment of the rights of child victims but also adults who are victims of criminal acts. Furthermore, this study also states that the non-implementation of restitution is related to the non-optimal role of law enforcement authorities. Furthermore, it was stated that the non-optimal role of law enforcement officials in implementing restitution for victims of sexual violence is the absence of efforts to force perpetrators of sexual violence to pay restitution decided in court.[13] This finding is certainly a lesson learned from previous studies, which have not found court decisions that mention restitution for victims of criminal acts.[14]

Based on the description above, this paper discusses the learning from community service entitled "Education and Training on Restitution Rights to Fulfill the Rights of Victims of Crime". The problems that will be discussed are (1) What is the level of knowledge of the community about restitution as the right of child victims of crime, (2) What is the position of the payment of peace money from one party to another in the settlement of a criminal case compared to the restitution request submitted by the victim or family at the investigation and prosecution stages.

II. Restitution and Peacemoney Terminology, Restitution and the Important Role of Law Enforcement Authorities

Community Service applies a qualitative research approach by examining secondary data in the form of documents, laws and regulations, research results and books. As part of the implementation of community service carried out by the Faculty of Law Team of the Universitas Sumatera Utara together with partners, namely the Center for Child Study and Protection (PKPA) and the Correctional Center (BAPAS) Klas I North Sumatra, the results of this study are supported by supporting data in the form of surveys and interviews with the community who are participants

[13] *Ibid.*
[14] *Ibid.*

in the activity "Education and Training on Restitution Rights for Fulfilling the Rights of Victims of Crime" totaling 33 people consisting of the Community, Head of the Environment, Religious Leaders and Community Leaders. Furthermore, this service is expected to help achieve the University's Main Performance Indicators (KPI), especially KPI 2 (People Get Experience Outside Campus), KPI 3 (Lecturers Do Activities Outside Campus), and KPI 5 (Lecturer Work Results Used by the Community). As a community service entitled "Education and Training on Restitution Rights to Fulfill the Rights of Victims of Crime", This paper is expected to be able to see the planned achievements, namely (1) Implementing community service programs as a form of Tri Dharma of Higher Education, and (2) Providing an in-depth understanding of the concept of restitution and the mechanism for applying restitution given that there is still a low application of restitution which is a new mechanism in victim protection as a form of criminal case settlement.

Article 71D of Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection

(1) Every child who is a victim as referred to in Article 59 paragraph (2) letter b, letter d, letter f, letter h, letter i, and letter j has the right to apply to the court for the right to restitution which is the responsibility of the perpetrator of the crime.
(2) Further provisions regarding the implementation of restitution as referred to in paragraph (1) shall be regulated by Government Regulation.

Referring to Article 71D paragraph (1) of Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection above, it is known that children as victims can apply for restitution. The child who is intended to get restitution is every child who is a victim as referred to in Article 59 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, which reads:

1) The Government, Regional Governments, and other state institutions are obliged and responsible for providing Special Protection to Children.

2) Special Protection to Children as referred to in paragraph (1) is given to:

a) Children in emergency situations;
b) Children who are in conflict with the law;
c) Children from minority and isolated groups;
d) Children who are economically and/or sexually exploited;
e) Children who are victims of abuse of narcotics, alcohol, psychotropic substances, and other addictive substances;
f) Children who are victims of pornography;
g) Children with HIV/AIDS;
h) Child victims of abduction, sale, and/or trafficking;
i) Child victims of physical and/or psychological abuse;
j) Child victims of sexual crimes;
k) Child victims of terrorism networks;
l) Children with disabilities;
m) Child victims of mistreatment and neglect;
n) Children with deviant social behavior; and
o) Children who are victims of stigmatization from labeling related to the condition of their Parents.

The mention of the word "restitution" in Law No. 35/2014 on the Amendment to Law No. 23/2002 on Child Protection has been the subject of discussion among academics, child rights activists and the general public. Various questions have arisen regarding the definition, the actor responsible for paying, the submission process and the "possibility" of implementation. Alexandra, H. F. S. in a research paper states that strict and clear legal norms are needed to regulate the provision of restitution and/or compensation.[15] Furthermore, it is stated that the regulation on restitution must be clearly discussed in the new Draft Criminal Code (RKUHP), which currently has been passed into Law Number 1 of 2023. This law will take effect after 3 (three) years from the date of enactment or 3 (three) years after January 2, 2023.

[15] H. F. S. Alexandra, "Pemberian Restitusi Dan Kompensasi Bagi Korban Tindak Pidana Berdasarkan Nilai Keadilan," *Jurnal Pendidikan Dan Konseling (JPDK)* 4, no.5 (2022): 5975-5984.

Indonesia, from the international perspective, is a State Party that is obliged to fulfill or implement its obligations as stated in the Human Rights Covenant and other international human rights legal instruments.[16] When a State Party fails to do so to fulfill its obligations under the treaty, it has committed a violation of the human rights that its citizens should have.[17] Today, the Convention on the Rights of the Child (CRC) has become an international legal instrument that can achieve its goal of providing children's rights through the process of adapting the national laws of participating states. Article 4 of the CRC states the general obligation of state parties to meet the needs of children's rights by taking appropriate legislative, administrative and other measures to ensure the implementation of the rights recognized in the CRC.[18] Indonesia as an independent state has the purpose and basis of existence which is to actualize the respect and protection of human dignity. The commitment of this nation and state is to respect human dignity.[19] In essence, the normative formulation embodies more of an ideal to be achieved, and not an elaboration of a real fact that human dignity has been truly respected and cared for in this country through efforts to uphold human rights.[20]

Challenges and violations to the respect of the noble dignity of human beings are the occurrence of acts of violence and threats to human life, including children. Various forms of violence such as sexual harassment, sexual exploitation, and other acts of violence, involve children (boys and girls) as victims. Sexual violence occurs in various places, including the school environment, in children's playgrounds and the family environment and its surroundings.[21] As a form of fulfillment of human rights to children, restitution can be interpreted as a

[16] R. Rosmalinda, et.al., "The Right Of Restitution For Child Victims Of Sexual Violence In Indonesia".,

[17] *Ibid.*

[18] *Ibid.*

[19] C. A. Dahlia, "Kebijakan Kriminal Tentang Hak Restitusi Terhadap Anak Korban Kekerasan Seksual (Kajian Falsafah Pemidanaan Dalam Penegakan Keadilan Berdasarkan Pancasila," (Doctoral Dissertation, Universitas Kristen Indonesia, Jakarta, 2022).

[20] *Ibid.*

[21] *Ibid.*

manifestation of the principle of non-discrimination against children.[22] The principle of non-discrimination also underlies the implementation of all guaranteed rights, namely that everyone is entitled to enjoy civil and political rights as well as economic, social and cultural rights without any difference.[23]

Children are potential victims of sexual crimes, especially rape. Although their protection has been regulated in law, namely Law No. 35/2014 on Child Protection (Child Protection Law), in fact, this legal regulation has not maximally provided protection to children, especially to children as victims of rape committed by adults. The law only provides protection in the form of criminal punishment for perpetrators, while the rights of children as victims have not been regulated in the law. The form of protection referred to is the form of protection after the occurrence of a criminal offense, which has a direct effect or impact on the victim, one of which is the provision of compensation or restitution to the victim.[24]

Article 81 paragraph (1) of the Child Protection Law states that there are two types of penalties imposed on the perpetrator or defendant, namely corporal punishment and fines. Judging from the imposition of fines that must be paid by the defendant to the state in addition to the corporal punishment he must serve in the Correctional Institution, this is considered very unfair to the victim, because the provision of compensation to the victim by the perpetrator of this crime is also a form of criminal responsibility. One form of legislation that has been issued that regulates the provision of compensation or restitution to children as victims of crime is Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Who Are Victims of Criminal Acts promulgated on October 16, 2017, as a form of implementing the mandate of Article 71 D paragraph 2 of the Child Protection Law, which is expected to realize justice and legal benefits in addition to legal certainty for children as victims of criminal acts to claim

[22] A. Rahmi, "Pemenuhan Restitusi Dan Kompensasi Sebagai Bentuk Perlindungan Bagi Korban Kejahatan Seksual Dalam Sistem Hukum di Indonesia," *De Lega Lata: Jurnal Ilmu Hukum* 4, no. 2 (2019): 140-159

[23] *Ibid.*

[24] Putri, "Pelaksanaan Restitusi Bagi Anak" 115-134.

their rights in court. The birth of this government regulation will bring reform in national criminal law regarding the provision of compensation or restitution to children as victims of crime can provide changes to society through changes from the criminal law (law as a social engineering tool).[25] Restitution is the replacement or payment of losses that are the responsibility of the perpetrator through a court decision. The provision of restitution is based on the losses suffered by victims or their heirs, both material and / or immaterial. However, the fulfillment of restitution is still based on the ability of the perpetrator. Restitution for child victims of sexual violence is a form of handling, protection and recovery for victims. The provision of restitution for child victims of sexual violence in the criminal stencil is carried out through criminal policy. [26]

Supreme Court Regulation (PERMA) 1 Year 2022 regulates the procedure for applying for restitution and compensation for victims of crime. This regulation accommodates laws and regulations governing restitution and compensation, namely Government Regulation No. 43/2017 on the Implementation of Restitution for Children who are Victims of Crime and Government Regulation No. 7/2018 as amended by Government Regulation No. 35/2020 on Amendments to Government Regulation No. 7/2018 on Providing Compensation, Restitution, and Assistance to Witnesses and Victims. Based on this government regulation, further provisions regarding the technical implementation of the examination of requests for restitution are regulated by a Supreme Court Regulation. Following up on this, on February 25, 2022, Perma 1 Year 2022 was issued which was promulgated in the State Gazette on March 1, 2022.[27]

According to Article 2 of the PERMA, criminal offenses that can be requested for restitution are crimes of gross human rights violations,

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[25] *Ibid.*

[26] Dahlia, "Kebijakan Kriminal Tentang Hak Restitusi Terhadap Anak Korban Kekerasan Seksual."

[27] Kepaniteraan Mahkamah Agung. "Perma 1 Tahun 2022 Atur Tata Cara Pengajuan Restitusi dan Kompensasi Korban Tindak Pidana." Accessed October 20, 2023. https://kepaniteraan.mahkamahagung.go.id/prosedur-berperkara/2068-inilah-ketentuan-restitusi-dan-kompensasi-korban-tindak-pidana.

terrorism, trafficking in persons, racial and ethnic discrimination, child-related criminal offenses, and other criminal offenses stipulated by LPSK Decree as referred to in the provisions of laws and regulations. Meanwhile, non-crimes that can be requested for compensation are serious human rights violations and terrorism as referred to in the provisions of laws and regulations. In relation to the compensation stipulated in Qanun Number 7 of 2013 concerning Jinayat Procedure Law, by Perma 1 of 2022 the compensation is equated with Restitution. Restitution is compensation given to victims or their families by the perpetrators of criminal acts or third parties. According to Article 4 of the Perma, the form of restitution provided to victims of criminal acts can be in the form of (1) compensation for loss of wealth and/or income; (2) compensation for losses, both material and immaterial, incurred due to suffering directly related to the criminal act; (3) reimbursement of medical and/or psychological treatment costs; and/or (4) other losses suffered by the Victim as a result of the criminal act, including basic transportation costs, lawyer fees, or other costs associated with the legal process.

To apply for restitution, one must pay attention to the administrative requirements of the application as stipulated in Article 5 of the Perma. An application for restitution must be made in writing in the Indonesian language and submitted to the President/Head of the Court either directly or through LPSK, investigators or public prosecutors. The court authorized to hear the request for restitution is the court that tried the perpetrator of the crime, namely the district court, human rights court, military court, high military court and sharia court. According to Article 9 of the Perma, the request for restitution does not remove the right of victims, families, heirs and guardians to file a civil lawsuit, in the event that (1) the request for restitution is rejected because the defendant is acquitted or released from prosecution; and (2) the request for restitution is granted and the defendant is convicted, but there are losses suffered by the victim

for which restitution has not been requested to the court or has been requested but not considered by the court.[28]

The previous sections on the terminology of restitution, which is the right of children of criminal offenses, has existed and is utilized in the legal process. As a service that involves people who are vulnerable to dealing with the law, it shows that the term restitution is not recognized as the right of child victims of criminal acts. This is a common finding considering that the community is a legal subject that from birth to death carries out the law to achieve order in carrying out daily life. Whether a society is prosperous or not can be seen from its compliance with the law, known as the legal culture of the community. It can be seen whether the legal awareness has upheld the law as a rule in living together.[29] Furthermore, an article states that laws and regulations are static while society is dynamic, so that often laws and regulations are left behind by the development of society, meaning that events that occurred in society are not regulated in the applicable laws and regulations.[30] The reality in this community service seems different where the community does not even recognize the term restitution as the right of child victims of criminal acts as regulated in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection and Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Who Are Victims of Criminal Acts. Furthermore, it is recognized that when referring to the definition of Restitution, there are a number of important points, namely (1) replacement or payment (2) for losses (3) the responsibility of the perpetrator (4) through a judicial verdict. In addition, the provision of restitution is based on the losses suffered by victims or their heirs, both material and / or immaterial, but in practice the fulfillment of restitution is still based on the ability of the

[28] https://kepaniteraan.mahkamahagung.go.id/prosedur-berperkara/2068-inilah-ketentuan-restitusi-dan-kompensasi-korban-tindak-pidana, diunduh pada 20 Oktober 2023

[29] Y. Ernis, "Implikasi penyuluhan hukum langsung terhadap peningkatan kesadaran hukum masyarakat," *Jurnal Penelitian Hukum De Jure* 18, no.4 (2018): 477-496.

[30] E. Juanda, "Konstruksi hukum dan metode interpretasi hukum," *Jurnal Ilmiah Galuh Justisi* 4, no.2 (2017): 168-180

perpetrator or as conveyed by the service participants, restitution is not known but peace money. Peace money payments from one party to the other parties in the settlement of criminal cases are better known than the application for restitution submitted by victims or their families at the investigation and prosecution stages. Furthermore, what is discussed is the low role of Law Enforcement Authorities (APH) who handle criminal cases involving children as perpetrators to provide information about restitution to their family victims. This was conveyed by participants in legal counseling in community service who stated that they only heard and knew about restitution in this activity even though previously there were several times communicating with the Police regarding criminal acts that occurred in the society.

III. Conclusion

The conclusion of this study is that the implementation of restitution for child victims of crime requires participation and further steps in the form of increasing knowledge and awareness for the community and law enforcement officers regarding restitution and the application process, which can be seen in; (1) the terminology of restitution is not recognized as a right of child victims of crime, (2) the payment of peace money from one party to another in the settlement of a criminal case is better known than the request for restitution submitted by the victim or family at the investigation and prosecution stages, (3) the low role of Law Enforcement Authorities (APH) handling criminal cases involving children as perpetrators provides information about restitution to victims and their families. As recommendations, (1) increase the knowledge and ability of social workers and child advocates including staff of the Rehabilitation Center (BAPAS) about restitution, especially for children in conflict with the law (ABH) and their families. (2) increasing the role of the Victim Witness Protection Agency (LPSK) in collaboration with local governments such as the Office of Women's Empowerment and Child Protection (Dinas PPPA) or other nomenclature to socialize restitution as an obligation of the perpetrator and his family to the victim and his family.

Acknowledgment

Thank you for the support of the Institute for Community Service of Universitas Sumatera Utara which supports the implementation of community service on Non-PNBP financing of the Universitas Sumatera Utara in accordance with the Assignment Letter for the Implementation of Community Service to the Regular Mono Year Scheme of Non-PNBP Funding Source USU T.A.2023 Number: 539/UN5.2.4.1/PPM/2023.

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5th icLave

The System of Collection and Distribution of Song and/or Music Copyrights Royalties and Its Applicable Rates on Digital Platforms in Indonesia

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Abstract

Digital disruption accelerated by the Covid-19 pandemic has changed the lifestyle and business of the music industry in Indonesia and around the world from a physical sales business to a digital business. Government Regulation No. 56 of 2021 regulates that the use of song copyrights in commercial public services, both analog and digital, requires paying royalties to The National Collective Management Organization through SILM. The maximum limit for SILM development is 2 (two) years after PP 56/2021 is promulgated, but until now the system has not been completed. The National Collective Management Organization has set tariffs for royalties for song and/or music copyrights for non-digital use, but the rules regarding tariffs for the use of song copyrights in digital platforms have not been regulated. This is qualitative research where data will be analyzed, elaborated, and compared to prescribe solutions.

Keywords: Digital platforms; Royalties; Tariffs.

I. Introduction

The system of withdrawal, collection and distribution of copyright royalties for songs and music used on digital platforms is not yet clearly regulated in statutory regulations in Indonesia. In fact, in this digital era, almost all the use of song and music copyrights is done through platforms. This ambiguity reduces legal certainty and protection for the copyright of songs and music used on digital platforms.

The use of song and music copyrights has shifted from a business model using physical recordings to distribution via digital media. Various digital platforms around the world provide songs and music with various business models for users to enjoy. Youtube, Spotify, Tiktok, Bigo, Resso, Langit Musik, and many other digital platforms use song and music copyrights in carrying out their business. Content uploaded, displayed and enjoyed by users on digital platforms can be divided into 2 (two) large categories: music content and general entertainment content. Some platforms categorize using different names: music centric content and non music centric content. However, the content in question basically has the same basic distinction, only the name is different.

One of the organizations in the recorded music industry, namely the International Federation of Phonographic Industry (IFPI), in its report stated that subscription audio streaming revenue increased 10.3% to US$12.7 billion and there were 589 million paid subscription account users by the end of 2022. Total streaming (including paid and ad-supported subscriptions) grew by 11.5% to reach US$17.5 billion, or 67.0% of total global recorded music revenue.[1] The RIAA noted that recorded music revenues in the US in 2022 will continue to grow for the seventh consecutive year. Total revenue grew 6% to a record high of $15.9 billion based on estimated retail value. Streaming continued to be the largest driver of growth with record levels of engagement in paid subscriptions, continued growth in ad-supported format revenue, and increasing contributions from new platforms and services. Streaming grew 7% to $13.3 billion, and accounted for 84% of revenue in 2022.[2] RIAA stands for the Recording Industry Association of America, a trade organization that supports and promotes the creative and commercial activities of music labels in the United States. These reports indicate that

[1] IFPI Global Music Report, retrieved from https://www.ifpi.org/ifpi-global-music-report-global-recorded-music-revenues-grew-9-in-2022/#:~:text=Figures%20released%20today%20in%20IFPI%27s,2022%20were%20US%2426.2%20billion.

[2] RIAA Reports as retrieved from https://www.riaa.com/reports/2022-year-end-music-industry-revenue-report-riaa/.

there is a shift in music industry revenues towards digital sales and distribution.

As the direction of the world music industry changes towards digital sales, so too in Indonesia. The Collective Management Organization for song and music copyright Wahana Musik Indonesia in its 2021 report stated that 95% of its income was digital income, namely IDR. 131.94 billion.[3] This amount is very far compared to non-digital income, which in the 2021 report is worth IDR 1.48 billion, even though the COVID-19 pandemic was a trigger for the decline in non-digital royalty income for song and music copyrights in Indonesia. Even though the COVID-19 pandemic has turned into an endemic, the digital sales trend seems to be continuing.

Reports from these song and music management organizations show that digital revenue has now become the spearhead of music industry revenue throughout the world, including in Indonesia. The development of song and music copyright underlies the development of the music industry which will increase economic growth in the form of national income (Gross National Products).[4] Intellectual property for developed countries is no longer just a legal tool that is only used to protect someone's intellectual work, but is also used as a business strategy tool to commercialize an invention.[5]

This important role certainly has consequences for the copyright of songs and music used on digital platforms. Song and music copyrights used on digital platforms must receive legal protection and certainty regarding the enforcement of the moral rights of songwriters and the use of economic rights over song copyrights.

In contrast to the use on digital platforms, analog use of song and music copyrights is regulated in Article 3 of Government Regulation (GR) no. 56 of 2021 concerning Management of Song and Music Copyright

[3] Wahana Musik Indonesia Annual Report, retrieved from https://www.wami.id/laporantahunan.

[4] Abdulkadir Muhammad, *Kajian Hukum Ekonomi Hak Kekayaan Intelektual* (Bandung: Citra Aditya Bakti, 2007), 15.

[5] Cita Citrawinda Noerhadi, *Hak Kekayaan Intelektual dan Perkembangannya* (Penerbit Buku Kompas: Jakarta, 2021), 25.

Royalties. There are fourteen categories of use of song and music copyright which are regulated as uses for which royalties are paid to creators and copyright holders[6] through the National Collective Management Organization.[7]

Regarding the royalty rates for song and non-digital music copyrights, GR 56/2021 states that the guidelines for determining the royalty rates for song and music copyrights will be determined by the LMKN and ratified by the Minister.[8] In the Explanation of GR 56/2021, it is not explained which minister is responsible for this determination, but taking into account the implementation of song and music copyright under the authority of the Directorate General of Intellectual Property, the minister in question is the Minister of Law and Human Rights of the Republic of Indonesia.

In practice, copyright of songs and music used on digital platforms will at least require a license for performing rights and mechanical rights. Royalties regulated in GR 56/2021 are royalties for the use of song and music copyrights in commercial public services, or what is known in practice as public performing rights. GR 56/2021 does not regulate other uses of song and music copyright, for example translation, adaptation, duplication and others as regulated in Law no. 28 of 2014 concerning Copyright ("Copyright Law").

Considering the widespread use of song and music copyrights and the large amount of royalty income from song and music copyrights on digital platforms, the amount of royalty rates for their use on digital platforms needs to be regulated so as not to create inequality in the industry. This arrangement will provide legal certainty and protection to creators and copyright holders in exercising both moral rights and economic rights over their copyrighted song works.

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[6] Government Regulation No. 56 of 2021 concerning management of Song and/or Music Copyrights Royalties, Article 3 paragraph (2).

[7] Government Regulation No. 56 of 2021 concerning management of Song and/or Music Copyrights Royalties, Article 3 paragraph (1).

[8] Government Regulation No. 56 of 2021 concerning management of Song and/or Music Copyrights Royalties, Article 13 paragraph (3).

II. System of Collection and Distribution of Song and/or Music Copyrights Royalties in Digital Platforms in Indonesia

Intellectual property rights as exclusive rights are attached to the creator and copyright holder. Copyright consists of moral rights and economic rights, and is a declarative right and arises when a work is made public. The author agrees with G. W. Friedrich Hegel who emphasized that intellectual creation is the embodiment of personality as an abstract right as the reason for human existence and appreciation is not just economic compensation but is more ethical and moral (reward) which has implications for the recognition of moral rights.[9] Moral rights and economic rights both need to receive fair legal protection. The implementation of the moral rights of songwriter(s) on digital platforms is at least accommodated in the form of mentioning the name of the songwriter(s) and/or copyright holder.

The essence of copyright is to obtain exclusive economic benefits from the exploitation of creations,[10] so that song and music creators are entitled to royalties for the commercial use of their creations. This also applies to the use of song and music copyrights on digital platforms. The law acts to guarantee the author's exclusive control and enjoyment of his creation with the assistance of the state.[11]

Even though the amount of royalty rates for use on digital platforms has not yet been regulated, this does not mean that the economic rights of creators and copyright holders can be ignored. The government still needs to guarantee the implementation of the moral and economic rights of creators and copyright holders.

In Indonesia, the Copyright Law regulates that royalties for the use of economic rights for song and music copyrights are given for commercial use of works in the form of[12]:

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[9] Rahmi Jened, *Hukum Hak Cipta (Copyright Law)* (Bandung: Citra Adhitya Bakti, 2014), 6-7.

[10] Agus Sardjono, "Hak Cipta Bukan Hanya Copyright", *Jurnal Hukum Dan Pembangunan* Year 40, No. 2 (April June 2010): 256.

[11] Yoyo Arifardhani, *Hukum Hak Atas Kekayaan Intelektual: Suatu Pengantar* (Penerbit Kencana: Jakarta, 2020), 9.

[12] Law No. 28 of 2014 concerning Copyrights, Article 9 paragraph (1)

a. Publishing creations;
b. The multiplication of creation in all its forms;
c. Translation of creation;
d. Adapting, arranging, or transforming a work;
e. Distribution of the work or copies thereof;
f. Performance of creation;
g. Announcement of creation;
h. Communication of Creation; And
i. Rent of Creation.

However, the use of economic rights that is regulated in GR 56/2021 are only the use of copyright in commercial public services for[13]:

a. Performance of creation;
b. Announcement of creation; And
c. Communication of creation.

This shows that there are 6 categories of use of song and music copyright that are not regulated by GR 56/2021. The performance, announcement and communication of works are rights that can be categorized as public performing rights.[14] Thus, mechanical rights as rights that are also used in content distributed on digital platforms are not regulated by GR 56/2021. There is a legal vacuum that needs to be addressed immediately by the Indonesian government, so that there are no losses for stakeholders related to the absence of regulations regarding the mechanical rights of song and music copyright and the use of song and music copyrights in digital platforms in Indonesia.

[13] Government Regulation No. 56 of 2021 concerning management of Song and/or Music Copyrights Royalties, Article 2 paragraph (1)

[14] Diana Silfiani, "Indonesian Legal Protection for Song Commercialization and Music Copyrights in Digital Platforms," *Padjajaran Journal of Law*, Vol 9 No. 2 (2022): 155

III. Applicable Rates of Song and/or Music Copyrights Royalties in Digital Platforms in Indonesia

GR 56/2021 strengthens the types of use of song and music copyrights in commercial public services[15] and its royalty rates is determined by the the National Collective Management Organizations (*Lembaga Manajemen Kolektif Nasional*/LMKN) and ratified by the Minister [16](of Law and Human rights).

Copyrights suffers a deep uncertainty mostly because of the unpredictable standards governing the lawful use of copyrighted works.[17] One may use copyrighted works on a digital platform, not knowing how much royalties he must pay or will it be an infringement. The tariff of royalties in licenses granted by songwriter(s) and copyright holders regarding the commercial use of works is not specifically stated in the Copyright Law. It is stated that the tariff and procedures for paying royalties must be stipulated in the license agreement by and between the creator and/or copyright holder and the user.[18] This means that the tariff and procedures for royalty payments are the result of an agreement between the parties in the agreement. Such tariff and procedures are affected by variables, for example applicable industry practices, the size of the user's commercial capacity, the number of uses of song and music copyrights, the size of the licensor's catalog and others and other relevant variables.

A license agreement is an agreement between the parties to the agreement. So that the amount of royalties paid by users for the commercial use of song and music copyrights is a result of negotiations and agreements between the parties will only apply to the parties who are parties to the license agreement. Article 1340 paragraph (1) of the Indonesian Civil Code states that agreements made are only valid between

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[15] Government Regulation No. 56 of 2021 concerning management of Song and/or Music Copyrights Royalties, Article 3 paragraph (2).

[16] Government Regulation No. 56 of 2021 concerning management of Song and/or Music Copyrights Royalties, Article 13 paragraph (3).

[17] Steven J. Horrowitz, "Copyrights Assymentric Uncertainty," *The University of Chicago Law Review*, Vol. 79 No. 1 (Winter 2012): 332.

[18] Law No. 28 of 2014 concerning Copyrights, Article 80 paragraph (4).

the parties who make them. This means that every agreement only results in the enactment of the provisions of Article 1131 of the Indonesian Civil Code for the parties involved or who made the agreement.[19]

The basis for determining the license value for the use of song and music copyrights is stated to be normal practice in the industry and fulfilling the elements of justice.[20] These two parameters are very abstract, because the prevalence of practice and fulfilling the elements of justice must be given a precise and comprehensive definition and require the understanding of all industry players in Indonesia. This requires not only specific abilities and expertise in determining the valuation of song and music copyrights, but also negotiation skills. So for the time being, the agreement between creators and/or copyright holders and users can be considered as a middle ground in determining the license value.

However, the Minister of Law and Human Rights has accommodated the regulations regarding the tariff of royalties quoted from the use in commercial public services of song and music copyrights.[21] Basically, the tariff of royalties approved by the Minister of Law and Human Rights is the legitimacy of LMKN's decision regarding the amount of royalties that will be charged to users.

The tariff rates for the use of song and music copyrights in commercial public services are considered a bit confusing and do not pay attention to fairness factors because they do not use variables that are commonly used in determining royalty values, for example how much of the song catalog is used or how long the song catalog is broadcast. In Indonesia, licensing tariffs for the use of song copyright are calculated based on physical matters, for example for café owners, the royalty value paid is calculated from the number of seats in the café. For hotels, the value of song and music copyright royalty payments depends on the

[19] Kartini Muljadi dan Gunawan Widjaja, *Perikatan yang Lahir dari Perjanjian* (Jakarta: Rajawali Pers, 2010), 165.

[20] Law No. 28 of 2014 concerning Copyrights, Article 80 paragraph (5).

[21] Decree of the Minister of Law and Human Rights of the Republic of Indonesia No. HKI.02.OT.03.01-02 of 2016 concerning Ratification of Royalty Rates for Users Who Make Commercial Use of Creations and/or Related Rights Products of Songs and Music.

number of rooms in the hotel. For malls, supermarkets, fitness centers, shops and salons, the royalty value is set according to the area of the user's premises in square meters (m2).

Despite all the controversy regarding the basis for calculating royalty rates for use in commercial public services, at least there are still specified parameters for the royalty rates collected and distributed by LMKN.

Unfortunately, for digital use there is no specified rate applied. As time goes by, it is necessary to realize that the use of song copyrights in the digital realm is a source of quite large royalties considering the numbers of digital platforms using song and music copyrights in running their business. But the rates and royalty values for commercial use of song and music copyrights on digital platforms are not regulated or have not been regulated in Indonesian laws and regulations.[22] This is a very big gap because if the rules do not yet exist clearly, then the royalty value for the use of song copyright on digital platforms will be very varied, non-uniform, has no basis for calculation and does not have clear benchmarks. Meanwhile, generalization of tariffs for the use of song copyrights on digital platforms can be detrimental to users. These will lead to potential harm for both the songwriter and/or copyright holder and also the user.

In comparison, the United States is a country that has regulated the tariff of copyright royalties in detail and regularly through the Copyright Royalty Board. The Copyright Royalty Board not only regulates the tariff of royalties for song and music copyrights, but also all types of copyrights. For song and music copyright, the Copyright Royalty Board regulates it at 37 CFR Part 385 on Rates and Terms for Use of Nondramatic Musical Works in the Making and Distributing of Physical and Digital Phonerecords.[23] Then in these Codes the value of copyright royalties for songs and music is further divided depending on the type of use.

The Copyright Royalty Board is a panel consisting of 3 (three) people. The Copyright Royalty Board determines the rates for the new

[22] AR, Ginting, "Peran Lembaga Manajemen Kolektif Nasional Dalam Perkembangan Aplikasi Musik Streaming," *Jurnal Ilmiah Kebijakan Hukum*, Vol. 13 No. 3 (2019): 388.

[23] Retrieved from https://www.law.cornell.edu/cfr/text/37/part-385.

term based on public comments and hearings during the review period. CRB-level decisions may be appealed to the United States Court of Appeals, District of Columbia Circuit.[24]

Each digital platform has a royalty calculation that is applied in carrying out its business. Therefore, the calculation of the amount of royalties paid by each digital platform to songwriter and copyright holders is relatively different.

The content category is divided into music content (music centric content) and general entertainment content (non music centric content). Music content contains longer duration of song and music. Music video and lyric video shall be included in this category. In general entertainment content, the duration of the song copyright used is shorter, and in one content it is possible to have more than one song and music copyright. The song can be used as a back song or theme song of a general entertainment content. Both have different calculations of copyright tariff.

To avoid generalizing royalty calculations which could lead to inaccuracies, digital platforms usually calculate the royalty value based on several main variables. In general, the basis for calculating song copyright royalties will be based on several main things: per play, per download, per ads (advertisement), and per voucher spent.

Per play is a royalty value calculated based on the number of songs played on the digital platform. Spotify, for example, calls it streams, and YouTube uses the number of viewers.

The basic calculation per download is carried out to anticipate users who want to save content to their data storage, whether on a computer, mobile phone or other medium. The calculation of the royalty value for downloads should be greater than the calculation of the royalty value for per play, because one download can be listened to many times. This actions requires a license for reproduction/mechanical rights.

Calculating the amount of royalties based on the number and value of advertising embedded in such content usually provides quite a large

[24] Retrieved from https://opentext.uoregon.edu/payforplay/chapter/chapter-26-mechanical-rights/.

income for the content owner and the creator of the songs copyrights used in the content. Each digital platform has different advertising value agreements for different content. Advertisers usually have their own strategies for spending on digital platforms, and this certainly affects the value of advertising placement agreements between advertisers and digital platforms.

Calculating royalties using a per play, per download and per ads are calculations commonly used by most digital platforms. YouTube, Spotify, TikTok are digital platforms using these systems.

Another royalty calculation, namely per voucher spent, is usually carried out for certain platforms whose income is obtained from vouchers purchased by users to access content on digital platforms. Royalties are calculated as a percentage of the value of the voucher spent and this percentage depends on the agreement between the owner and/or copyrights holder of the content with the digital platform. This type of calculation can be applied to digital platforms such as Bigo.

Various types of royalty calculations on digital platforms can be applied in Indonesia in accordance with industry agreements. However, as John Rawls argues, the distribution of IPR control must be based on the principle of equitability, namely justice as fairness.[25] Justice must be applied with the principle of fairness, taking into account equality and each stakeholder in society. Protection by the state in a balanced manner based on the principle of equitability (fair and just) in the distribution of IPR control, including through various IPR legal regulations and competition law regulations.[26] The state must provide optimal protection not only to protect the rights of creators and copyright holders for the economic benefits of their creations, but also provide equal justice for commercial users of song and music copyright by establishing conditions and a legal system that protects both equally .

[25] Rahmi Jened Parinduri Nasution, *Interface Hukum Kekayaan Intelektual dan Hukum Persaingan (Penyalahgunaan HKI)* (Depok: RajaGrafindo Persada, 2017), 47.

[26] Jened, *Interface Hukum Kekayaan Intelektual*, 50.

The author suggests that even though there is an industry agreement regarding digital tariffs that apply to the use of copyrighted songs and music on digital platforms, the government needs to provide protection for creators and copyright holders. Digital platforms are large entities and have strong bargaining power. The government's role is needed to set a standard royalty rate for song and music copyrights used on digital platforms. The author believes that there is at least a minimum guarantee for the use of copyright in songs and music used on digital platforms, namely a minimum value that must be paid by digital platforms to creators and copyright holders. Because it is very rare for individual creators to make personal promises to digital platforms, the imposition of minimum guarantees can be made in licensing agreements between digital platforms and Collective Management Organizations (*Lembaga Manajemen Kolektif*/LMK) and/or music publishers.

IV. Conclusion

As digital technology develops, the use of copyrighted songs and music on digital platforms requires legal protection to avoid violations or infringement of the creator's intellectual property. Enforcement of the moral rights and implementation of the economic rights of creators must be carried out fairly and justly.

The Indonesian government has issued a decision regulating royalty rates for the use of song and music copyrights on commercial public services, but has not yet regulated the rates that apply to use on digital platforms. To ensure legal certainty for all stakeholders in the music industry, the government needs to immediately regulate it.

Royalty rates for song and music copyrights on digital platforms are usually based on music industry agreements. The government should set a minimum guarantee where digital platforms must pay a minimum royalty value for the use of song and music copyrights. The minimum guarantee can be paid through LMK and music publishers.

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Contemporary Challenges in Law and Governance towards
100 years of Indonesian Legal Education
Proceedings of the International Conference on
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5th icLave

Legal Certainty of Housing Purchase and Purchase of Housing Credits without the Creditor's Permission

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Abstract

Home ownership credit (*kredit pemilikan rumah* or KPR) is one of the government's efforts to meet the needs of adequate housing for the people as mandated by the 1945 Constitution, Article 28 Letter H in conjunction with Article 129 of Law Number 1 of 2011. The existence of guaranteed protection and legal certainty for home ownership credit debtors is realized through Law Number 1 of 2011. The absence of protection and certainty regarding home ownership credit without the creditor's permission has given rise to many problems. discussion regarding legal certainty for home ownership credit (KPR) debtors without the creditor's permission. This research uses normative research using a case approach. The data used is secondary data including judge's decisions and related laws.

Keywords: *Legal Certainty; Credits Without; Creditors Permission.*

I. Introduction

In the period 2021 to 2023, Indonesia's population growth rate continues to increase by an average of 1.20% per year.[1] Meanwhile, according to data compiled by the World Bank, up to 2021, Indonesia's population has reached around 273.8 million people. The increase in population and its growth rate will have an impact on increasing the living needs of the Indonesian population, namely related to the need for housing (place to live).[2] The need for housing for the people must of course be balanced with the number of houses built so that there is no gap or backlog.

The government is currently trying to carry out development and change for the better in all aspects of life, including improving the welfare of its people. As stated in Article 28 H paragraph (1) of the 1945 Constitution of the Republic of Indonesia which emphasizes "that every person has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment, and has the right to receive health services, which is a basic human need".

A house is one of the most basic needs for humans as living creatures, namely having a good and healthy place to live, but one of the main problems still faced by people in Indonesia is the availability of houses, in this regard, the banking sector has a very important role. in improving community welfare through the distribution of funds in the form of Home Ownership Credit (KPR).[3]

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[1] Nugroho Agung Pambudi et al., "Renewable Energy in Indonesia: Current Status, Potential, and Future Development," *Sustainability* 15, no. 3 (January 27, 2023): 2342, https://doi.org/10.3390/su15032342.

[2] Djoni Hartono et al., "Determinant Factors of Urban Housing Preferences among Low-Income People in Greater Jakarta," *International Journal of Housing Markets and Analysis* 15, no. 5 (December 1, 2022): 1072–87, https://doi.org/10.1108/IJHMA-05-2021-0056.

[3] Dwi Suci Lestari, "THE IMPACT OF SHARIA BTN CREDIT AND INCOME FACTORS ON PUBLIC INTEREST IN HOME OWNERSHIP LOANS (KPR)," *Syari'ah Economics* 6, no. 1 (September 10, 2022): 65, https://doi.org/10.36667/se.v6i1.1168.

Home ownership credit is one of the banking products to channel funds for housing financing programs for the people.[4] The process of purchasing a house on credit through a home ownership credit program by the buyer (debtor) in the form of ownership of the land and the house building on it. In this process, the banking sector uses land and building deeds as collateral, because the process of purchasing through credit requires collateral or collateral. The Home Ownership Credit Program is also an effort to uphold human rights as explained in the 1945 Constitution, Article 28 I paragraph (4), which mandates "The protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government".

The facts that occur in the financing system implemented through the Home Ownership Credit program are that there are many obstacles and there is no protection for mortgage debtors who make the transition to new debtors to fulfill the debtor's rights and obligations for the mortgage that has been agreed between the debtor and the creditor. This happens a lot in the community, many of whom do not know the legal certainty aspects of mortgage transfers without the creditor's permission, giving rise to many new debtors who are unable to own and receive proof of ownership of the mortgage after the debtor's obligations are completed. Based on this, it is important to carry out this research to answer problems and provide legal certainty and protection for debtors who transfer mortgage credit without the creditor's permission.[5]

The research method carried out by this legal research is a normative juridical research method. This research was carried out by examining library materials in the form of secondary data or what is also called library research. The method used in preparing this study is to examine the legal rules contained in laws and regulations, agreements, expert opinions and theories related to banking home ownership credit (KPR) products. This research uses several approaches in the form of a statutory approach, a

[4] Ahmet Suayb Gundogdu, "Islamic Mortgages and Securitization," 2023, 27–55, https://doi.org/10.1007/978-3-031-27689-7_2.

[5] Andrea Moro, Daniela Maresch, and Annalisa Ferrando, "Creditor Protection, Judicial Enforcement and Credit Access," *The European Journal of Finance* 24, no. 3 (February 11, 2018): 250–81, https://doi.org/10.1080/1351847X.2016.1216871.

conceptual approach and a case approach. The analysis carried out will provide answers to existing problems.

II. Factors and Impact of KPR Switching by Debtors without Creditor Permission

Since humans are born until they die, humans are members of society who live among other humans or are called society,[6] so it can be concluded that as long as humans live they are members of society. Referring to the mandate of Article 28 Letter I paragraph (4) of the 1945 Constitution, every member of society has the right to carry out legal actions related to fulfilling his or her rights as a human being. The Home Ownership Credit Program is an effort to realize the ideals of the nation and state as stated in the 5th (five) principle of Pancasila, namely social justice for all Indonesian people.

The above is in line with the government's national program, namely "One Million Houses".[7] The Ministry of Public Works and Public Housing (PUPR) noted that as of early December 2020, the realization of the one million houses program had reached 777,708 units from the target of 900,000 housing units. The One Million Houses Program continues to be implemented so that every Indonesian citizen can own and live in a house that is livable.[8] Therefore, several financial institutions such as banks play a role in encouraging the national "One Million Houses" program by

[6] Robert Kastenbaum, *Death, Society, and Human Experience*, ed. Christopher M. Moreman (Twelfth Edition. | New York : Routledge, 2018. | Revised edition of Death, society, and human experience, c2012.: Routledge, 2018), https://doi.org/10.4324/9781315232058.

[7] Anneke Nurdiani Syukry et al., "Socialization of One Million Houses Subsidy Program Policy in Indonesia," *Linguistics and Culture Review* 6 (February 13, 2022): 274–91, https://doi.org/10.21744/lingcure.v6nS5.2164.

[8] Deden Rukmana, "Upgrading Housing Settlement for the Urban Poor in Indonesia: An Analysis of the Kampung Deret Program," in *Metropolitan Governance in Asia and the Pacific Rim* (Singapore: Springer Singapore, 2018), 75–94, https://doi.org/10.1007/978-981-13-0206-0_5.

providing the Home Ownership Credit (KPR) program to the community.[9]

The credit purchase program is one of the products of several banks, including Bank Sumatra Utara (Bank SUMUT),[10] Bank Tabungan Negara (Bank BTN) and Bank Syariah Indonesia (BSI) in Medan City, where in implementing home ownership credit agreements it is easy to encounter problems, especially the problem of the legality of the transfer of home ownership credit which is carried out under the hands of the debtor to another party before the mortgage is paid off without the knowledge of the creditor. Then the conditions and procedures set by creditors for transferring home ownership credit make it very difficult for debtors.[11] In this case, consumers often do not properly understand the process of transferring home ownership credit and only carry out the transfer based on agreements and agreements between the first debtor and the prospective new debtor without the creditor's permission so that consumers or new debtors experience difficulties in obtaining or transferring rights to the house at the time, the home ownership loan has been paid off.

Banking analysis factors in North Sumatra indicate that the main cause of the transfer of home ownership credit[12] without the creditor's permission is due to the debtor's inability to pay and avoid debtor losses if the home ownership credit goes bad then the bank will confiscate and

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[9] Zein Lokot Nasution, "Policy Scheme for Housing Provision in Improving Welfare: A Case Study on ASN (State Civil Apparatus)," *Jurnal Ekonomi Pembangunan* 17, no. 1 (September 6, 2019): 73, https://doi.org/10.22219/jep.v17i1.9429.

[10] Ternamentha Sitepu et al., "Literature Review: Decision to Choose Non-Subsidized Home Ownership Loans at PT. Bank Tabungan Negara for North Sumatra Region," in *Proceedings of the 1st International Conference on Social, Science, and Technology, ICSST 2021, 25 November 2021, Tangerang, Indonesia* (EAI, 2022), https://doi.org/10.4108/eai.25-11-2021.2319423.

[11] "Legal Consequences of Transfer of Home Ownership Loans without Creditors' Permission," *International Journal Reglement & Society (IJRS* 1, no. 2 (September 30, 2020), https://doi.org/10.55357/ijrs.v1i2.8.

[12] Galuh Finna Wais Al Qorni and Juliana Juliana, "SHARIA PROPERTY PURCHASE DECISION WITHOUT BANK: ANALYSIS OF THE INFLUENCE OF PRICE FACTORS, ENVIRONMENT AND RELIGIOSITY," *Jurnal Ekonomika Dan Bisnis Islam* 3, no. 3 (December 30, 2020): 234–45, https://doi.org/10.26740/jekobi.v3n3.p234-245.

auction it. The debtor's attempt to transfer rights in the form of a house by buying and selling privately before the KPR is paid off is by not notifying the credit provider because the over-credit process through the bank for the KPR cannot provide certainty and the price is relatively low so it is very detrimental to the debtor in getting back the rights to the house. the price of the house that has been paid by repayment of the remaining home ownership credit by a third party.

Credit transfers or transfers of house ownership credits from old debtors to new debtors without the creditor's permission give rise to legal uncertainty and give rise to conflicts between old debtors and new debtors regarding ownership of the rights to the house after the debtor's obligations are completed. Legal uncertainty regarding new debtors is due to the legal conditions for transferring home ownership credit that have been determined by the creditor. This means that home ownership credit debtors are not allowed to take legal action without the creditor's knowledge and permission.

III. Legal certainty of transfer (KPR) without the creditor's permission based on the principle of freedom of contract

The mandate of the establishment of Law Number 1 of 2011 concerning Housing and Settlement Areas has 3 three important things in the mandate of this law. Firstly, Article 19 states explicitly the right of every citizen to housing. The spirit of this regulation is the strong will of legislators to fulfill the needs of low-income people. Article 17 and Article 26 concerning the obligation of the provincial government to reserve and provide land for low-income housing (MBR).[13] This law places housing and slum settlements as part of a system consisting of development, housing management and settlement area management. Second, there is recognition that housing management is the responsibility of the state, the guidance of which is carried out by the central government and regional

[13] Anita Vitriana, "Post-Implementation Review of Low-Income Housing Provision Policy: A Qualitative Study with Executives' Perspective," *International Review for Spatial Planning and Sustainable Development* 11, no. 4 (October 15, 2023): 8, https://doi.org/10.14246/irspsd.11.4_131.

governments. This clause further emphasizes that housing and settlement development cannot be separated from regional development, urban or rural. The division of tasks and authority of the government in carrying out guidance on the implementation of housing and residential areas refers to regional autonomy and regional independence.[14]

Third, the financing system will be an important part of housing and residential area development. In the previous law, namely Article 33 of Law Number 4 of 1992 concerning Housing and Settlements,[15] there was only one government provision to provide convenience for Home Ownership Credit (KPR). Meanwhile, in Article 128 of Law Number 1 of 2011 concerning Housing and Settlement Areas there are several articles and even special chapters regarding funding and financing systems, namely in Chapter X, which lists various financing systems up to secondary financing for housing.

Based on Article 119 regarding funding, it is said that the source of funds to fulfill housing needs can come from APBN (State Revenue and Expenditure Budget) funding sources.[16] The three mandates of Law Number 1 of 2011 provide freedom for every citizen to obtain and transfer the rights and obligations of home ownership in legal ways according to applicable law. The legal fact in transferring home ownership credit without the creditor's permission, as is often the case in society, especially home ownership credit debtors, is that there is an imbalance between the rights of creditors and debtors in fulfilling the obligation to obtain and provide housing as mandated by Law Number 11 of 2011, namely providing convenience in home ownership credit for the community.

The implementation of the program and distribution of funds for home ownership loans is carried out by banks and usually through an

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[14] Nuvazria Achir and Sri Nanang Meiske Kamba, "The Function Of Sharia-Based Regional Regulations On Education And Social Services In The Regions," *Jambura Law Review* 3 (April 24, 2021): 1–17, https://doi.org/10.33756/jlr.v3i0.7643.

[15] Marco Aurélio Zazyki et al., "Property Rights in Informal Settlements," *Cities* 122 (March 2022): 103540, https://doi.org/10.1016/j.cities.2021.103540.

[16] Emilda Sulasmi, Indra Prasetia, and Arief Aulia Rahman, "Government Policy Regarding Education Budget on The Posture of The State Budget (APBN)," *Journal for Lesson and Learning Studies* 6, no. 1 (April 7, 2023): 142–51, https://doi.org/10.23887/jlls.v6i1.60171.

alliance mechanism in contracts, which consist of a main contract or debt agreement and additional agreements in the form of collateral bonds from the borrower. The existence of a memorandum of agreement and contract is a legal relationship or event where someone makes a promise to another person. The same thing applies when purchasing a house from a bank based only on a loan agreement. Contracts are the fundamental basis of the legal process and confirm proof of ownership, because an agreement is made to protect legal certainty and safeguard the interests of the party stating the agreement. This refers to Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations, and regulations requiring every form of transfer of rights based on Government Regulation Number 24 of 1997 concerning land registration, which is stated in Article 37 paragraph (1) which states that " The transfer of land rights and ownership rights to apartment units through sale and purchase, exchange, grant, entry into a company and other legal acts of transfer of rights, except for the transfer of rights through auction can only be registered if proven by a deed made by a notary (official Land Deed Maker) who is authorized according to the provisions of the applicable laws and regulations".

Banking as the party that provides and channels funding for home ownership loans with a mechanism, namely a contract between the bank and the credit recipient by formulating the interests and convenience of banking to obtain large profits in a contract by ignoring the objectives of Law Number 11 of 2020, namely limiting The debtor's right to profit from home ownership without permission from the creditor. The process of transferring rights to a home ownership credit is said to be valid if it complies with Article 1338 of the Criminal Code and Article 1320 of the Criminal Code and has good faith. The existence of rigidity in formulating an agreement law and an imbalance in the objectives of an agreement in home ownership credit financing causes losses for the debtor and causes failure or inability to fulfill its achievements.

The Indonesian legal system regulates engagements in Book III of the Civil Code concerning engagements (*van verbintenis*). Engagements regulated in Book III BW are contractual engagements and non-contractual engagements. Contractual engagements originate from contractual relationships. Contractual relationships arise because of an

agreement between the parties involved in the agreement. The engagement of the parties in an agreement is based on the principle of consensualism. Meanwhile, non-contractual engagements arise not because of an agreement between the parties, but the engagement of the parties has been regulated and determined by law. Based on this, referring to Articles 1338 of the KUHPdt and 1320 of the KUHPdt, transition (KPR) without the creditor's permission can be formulated as legal according to law with provisions on the principle of balance and that there are no parties who are harmed by the agreement made by the parties.

IV. Reform of the Law on Transferring Home Ownership Credit (KPR) Without the Creditor's Permission

This problem was studied by considering the gap between legal principles and reality. In this case, in fact, there was a violation of the law in the transfer process (from the defendant to the plaintiff) without involving the co-defendants, meaning that the defendant had violated the meaning of the written agreement regarding ownership and the basic principles, namely through a deed made before a Notary, so that the transfer process can be declared legally valid. The defendant and the plaintiff did not carry out the sale and purchase process through a notary, however, due to consideration of sufficient evidence, such as an agreement between the defendant and the plaintiff in the form of receipts and other supporting evidence as well as witnesses, the court decided that the defendant and plaintiff The defendant complies with the court's decision, namely handing over documents that are used as collateral to the plaintiff and can also be transferred to the plaintiff's name. Based on the decision, the court emphasized in its decision that the transfer of rights in the form of a house by means of private sale and purchase without the permission of the creditor can be declared legally valid.

Based on court decision number 277/ Pdt.G/2022/ PN. Mdn, court decision number 80/Pdt.G/2015/PN.Sda, court decision number 54/Pdt.G/2021/PN.Kwg, court decision number 27/Pdt.G/2017/PN Unr, provides a form of protection for consumers who buy and sell mortgages without the creditor's permission or under their hands. As the

principle of consensuality shows us all, that basically an agreement made verbally between two or more people is binding and therefore has created obligations for one or more parties to the agreement, as soon as these people reach an agreement or concencus. , even if the agreement has been reached solely orally. This means that in principle the agreement is binding and applies as an agreement for the parties who promise that it does not require formalities, however, to safeguard the interests of the debtor (or those who are obliged to fulfill performance) forms of formalities are held, or certain concrete actions are required.[17]

Based on temporary data found regarding over-credit carried out by debtors without the knowledge of creditors at banks in North Sumatra, Bank SUMUT, Bank Tabungan Negara (Bank BTN), and Bank Syariah Indonesia (Bank BSI) in Medan City can be explained as follows:

Table 1. Data on Banking Problems Related to Home Ownership Credit in North Sumatra.

No	Banking Problems Related to Home Ownership Loans in North Sumatra	Percent	Amount of Loss
1.	Problem Loans in the Housing Sector in North Sumatra Banking in 2018.[18]	8.7%	Rp. 1,336 Trillion
2.	400 Medan State Savings Bank (BTN) consumers 85 consumers have not received a certificate even though they have paid off their home ownership credit in 2019.[19]	20%	Rp. 1.7 Billion
3	The disparity between housing availability and demand in North Sumatra of 70,000 is realized at only 11,000 units.	15%	60,000 units of unfulfilled demand
4.	Housing Developer Fraud Against Creditors by embezzling certificates from 95 to 60 certificates.	30 %	Rp. 15 Billion

[17] Sonang Nimrot Jewel, "Peralihan Hak Atas Rumah KPR Melalui Jual Beli Di Bawah Tangan," *UNNES Law Journal* 2 (2013): 106.

[18] Juriadi Evalisa Siregar, "Evalisa Siregar, Juriadi," Antara Sumut, 2023.

[19] Yeka Hendra Fatika, "Temukan 600 Konsumen Belum Terima Sertifikat Setelah Pelunasan KPR, Ombudsman Berikan Saran Perbaikan Kepada BTN," 2023.

Source: Analysis of data on home ownership credit cases at Bank Sumut, Bank BTN, and Bank Syariah Indonesia (BSI) in Medan City.

Based on the data above, there are 20% problems related to home ownership credit without the creditor's permission so that consumers have not been able to receive proof of home ownership due to the lack of approval from the first debtor to transfer or receive a certificate of title to the home. The problems that occur in table 1 above provide an illustration of the need to simplify regulations and eliminate regulations or policies that are obstructive (deregulation) regarding distribution and financing as well as protection for home ownership credit consumers due to deviant behavior carried out by depelovers and banks in selling or financing Ownership Credit. Houses, especially for lower middle class people, in general for all people who use Home Ownership Credit financing facilities.

The process of channeling funds carried out by banks as their function is to collect, distribute and safeguard funds entrusted to them by the public so that they can be used and managed well in productive fields that are closely related to the public interest, one of which is the Home Ownership Credit program which is experiencing problems in its implementation. The dominant problem in Home Ownership Credit financing is the debtor's failure to make payments resulting in buying and selling transactions carried out by the debtor to other parties to avoid further losses due to the credit agreement that has been agreed between the debtor and the creditor.

Buying and selling carried out by the debtor to another party without the creditor's permission on the one hand creates new problems[20] regarding the transition process which can result in the replacement debtor not being free to have legal standing over the acquisition so that it can cause losses for the replacement debtor who has purchased without the creditor's permission (under the hand) to be able to control and own the rights after the Home Ownership Credit financing has been repaid. The position of a land sale and purchase document that was executed privately

[20] Hideki Kanda and Saul Levmore, "Explaining Creditor Priorities," in *The Creation and Interpretation of Commercial Law* (London: Routledge, 2022), 295–346, https://doi.org/10.4324/9781315193939-11.

can be used as evidence. In accordance with the intent of Article 3 of the Regulation of the Minister of Agriculture and Agrarian Affairs Number 2 of 1962, namely: "A request for confirmation as stated in Article 1 regarding rights that are not described in a land right as intended in Article 2, is submitted to the Head of the Registration Office The land in question is accompanied by the specified conditions.

Several housing cases that have occurred generally position consumers as a weaker group compared to developers. Both from a socio-economic perspective, technical knowledge and ability to take legal action through court institutions. Legal protection for it is not guaranteed as expected. The consumer protection movement in Indonesia which was spearheaded by the Indonesian Consumers Foundation (YLKI) was the main trigger for the birth of similar institutions which then encouraged the government to enact legislation regarding consumer protection and provisions related to the provision of public housing. These include Presidential Decree Number 55 of 1993 concerning Land Acquisition for the Implementation of Development in the Public Interest, Law Number 4 of 1992 concerning Housing and Settlements, Decree of the Minister of Public Housing (Kepmenpera) Number 09/KPTS/1995 concerning Guidelines for Binding the Sale and Purchase of Houses, Law Number 8 1999 concerning Consumer Protection (UUPK) and the enactment of Indonesian Government Regulation Number 59 of 2001 concerning Non-Governmental Consumer Protection Institutions.

The types of housing-related problems that YLKI most often receive are related to certificates that have not been handed over by developers to consumers and consumers experiencing default in paying the bank due to changes in interest rates set by the bank and the large fees set by the developer so that construction can be carried out immediately. In this regard, in Law Number 1 of 2011 concerning Housing and Settlement Areas, it is stated in Article 106 letter c that "Provision of land for the construction of houses, housing and residential areas can be carried out through the transfer or release of land rights by the land owner ." In this regard, in Law Number 1 of 2011 concerning Housing and Settlement Areas, it is stated in Article 106 letter c that "Provision of land for the construction of houses, housing and residential areas can be carried out

through the transfer or release of land rights by the land owner ." Then the underlying thing for preparing the contents of an agreement that is binding on the parties who have made the agreement is strengthened in Article 1340 of the Civil Code which explains that an agreement only applies to the parties who make the agreement and are attached. The Civil Code also explains the validity of a sale and purchase agreement in article 1458 of the Civil Code, that a sale and purchase is deemed to have occurred between the two parties immediately and thereafter if the parties reach an agreement regarding the goods being traded and the price, even though the object or object has not been delivered. or the price has not been paid. Then the validity of the sale and purchase refers to Article 55 paragraph (2) of Law Number 1 of 2011 concerning the transfer of ownership rights to houses and residences. The legal rules above provide the basis and guarantee for debtors or perpetrators (over credit) of KPR (Public Housing Credit), to obtain legal certainty regarding the rights they have.

V. Conclusion

People cannot be forced to give their consent, an agreement given by force gives rise to a Contradictio in terminis. The existence of coercion shows that there is no agreement which may be made by the other party to give him a choice, namely agreeing to bind himself to the agreement in question, or refusing to bind himself to the agreement with the result that the desired transaction is not carried out (take it or leave it). Based on the above formulation, it can be said that home ownership credit without the creditor's permission is valid and has legal force as long as it complies with Article 1338 of the Criminal Code and Article 1320 of the Criminal Code and there is good faith for the parties binding themselves. With consensualism, a contract is said to have been born if there has been an agreement or agreement of will between the parties making the contract. With a promise, there is a willingness for the parties to achieve each other, there is a willingness to commit themselves to each other. These contractual obligations become a source for the parties to freely determine the contents of the contract with all its legal consequences. Based on this

will, the parties are free to reconcile their respective wishes. The wishes of the parties are the basis of the contract. The occurrence of a legal act is determined based on an agreement (consensualism).

Civil law reform in the contract system (KPR) must prioritize balance between debtors and creditors to provide legal certainty and legal protection for home ownership credit (KPR) consumers. The existence of a legal formulation based on court decision number 277/ Pdt.G/2022/ PN. Mdn, court decision number 80/Pdt.G/2015/PN.Sda, court decision number 54/Pdt.G/2021/PN.Kwg, court decision number 27/Pdt.G/2017/PN Unr, which provides validity for debtors who make a transition (KPR) without the creditor's permission on the basis of good faith and the absence of an aggrieved party is the legal basis for a transition.

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Contemporary Challenges in Law and Governance towards
100 years of Indonesian Legal Education
Proceedings of the International Conference on
Law and Governance in a Global Context (icLave) 2023

5th icLave

The Functions of Non-binding Environmental Provisions under the RTAs of ASEAN Member States[1]

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Abstract

International trade law has traditionally focused on the application of hard norms that can be enforced through international judicial mechanisms such as WTO dispute settlement. In contemporary practices of Regional Trade Agreement (RTA) making, there are issues beyond WTO law that are addressed as part of new generations of RTAs. One such issue is sustainable development, which is subsequently embedded into a "Trade and Sustainable Development" (TSD) chapter. The TSD chapter incorporates rules on non-trade and extra-WTO issues, such as labour, human rights, and the environment within the context of RTAs. A significant majority of TSD rules, are crafted in a non-binding manner. The position of non-binding rules within international trade regulation is rather peculiar. If international trade regulation is obsessed with the security and predictability of rules, why do states, when crafting RTAs that deal with TSD issues, emphasise the use of non-binding rules? This paper attempt to address questions the problem of non-binding rules in ASEAN Member States' RTAs. This paper concludes by asserting the four purposes of incorporation of TSD provisions, even though they are non-binding. Non-binding TSD rules function to establish a 'shared understanding' between the parties; a means to soften non-acceptance of hard norms; a means to create a base-level

[1] Previous version of this paper entitled 'Soft Law' Rules Under Trade & Sustainable Development Chapter of ASEAN Member States' RTAs: A Constructivist Analysis' was presented at the 5th International Conference on Law and Governance in Global Context (icLave), in Balige, North Sumatera, Indonesia, 7-8 November 2023.

commitment on TSD issues; and a means to bridge commitments across self-contained regimes that govern similar matters.

Keywords: ASEAN, non-binding rules, regional trade agreement, trade and sustainable development

I. Introduction

International trade law has traditionally focused on the application of hard norms that can be enforced through international judicial mechanisms such as WTO dispute settlement. In contemporary practices of Regional Trade Agreement (RTA) making, there are issues beyond WTO law that are addressed as part of new generations of RTAs. One such issue is sustainable development, which is subsequently embedded into a "Trade and Sustainable Development" (TSD) chapter. The TSD chapter incorporates rules on non-trade and extra-WTO issues, such as labour, human rights, and the environment within the context of RTAs. A significant majority of TSD rules are crafted in a non-binding manner. The position of non-binding rules within international trade regulation is rather peculiar. If international trade regulation is obsessed with the security and predictability of rules, why do states, when crafting RTAs that deal with TSD issues, emphasise the use of non-binding rules? This paper attempts to address questions the problem of non-binding rules in ASEAN Member States' RTAs.

The question of non-binding rules in international law is has been debated by scholars.[2] Some scholars reject non-binding rules and do not consider them as 'law'.[3] But the presence of non-binding rules themselves

[2] See: Christine M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law," International and Comparative Law Quarterly 38, no. 4 (October 1989): 850–66, https://doi.org/10.1093/iclqaj/38.4.850; Melaku Geboye Desta, "Soft law in international law: an overview," Melaku Geboye Desta, "Soft Law in International Law: An Overview," in *International Investment Law and Soft Law*, ed. Andrea K. Bjorklund and August Reinisch (Cheltenham, UK: Edward Elgar Publishing, 2012), p. 42.

[3] Jan Klabbers, "The Redundancy of Soft Law," *Nordic Journal of International Law* 65 (1996): 167–82; Kal Raustiala, "Form and Substance in International Agreements," *American Journal of International Law* 99 (2005): 586–87.

cannot be denied in factual sense in contemporary international economic law.[4] Given the current proliferation of non-binding rules under TSD chapter of RTAs, it is important to reflect the rules' existence under RTAs and link it with existing scholarly debates. Due to length limitation this paper particularly analyses non-binding TSD rules that concerns with linkage between trade and environment. Also, this paper looks at the RTA that made between ASEAN Member State(s) and external trading partners.[5] The limited choice of RTAs that analysed here is deliberate. This is due to ASEAN's absence about policy preference at the regional level on how to incorporate sustainable development concerns with trade agreements. Secondly, by choosing certain ASEAN Member States' RTA that concluded with external parties, we can learn the extent of influence in the context of interactions that external partners brought.

Subsequent part of this paper will be divided as follows. In the second section, this paper elaborates on the scope and existence of TSD rules in selected ASEAN Member States' RTA, particularly highlighting the environment provisions. In the third section, this paper analyse the non-binding nature of environmental rules found in TSD provisions of selected RTAs. Finally, this paper concludes by asserting the four purposes of incorporation of TSD provisions, even though they are non-binding.

II. Trade and Environment Provisions under ASEAN Member States-related RTAs

Sustainability issues in international trade law discourse emerged as the discussion on how to link environmental issues that have contact points with the rules of international trade. In GATT meetings,

[4] Michael Hahn, "Interesting Times: Soft Law in International Economic Governance," in *Asian Yearbook of International Economic Law* 2022, ed. Michael Chi, Marc Bungenberg, and Andrea K. Bjorklund (Cham: Springer, 2021).

[5] Among others, European Union–Vietnam Free Trade Agreement, 30 June 2019' European Union – Singapore Free Trade Agreement, 19 October 2018; Indonesia – EFTA Comprehensive Economic Partnership Agreement, 16 May 2018; Philippines – EFTA Free Trade Agreement, 28 April 2016; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018; Regional Comprehensive Economic Partnership Agreement, 15 November 2020.

environmental issues are a divisive issue among the GATT Contracting Parties. Developing countries sees that environmental regulation and standards put by developing countries are form of trade barrier to restrict goods originated from developing countries.[6] In this sense, environmental issues have been discussed for a quite some time, even after the formation of WTO, the Members have yet to reach a consensus about a binding rule about trade and environment. Consequently, RTAs are considered as the alternative avenue for states to push their position on trade and environment issues.

A. Right to Regulate and Non-regression Commitment

Environmental concerns, as a part of sustainable development, in principle lies within the sovereignty of states to regulate. It is the autonomy under the authority of state that could determine environmental regulations and standard adjusting to the environmental interest that wish to be protected by states. Thus, European style FTA (EU and EFTA states) of RTA typically incorporate the affirmation of right to regulate and level of protection that is appropriately targeted through regulation. Under Indonesia – EFTA FTA, for example:

> "Article 8.2 - Right to Regulate and Levels of Protection
> 1. Recognising the right of each Party, subject to the provisions of this Agreement, to pursue its own means for achieving sustainable development, including establishing its own levels of labour and environmental protection and to adopt or modify accordingly its relevant domestic laws and policies, ***each Party shall seek to ensure that its domestic laws and policies provide for and encourage high levels of environmental and labour protection***, consistent with standards, principles and agreements which they are committed or a Party to, and ***shall strive*** to further improve the level of protection provided for in those domestic laws and policies." (emphasis added).

The article above expressed a general objective that TSD provisions want to achieve. Following that general declaration, there are non-binding

[6] Pascal Lamy & Geneviève Pons, "Environment and International Trade: The New European Posture," *Green* 3, no. 1 (2023): 88-96.

format of verb 'shall seek' and 'shall strive', which indicate a soft form of obligation within the agreement.

In similar spirit, European-style TSD chapter template also specifically addresses the issue of 'race to the bottom.' It refers to conditions where the host country of investment or manufacturers lower the regulatory standards for environment to attract investment and to create a trade advantage. This is precisely the 'non-regression'[7] why clause was introduced.

> "Article 8.3 - Upholding Levels of Protection in the Application and Enforcement of Laws, Regulations or Standards
> 1. The Parties ***shall effectively apply*** their environmental and labour laws, regulations or standards.
> 2. Subject to Article 8.2 (Right to Regulate and Levels of Protection), ***the Parties shall not***:
>
> ***(a) weaken or reduce levels of environmental or labour protection*** provided by their domestic laws, regulations or standards with the sole intention to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory; or
>
> (b) ***waive or otherwise derogate from***, or offer to waive or otherwise derogate from, such domestic laws, regulations or standards ***in order to encourage investment from another Party or to seek or to enhance a competitive trade advantage*** of producers or service providers operating in its territory."

Reading the provision above, there are two normative standards that could be seen from it. First, there is a rule that tells the parties to 'effectively apply' laws and regulations. From ordinary meaning, the compliance wished by not a mere application of internal laws and regulations pertaining environment, but instead the application should be *effective*. But, the extent of application of laws and regulation needed is subject upon further interpretation. Second, there is a prohibitive norm that restrict parties to weaken environmental protection or waive the regulatory

[7] Andrew D. Mitchell and James Munro, "An International Law Principle of Non-Regression from Environmental Protections," *International and Comparative Law Quarterly* 72, no. 1 (2023): 35–71, https://doi.org/10.1017/S0020589322000483.

standard. The phrase 'shall not' create a stronger obligation compared to other form 'should not'. Thus, this indicates the stronger bindingness that the agreement want to target.

B. Commodity-related TSD Provisions

'Trade and environment' touches on the natural resource-based commodity in international trade. For a long **time**, environmental standards have been opposed by natural resource exporting countries, typically developing countries. This is because they reflect environmental protectionism that would hinder the market access of natural resources goods coming from developing countries. Thus, some ASEAN Member States' RTA explicitly refers to sustainable commodity as a part of TSD provisions. For example, as mentioned in Indonesia – EFTA CEPA:

> "Art. 8.8. Sustainable Forest Management and Associated Trade
> [...]
> 2. With the aim of contributing to sustainable management of forests and peatlands, including through the promotion of trade in products that derive from sustainably managed forests, ***the Parties undertake to, inter alia***:
> (a) promote the effective use of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
> (b) promote the development and ***use of certification schemes for forest related products*** from sustainably managed forests;
> (c) promote the effective implementation and use of ***legality assurance system for timber*** as required in ***Forest Law Enforcement Governance and Trade Voluntary Partnership Agreement*** and corresponding schemes, with the aim to combat illegal logging and eliminate trade of illegal timber products;
> (d) and exchange information on trade-related initiatives on forest governance, including measures to combat illegal logging and measures to exclude illegally harvested timber and timber products from trade flows." (emphasis added)[8]

[8] Similar provision also could be found in the Philippines – EFTA FTA Art. 11.8 "1. In order to promote the sustainable management of forest resources and thereby, inter alia, reduce greenhouse emissions from deforestation and degradation of natural forests and peat lands related to activities beyond the forest sector, the Parties will work together in the relevant multilateral fora in which they participate and through existing bilateral cooperation if applicable to improve forest law enforcement and governance and to

Given the use of action-verb '*undertake*', this provision could be seen as a non-legally biding provision. It prescribes the effort that should be done by timber exporting partner to ensure the sustainability of timber. This could be done through certification scheme, and implementation of legality assurance system. Also, this provision touches other biodiversity related conventions, the Convention on International Trade in Endangered Species, which can be considered as a specific legal regime that governs the wildlife trade, including forest products. Other than forestry commodity, some commodity-specific sustainability provisions also concern with fisheries,[9] and vegetable oils.[10]

C. Climate Change Provisions

Commodity concern is a classical trade environment issue that emerged since GATT era. RTAs also allow negotiating states to insert contemporary global concern such as climate change issue. The example of climate change commitment is reflected in Singapore – EU CEPA:

> "Art. 12.6. - Multilateral Environmental Standards and Agreements
> [...] 3. ***The Parties affirm their commitment to reaching the ultimate objective of the UN Framework Convention on Climate Change*** (hereinafter referred to as 'UNFCCC'), and to ***effectively implementing the UNFCCC, its Kyoto Protocol, and the Paris Agreement of 12 December 2015*** in a manner consistent with the principles and provisions of the UNFCCC. [...]" (emphasis added).

promote trade in legal and sustainable forest-based, agricultural and mining products. 2. Useful instruments to achieve this objective may include, inter alia, effective use of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) with regard to endangered timber species, certification schemes for sustainably harvested forest products, bilateral Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements."

[9] Art. 8.9 Indonesia – EFTA CEPA; Art. 13.10 Vietnam – EU FTA; Art. 12.8 EU – Singapore FTA.

[10] Art. 8.10 Indonesia – EFTA CEPA

This formulation of climate change provision is arguably apparent in EU-style RTAs which include TSD provisions.[11] Note that only it specifically refers to commitment under other international agreements, the provision also specifies the means on how to achieve that purpose albeit in vague language.

D. Specific International Environmental Regime-related provisions

Other than climate change commitments, some RTAs also feature references to other regimes of international environmental law, such as ozone protection and marine pollution from ships. The two areas evolved distinctly from the regime of international trade. CPTPP, for instance, parties are committed to taking measures to control the production and consumption of, and trade in substances that can deplete ozone layer. On this provisions footnote, it specifically refers to obligations under Montreal Protocol. [12] Reference to Montreal Protocol makes sense since measures under ozone protection regime intersects directly with the WTO/GATT

[11] EU – Vietnam FTA Art. 13.6. "Similar provision also could be found under EU – Vietnam FTA, 1. In order to address the urgent threat of climate change, the Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change of 1992 (hereinafter referred to as "UNFCCC") and to effectively implementing the UNFCCC, the Kyoto Protocol to the United Nations Framework Convention On Climate Change, as last amended on 8 December 2012 (hereinafter referred to as "Kyoto Protocol"), and the Paris Agreement, done at 12 December 2015, established thereunder. The Parties shall cooperate on the implementation of the UNFCCC, the Kyoto Protocol and the Paris Agreement. The Parties shall, as appropriate, cooperate and promote the positive contribution of this Chapter to enhance the capacities of the Parties in the transition to low greenhouse gas emissions and climate-resilient economies, in accordance with the Paris Agreement."

[12] CPTPP, Article 20.5: Protection of the Ozone Layer 1. The Parties recognise that emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment. Accordingly, each Party shall take measures to control the production and consumption of, and trade in, such substances. Under the footnote "A Party shall be deemed in compliance with this provision if it maintains the measure or measures listed in Annex 20-A implementing its obligations under the Montreal Protocol or any subsequent measure or measures that provide an equivalent or higher level of environmental protection as the measure or measures listed."

legal discipline.[13] Trade restriction on ozone destructing substances amounts to qualitative restriction under Art. XI GATT, but the measure would be justified. Interestingly, CPTPP include the provisions regarding marine pollution from shipping activities.[14] This area has been governed by International Maritime Organization (IMO) through the inception of MARPOL. CPTPP made two reference points towards other regimes in international environmental law, and non-compliance of the commitment could invoke non-compliance procedure under CPTPP.

One particularly interesting dimension of the international regime is the issue on biological diversity. This is where contestation between the North and South has been existing pertaining to the access of genetic resources.[15] Thus, the creation of UN Convention on Biological Diversity (UN CBD) and its subsequent instrument is monumental in this field. Reference is made to UN CBD in various TSD provisions. For instance, under Comprehensive Economic Partnership (RCEP) Agreement in Article 17.10, it set out the reference on UN Convention on Biological Diversity:

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[13] Osamu Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer* (Brill, 2018), p. 161.

[14] CPTPP, "1. The Parties recognise the importance of protecting and preserving the marine environment. To that end, ***each Party shall take measures to prevent the pollution of the marine environment from ships***. [...] Footnote: For greater certainty, for each Party, this provision pertains to pollution regulated by the International Convention for the Prevention of Pollution from Ships, done at London, November 2, 1973, as modified by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, done at London, February 17, 1978, and the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973 as Modified by the Protocol of 1978 relating thereto, done at London, September 26, 1997 (MARPOL), including any future amendments thereto, as applicable to it. [...] Footnote: A Party shall be deemed in compliance with this provision if it maintains the measure or measures listed in Annex 20-B implementing its obligations under MARPOL, or any subsequent measure or measures that provide an equivalent or higher level of environmental protection as the measure or measures listed." (emphasis added).

[15] Camena Guneratne, *Genetic Resources, Equity and International Law* (Cheltenham: Edward Elgar, 2012), p. 191.

> "***Each Party affirms its rights and responsibilities*** under the Convention on Biological Diversity done at Rio de Janeiro on 5 June 1992." (emphasis added)[16]

While RCEP does not attempt to incorporate the core provisions of the UN CBD, RCEP parties expressed the intention to affirm rights and responsibilities that created in UN CBD. So far, this is the only environmental-related provision that could be found under RCEP. In EU style, reference also made to UN CBD as well as CITES and subsequent instruments.[17] More importantly, in EU style provision, with regard to access to genetic resources, sovereign rights of genetic resources are acknowledged as well as requirement of prior informed consent in accessing genetic resources is stipulated.[18]

III. Purpose of Non-binding Environmental Rules

Discussions above laid the discursive overview on how TSD rules take shape in RTA. The softness of TSD rules could be understood through 1) the way the provision is drafted; and 2) the absence of enforcement or non-compliance mechanism under the respective RTAs. With regard to the language use, at first sight, one element that highly noticeable in TSD provisions are the use of action-verb such as *'affirm'*,

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[16] RCEP, Art. 17.10

[17] EU – Vietnam FTA, Art. 13.7.1. "The Parties recognise the importance of ensuring the conservation and sustainable use of biological diversity in accordance with the Convention on Biological Diversity of 1992 (hereinafter referred to as "CBD") and the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, adopted at the tenth meeting of the Conference of the Parties in Nagoya on 18 to 29 October 2010, Convention on International Trade in Endangered Species of Wild Fauna and Flora, as last amended in Gaborone in 1983 (hereinafter referred to as "CITES"), and other relevant international instruments to which they are party, as well as the decisions adopted thereunder."

[18] EU – Vietnam FTA, Art. 13.7.2. "The Parties recognise, in accordance with Article 15 of the CBD, the sovereign rights of states over their natural resources, and that the authority to determine access to their genetic resources rests with their respective governments and is subject to their domestic law. The Parties shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses and not to impose restrictions that run counter to the objectives of the CBD. The Parties recognise that access to genetic resources shall be subject to the prior informed consent of the Party providing genetic resources, unless otherwise determined by that Party."

'shall undertake', *'shall refer'*, *'undertake'* or *'recognise'*. In TSD provisions as discussed above, particular use of verb indicates depth of commitment that the parties pursue. Traditionally, international lawyers understood the normativity of the word '*shall*' to indicate an obligation.[19] However, when '*shall*' is combined with other verb, such as, '*refer*' the obligation created toward the parties are shifted. The parties are not required to comply with the general idea of the norm, but only instructed only to '*refer*' certain documents. The provision does not create additional obligations for parties to comply with *that* mentioned document. In this sense, normativity of the provision is thus diminished. The word '*affirm*' only indicate the statement that something is true or support of something.[20] In particular use of TSD provisions, the word '*affirm*' appear when there are external obligations exist that linked with the future operationalisation of RTAs. Similarly, the word '*recognise*' does not create legal bindingness as such. In ordinary meaning, it indicates that the subject "accepts something is legal, true or important."[21] The obligations referred by the word '*recognise*' are external to the agreements. Except for non-regression provision under European-style RTAs, the vast majority of TSD provisions are non-binding rules. This is seen from the particularly deliberative verb-choice that was made by the drafters.

In explaining the existence of non-binding TSD rules, there are at least four purposes that the soft law form of TSD rules could serve for the respective states. Non-binding TSD rules function to establish a 'shared understanding' between the parties; a means to soften non-acceptance of hard norms; a means to create a base-level commitment on TSD issues;

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[19] Giuseppina Scotto di Carlo, "Linguistic Patterns of Modality in UN Resolutions: The Role of *Shall, Should,* and *May* in Security Council Resolutions Relating to the Second Gulf War," *International Journal of Semiotics of Law* 30 (2017), p. 232; Lavanya Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," *Journal of Environmental Law* 28, no. 2 (July 2016), pp. 337–358, https://doi.org/10.1093/jel/eqw015

[20] "[t]o state something is true, or to state your support for an idea, opinion, etc." Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/affirm. Accessed 15 April 2024.

[21] "Recognize," Cambridge Dictionary, accessed May 15, 2024, https://dictionary.cambridge.org/dictionary/english/recognize.

and a means to bridge commitments across self-contained regimes that govern similar matters.

A. Means to establish 'shared understanding'

First, drawing from interactional international law thesis,[22] shared understanding of norms between the actors is paramount importance in shaping the norms' normativity. As discussed previously, international legal norms could not exist devoid of shared understanding between the actors involved. This is due to the nature of law as the product of social practice. Emphasis of 'shared understanding' is about participation of actors involved in international legal process.[23] Through this lens, international law serves as a 'language' in international relations.[24] International actors speak through similar vocabulary, grammar, and syntax about 'trade and sustainable development'. This language, that thus could bridge the minds of actors participating in negotiation process, and subsequent post-norm creation process. Consequently, international actors would influence and try to influence other participants to form 'shared understanding' between the actors.

In this sense, the bindingness of rules is thus irrelevant. Interactional international law sees at the degree of norm internationalisation. Inclusion and subsequent acceptance of TSD clause, even though in its soft law form, could be seen as an attempt to establish a shared understanding. Furthermore, when 'shared understanding' about the rules of TSD in RTA is established, such understanding could be further brought into future law-making at the multilateral level.

B. Means to soften non-acceptance of hard norms

Second, TSD rules in its soft law form could serve as the means to soften rejection of TSD rules in its hard norm. This practical utility is

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[22] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).

[23] *Ibid.*, p. 65.

[24] Dino Kritsiotis, "The Power of International Law as Language," *California Western Law Review* 34, no. 2 (1998).

observed by Chinkin who explains the significant practical value of norms presented in soft law. According to Chinkin, soft law norms sway states into participating in agreements, particularly when they are hesitant to make a formal, legally binding commitment.[25] This is particularly holds true when a typical TSD rules are extra-WTO rules. States are often reluctant to accept WTO plus and extra-WTO binding commitment without a strong incentive to do so. Therefore, to soften the cautious approach or even total rejection of other negotiating parties to make a hard extra-WTO commitment, it would be proper for sponsoring state to introduce the idea of integration of sustainable development and trade in a non-legally binding formulation.

C. Means to create baseline-level commitment

Third, in contemporary RTA negotiations it is more apparent that states aimed to create a legal milleu through that is more liberalising and contains norms beyond has been settled at the WTO. This is partly to futureproofing the RTA to accommodate current and future trends in trade rule-making in the RTA. To avoid settling back to legal standard that has been achieved through RTA, negotiating states to an RTA could a 'ratchet clause'[26] Ratchet clause essentially once the rules has been settled parties to the RTA could not be go anymore backwards than has been settled. Thus, once created, TSD rules in RTA, even though they are in non-binding form, cannot be disabled once has been created in the future agreements. In this way, states could create baseline level commitment and lock the commitment to integrate the concern of TSD within RTAs.

D. Means to bridge self-contained legal regimes

International law has been endured a long-standing issue of fragmentation between the legal regime that intersects certain subject-

[25] Chinkin, "The Challenge of Soft Law."

[26] Deborah Elms, "Understanding the EU-Singapore Free Trade Agreement," in Australia, *the European Union and the New Trade Agenda*, Annmarie Elijah, Donald Kenyon, Karen Hussey, and Pierre van der Eng (Canberra: ANU Press, 2017), 46-47.

matter but operated in a different sphere of operationalisation.[27] Koskenniemi calls it as 'self-contained regime'.[28] International Law Commission's Report on Fragmentation particularly mentioned intersection between 'trade' and 'environment' international legal regime, as a particular case of fragmentation that would lead to different direction of law.[29] To reconcile this, ILC calls for what they label as 'the principle of harmonization.'[30] In principle, it is widely agreed that when overlaying norms exist on a single issue, these norms should be interpreted to rise a union of obligations that are not contradictory to each other. Harmonisation could be done through 'systemic interpretation', which is a basic feature of general rules of interpretation of treaty, as stipulated by Art. 31 (3) (c) VCLT.[31] Systemic interpretation basically require the treaty interpreter to take into account existing international legal obligations even if the obligations found beyond the treaty itself.

As briefly discussed above, Art. 31 (2) VCLT instructs treaty interpreter to look at what is written *within* the treaty itself. Thus, inclusion of TSD rules within a RTA, even in its non-binding form, could help achieve harmonisation between self-contained regimes to overcome the problem of fragmentation. A typical inter-regime linkage in TSD rules refers to other instruments in another self-contained regime. As elaborated above, the social protection clause in TSD chapter refers to ILO Declarations and Conventions, whereas environmental protection typically refers to other Multilateral Environmental Agreements (MEAs).

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[27] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006).

[28] *Ibid.*, p. 5.

[29] ""Trade law" and "environmental law", for example, have highly specific objectives and rely on principles that may often point in different directions." *Ibid.*, p. 6.

[30] *Ibid.*, 13.

[31] *Ibid.*, 12.

IV. Conclusion

Non-binding rules still puzzle international lawyers. Despite its controversies and disagreements, contemporary international law, including international trade features a large proportion of non-binding rules. Thus, the existence and the normativity of such rules are hard to disregard entirely. This paper particularly addressed the question on non-binding rules related to environment within 'trade and sustainable development' chapter of ASEAN Member States RTAs with external parties. The presence of non-binding rules is seemingly out of place with international trade regulation that emphasises 'rule-based' order and obsesses about enforceability of rules. In the previous section, this paper argues about the four purposive features of non-binding TSD rules. These are: non-binding TSD rules aim to establish a 'shared understanding' between parties, ease the resistance to binding norms, create a foundational commitment to TSD issues, and connect commitments across different regimes addressing similar concerns.

In the context of ASEAN regionalism, TSD rules are only available within RTAs that ASEAN (in case of RCEP) and ASEAN Member States form with external parties, especially from developed countries. Consequently, this fact even further augments our suggestion. Developed countries that have concern with the issue of TSD subsequently tries to proliferate the norm through RTAs with developing countries. Given the asymmetrical nature of RTAs, we can, in addition, critically examine whether 'shared understanding' about environmental concerns have already formed between the actors involved. Of course, the empirical observation about the extent of 'shared understanding' gained and normative meaning of non-binding rules are beyond this paper and should be followed up by other studies.

Acknowledgement

This paper is a part of doctorate research project "ASEAN approach on Trade and Sustainable Development" carried out at Doctor of Laws programme, Faculty of Law Universitas Indonesia under the supervision of Professor Hikmahanto Juwana and Dr Arie Afriansyah. The author

thank the participants of 5th icLave 2023 for suggestions given during the presentation. All errors are solely ours.

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ISBN 978-623-333-835-6