Bunga Rampai Tesis/Disertasi

SPIRIT

Scholarship Program for Strengthening Reforming Institutions

Tema:

Hukum, Pendidikan, Budaya dan Psikologi

Project Coordinating Unit (PCU) SPIRIT
Pusbindiklatren-Bappenas

Kementerian PPN/ Bappenas

Bunga Rampai Tesis/Disertasi

TEMA: HUKUM, PENDIDIKAN, BUDAYA, DAN PSIKOLOGI

Program Beasiswa SPIRIT

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Kelompok Ilmu Sosial

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KATA PENGANTAR

Prioritas utama target pembangunan nasional seperti yang tertuang dalam Rencana Pembangunan Jangka Menengah Nasional Tahun 2010–2014 (RPJMN 2010–2014) Indonesia adalah reformasi birokrasi dan penguatan tata laksana pemerintahan. Untuk mencapai hal ini, sebelas institusi pemerintah yang memiliki peran penting dalam sektor publik dipilih sebagai Participating Agency (PA) dalam program beasiswa SPIRIT (Scholarship Program for Strengthening Reforming Institutions). SPIRIT dirancang untuk mendukung agenda reformasi birokrasi dengan menyediakan program beasiswa gelar dan nongelar untuk staf kunci di institusi publik pusat selama periode tahun 2011–2017.

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Perancangan program SPIRIT dibedakan dengan program beasiswa lainnya di Indonesia melalui upaya pemenuhan kesenjangan kompetensi dan keahlian di tiap-tiap instansi dengan menanamkan program pendidikan gelar dan nongelar dalam Human Capital Development Plans (HCDP) di tiap-tiap instansi secara eksplisit. Program SPIRIT didukung melalui kerja sama antara pemerintah Indonesia dan Bank Dunia (World Bank) melalui pinjaman IBRD Loan No. 8010-ID.

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Serial buku ini diharapkan dapat menggambarkan manfaat dan kontribusi positif Program SPIRIT terhadap peningkatan kapasitas SDM sebagai *participating agencies*, baik dari sisi keterampilan teknis, manajerial, dan kepemimpinan aparat pemerintah, dan dalam melaksanakan reformasi birokrasi di instansi masing-masing. Program SPIRIT juga diharapkan dapat berkontribusi bagi pencapaian sasaran prioritas nasional dalam meningkatkan kinerja instansi pemerintah yang ditandai dengan berkurangnya praktik korupsi, kolusi, dan nepotisme, serta meningkatnya kualitas pelayanan publik.

Jakarta, November 2017

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DAFTAR ISI

Bunga Rampai Tesis/Disertasi

HUKUM

Program Beasiswa SPIRIT

The Alternatives of Dispute Settlement Procedures in Solving the Maritime Territorial Disputes

Alternatif Prosedur Penyelesaian Sengketa dalam Mengatasi Sengketa Teritorial Maritim

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Maritime Territorial Disputes

Ban Ki Moon mentioned that the sea has become an important factor for countries to support their economic interests due to the natural resources such as oil, gas, mineral, until enormous number of fish that are contained in the sea. What is more, the role of the sea in the world transportation systems could not also be underestimated since it provides about ninety percent of the transportation routes around the world which are not only used to move people from one place to another but also to transport goods as a part of international trading activities.

However, in middle of the 20th century, many countries began to realize that the existing uses of the sea were not right on the right track. At that time, those countries noticed that there were a lot of negative effects resulted by careless uses of the sea. The negative effects of that could be seen for example from the depletion of the fish stock and the spreading of pollution which was caused not only by waste from an enormous number of ships sailing on the sea but also from improper oil and gas drilling activities.

Another problem many countries began to extend their claims over the territory of the sea due to the pressure to fulfill their economic needs and security interests. At that time, this chaotic situation was reflected by a variety of claims of the breadth of the territorial sea asserted by different countries. For instance, there were countries which asserted three nautical miles, four nautical miles, six nautical miles, twelve nautical miles, even there were countries which asserted their territorial sea up until 200 nautical miles. Thus, it was clear that, anticipatory measures had to be taken to alleviate these chaotic situations and to avoid a worse condition of the uses of the sea.

What happened after that was in an attempt to achieve the following purposes such as: (1) Minimizing the negative effects of the excessive use of the sea; (2) Managing the allocation of the resources for the countries; (3) Maintaining the stability among countries; and (4) Providing dispute settlement procedures for any conflicting claims of the area of the sea, the UN organized the first conference on the Law of the Sea in 1956. The first conference was considered to have made a significant achievement by yielding four sea related treaties in 1958; however, the exact breadth of territorial sea still had not been decided in this first conference.

In relation to the alternative dispute settlement procedures for maritime territorial disputes which will also become the focus of this essay, there are currently several dispute settlement procedures which can be chosen by disputing countries to resolve maritime territorial conflicts they might have. To be specific, the procedures range from bilateral negotiations until the use military power. However, when discussing about the dispute settlement procedures; it should be bear in mind that there are two types of maritime territorial disputes that should be distinguished. The first type is sovereignty disputes over the islands and the second type is maritime delimitation disputes over the sea spaces adjacent to one particular islands. The major difference between these two types of disputes in term of the availability of dispute settlement

procedures is that the first type (sovereignty disputes) cannot be resolved by using the UNCLOS as guidance. In this essay, I would like to discuss about the alternatives dispute settlement procedures which can be taken by disputing countries in order to resolve their maritime territorial disputes. However, before starting to discuss about that matter, in part B of this essay, I would like to provide an overview about some potential benefits of the sea while in Part C, I would also summarize several cases relating to maritime territorial disputes.

The Potential Benefits Contained in the Sea

In this modern era, it is found that the potential benefits of the sea are not limited to the features as mentioned above. There are other benefits that can be obtained from the right uses of the sea. For example, under the seabed, it is estimated that there are many other sources of interest for hydrocarbons and other mineral resources. Moreover, other potential benefits which can be optimized for security purposes as well as tourism destinations.

The following discussion will provide a more comprehensive explanation regarding the potential benefits of the sea.

1. Natural Resources in the Sea

   In general, the types of the natural resources that are contained in the sea can be divided into two different types. The first type is renewable resources which their availability can be restored after they are taken or exploited. This first type of resources includes a numerous species of fish, seaweeds, mussels, and other living things in the sea. The second type is nonrenewable resources which as opposed from the first type cannot or at least need a long time to be restored after they are taken or exploited. This second type comprises oil, gas, tin, and many other mineral resources. Both types of the natural resources have been very important for people to sustain their lives and fulfill their needs.

   In the modern era, energy sources which are still dominated by fossil fuels including oil and gas hold a very significant role in many aspects of society. This significant role can been seen from the usage percentage of fossil based energy sources which is dominated by transportation (61.5 %), chemicals and pharmaceuticals, etc. (17.1 %), heating, electricity generation, agriculture, etc. (12.4 %), and Industry (9 %). It is close to impossible to wonder that the civilization would be as advanced as it is now without the availability of the fossil based energy sources such as oil and gas. Moreover, the availability of fossil based energy sources becomes even more urgent lately after the appearance of new emerging economies like China and India which obviously need a larger amount of energy supply to make sure the continuation of their development and industrial activities.

2. Sea as a Means of Transportation

So far, the only transportation mode which is able to fulfill those needs is maritime transportation mode which is run by the operation different kinds and various capacities of ships. Based on the statistics, the maritime transportation system provides about 90% of trading routes which connect trading places all over the world. In addition, this kind of transportation system also has a capability to transport a large quantity of goods at once which as the result allows the transportation cost to be pressed to the lowest possible level.

These facts obviously reflect another benefit of the sea for mankind because the access or connectivity provided by the maritime transportation system allows people to trade in a more global scope and exchanges each to another the main products from their place of origin. My conclusion in relation to the discussion of this part is that a country which is able to control a large area of sea would also be able to gain more benefits from the dependence of the trading activities to the availability of the sea routes in order to transport goods. This advantageous position can be used for example to speed up its trading activities with its trading partners without any fears for their transportations of goods to be interfered by other countries or in a less positive purpose this advantageous position can be used to hinder or slow down trading ships from other trading competitors when they are passing its sea territories for the purpose to win the competition against those competitors.

3. Organizing the Sea to Enhance the National Security

With regard to the security interests, the sea also holds a very important role in anticipating any threats which possibly come from the sea direction. In other words, the larger area of the sea that can be controlled means that the greater security interests can be achieved by countries. The need of larger controllable sea spaces particularly makes sense considering the advancement of the weapon technology which has significantly increased in terms of accuracy as well as destructive power.

In practice, the use of the sea for security interests can be exercised for example by establishing an integrated sea security system to anticipate any threats like terrorist or foreign military attacks which are possibly able to generate bad effects to the land territory. In this regard, the sea security system can also be equipped by a surveillance technology which is not only beneficial for defensive measures but also for law enforcement actions in response to criminal violations such as human trafficking, environmental destruction, and illegal drugs proliferation.

Thus, a strong integrated combination between the sea security system which operates on the sea territory and the land security system which guards the land territory is likely to enhance the quality of the national security of a country and as the result this will provide many positive things such as economic stability and good protection for the citizens who live in that country.

4. Optimizing the Sea as Potential Tourism Destinations

   If the environment of the sea is properly managed, there is no doubt that it would possibly become good tourism destinations and will further become a promising sector that would be able to increase a state income.

   One particular example in this matter can be taken from Indonesia. As an archipelagic state which consist of 17.504 islands, Indonesia has many tourism spots that rely on the beautifulness of the Indonesian sea and the underwater lives. It is admitted that this feature of the sea has contributed a significant amount of income not only for government but also for the local people. As stated by Rokhmin Dahuri, the former Minister of Marine and Fishery of the Republic of Indonesia, if the sea in is properly managed, the potential income generated from the marine sector including sea tourism in could reach $1.2 trillion/day.

   In order to reach a target to develop its marine tourism sector, Indonesia for example can follow the methods that have been used by Australia in order to optimize its marine sector. Why Australia? It is because from the data in 2012, Australia which the length of its coastline is only 2.100 kilometers was able to generate $ 3 million while Indonesia which its coastline last for 95.181 kilometers was only able to gather $ 7 million. The data have proved that Australia certainly has some effective methods in managing its maritime tourism sector that worth to be followed.

   These potential benefits coupled with other interests which can be achieved by the full control of the sea spaces have triggered a number of claims over the sea spaces which some of them can even be considered as excessive claims. This phenomenon is potentially able to trigger maritime territorial disputes between or among coastal states around the world.

Some Examples of Maritime Territorial Disputes

The following are summaries of several maritime territorial disputes which take place in the different parts of the world:

1. China – the Philippines Dispute over the Spratly Islands and Scarborough Shoal

   The dispute between China versus the Philippines about the claims of the Spratly Islands and Scarborough Shoal including the natural resources around those islands is actually only a part of the larger South China Sea conflicts which embroil at least five countries in that region.

   The core of the Chinese - the Philippines dispute is the Philippines' objection to the application of the nine dashed line which is used by the Chinese government to mark its sovereignty over the islands located in the South China Sea including the Pratas Islands, The Paracel Islands, the Macclesfield Bank, and the Spratly Islands. To be specific, the Philippines assert that the nine dashed line which

includes the Spratly Islands, the Scarborough Shoal and the Mischief Reef which is supposed to be within the Exclusive Economic Zone (EEZ) of the Philippines is not in accordance with the provisions in the UNCLOS which means that the line does not have any legal basis under international law; and therefore should be declared as invalid.

China states that it was not until the 1970s that the countries (Vietnam, the Philippines, Malaysia, and Brunei Darussalam) around the South China Sea began to one by one put its claim to the territory within the nine dashed line. In relation to this phenomenon, many Chinese experts allege that the claims of other countries over the territories within the South China Sea or especially within the nine dashed line are triggered by what is called "American Geopolitics and the American Quest for Oil," which means that there are economic interests to get the control over the natural resources in the disputed areas behind those claims.

2. Japan – China Dispute over the East China Sea

   The core of the dispute between Japan versus China in the East China Sea dispute is the overlapping claims of both countries over the area of 70.000 square miles in the East China Sea. Further, in this dispute, both Japan and China assert that they have respectively had legal bases which according to their statements are in accordance with the UNCLOS. In brief, Japan grounds its claim to the provisions of the EEZ while China lays its claim to the UNCLOS provisions which regulate the Continental Shelf.

3. Indonesia – Malaysia Dispute over the Sipadan and Ligitan Islands

   In the Sipadan and Ligitan case, the countries which involved in this case were Indonesia and Malaysia with the core of the dispute was the claims of the ownership over the Sipadan and Ligitan Islands. At the time of the dispute, Indonesia based its claim to the existence of three factors. Firstly, the existence of Article IV of London Convention 1891 which stipulated a border line which was used to divide the territory between the Netherlands and the British North Borneo Company; based on that convention, Indonesia argued that it had a legal right over the sovereignty of the islands because the Sipadan and Ligitan Islands were located inside of the Netherlands territory and Indonesia is the country which inherited the sovereignty over the territorial which was previously administered by the Netherlands.

   Secondly, Indonesia proposed a claim that it had the full right of the Islands based on the historical justification that the Islands was under the authority of Sultan Bulungan and Indonesia obtained the rights of the Islands because Indonesia is the successor of Sultan Bulungan territorial rights. And lastly, Indonesia also proposed the effective occupation principle to justify the sovereignty over those Islands by specifying several patrolling activities which had been done by The

Dutch Navy and The Indonesian Navy and also fishing activities conducted by Indonesian fishermen around the Islands.

However, on the different side, Malaysia also asserted its full claim over the Islands by proposing several bases. (1) Malaysia stated that it has a chain of title over the Islands which firstly belonged to Sultan Sulu and then had changed hands for several times and was finally transferred by the United Kingdom to Malaysia. (2) Malaysia proposed the principle of effective occupation to justify the claim. To be specific, Malaysia mentioned some activities which were conducted by its government and its people around the islands, such as regulating the turtle harvesting and eggs collecting activities, enacting a regulation which was intended to protect and preserve endemic birds, and establishing several lighthouses plus maintaining them in order to assure the safety of navigation.

Outside the substantial matters of the dispute, there was one other factor which affected the tense of this dispute namely the nationalism factor. Nationalism has always become a sensitive issue in Indonesia – Malaysia relationship since the Soekarno administration in 1960s; therefore, any problems between these two countries particularly for the important one such as this Sipadan-Ligitan dispute would get a full attention from the citizens of the countries and would therefore give no choice for the government of both countries except to endeavor for the dispute to be decided on its favor.

The Dispute Settlement Procedures

The general rule of the international dispute settlements is that every disputing country has to "settle their international disputes by peaceful means, in such a manner that international peace and security, and justice, are not endangered." Therefore, there is an obligation for disputing countries to avoid the use of military power to resolve any international disputes.

In relation to that matter, in a conference which was held by the CSIS on June 5-6, 2013, Professor Peter Dutton stated that there are five alternative procedures of international dispute settlements which can possibly be used to resolve disputes in relation to maritime territories, sea resources, and other maritime disputes.

Must Resolve International Disputes in a Peaceful Manner

The features of the sea have long become both important sources for decent lives as well as potential seeds of conflicts. It is known that the sea has many potential benefits which can be used by mankind to support their lives or even to improve the

quality of them. In this regard, it is not a difficult task to identify what sea can provide for mankind. The sea for instance can be:

1. An abundant food source by means of fishery;
2. A great source of energy by means of oil and gas exploration: or
3. A vital point in security strategy plan of a country.

However, just like a double edged sword, the sea with all of its potential benefits can also be a trigger of conflicts or disputes between countries.

It is widely known that many disputes have been triggered by the motivation to control the potential benefits of the sea, meanwhile, it seems that there are also other motivations which underlie an effort of countries to assert and control as large sea spaces as possible. Taking China as an example, besides having a target to control the potential benefits of the sea, it also has other goals such as seeking regional predominance and maintaining domestic stability as its motivations in asserting excessive area in the South China Sea and the East China Sea. This phenomenon which is obviously able to trigger maritime territorial disputes needs to be anticipated by the availability of reliable dispute settlement procedures which can be taken by the disputing countries to resolve the dispute.

As elaborated above, there are currently several alternatives of dispute settlement procedures which are available to be chosen by countries to resolve their maritime disputes. The current dispute settlement procedures are varied from the procedures with peaceful approach such as bilateral negotiations, multilateral negotiations, and third party arbitration until the procedures which rely on the use of power such as non-militarized coercion and armed conflict. However, it is greatly expected that in considering the most suitable procedure and seeking the best possible solution for them, the disputing countries should always take into account to take the procedures which leads to the peaceful situation of the world as mandated by article 2.3 of the Charter of the United Nations which clearly states that the disputing countries should "settle their international disputes by peaceful means, in such a manner that international peace and security, and justice, are not endangered."

Establishing an Inspection System for Places of Detention Modelled on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Indonesia

Menetapkan Sistem Inspeksi untuk Tempat Penahanan dengan Model Protokol Opsional pada Konvensi Menentang Penyiksaan dan Kekejaman Lain, Tidak Manusiawi atau Perlakuan Merendahkan atau Hukuman (OPCAT) di Indonesia

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ABSTRACT

As the party to the United Nations Convention against Torture and Ohter Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Indonesia has an obligation to establish an effective visiting system to prevent acts of torture and other ill-treatment as stipulated in Article 2(1) of the Convention. However, the existing visiting system in Indonesia is facing some deficiencies regarding its mandate clarity, level of independency, and insufficient expertise required. The fact that Indonesia is not party to the Optional Protocol to the United Nations Convention against Torture (OPCAT) complicates the matter. The OPCAT system has been hailed to be the most effective way to combat torture, as it combines national and international approaches. This thesis provides an alternative for Indonesia to enhance its inspection system to places of detention. By taking the OPCAT approach as the model, Indonesia will be very likely to have a more effective inspection system, as this system has set out a clear standard on how a visiting system should be conducted. By granting the National Human Rights Commission (Komnas HAM) the role of national preventive mechanisms (NPMs) under the OPCAT system, Indonesia might have a better opportunity to enjoy a more effective inspection system. At least by establishing a better inspection system, Indonesia's compliance to the obligation under the UNCAT, especially under Article 2(1) could be considered fulfilled, even though the Government may not ratify the OPCAT.

ABSTRAK

Sebagai bagian dari Konvensi Perserikatan Bangsa-Bangsa Menentang Penyiksaan dan Kekejaman Lain, Tidak Manusiawi atau Perlakuan Merendahkan atau Hukuman (UNCAT), Indonesia memiliki kewajiban untuk menetapkan sistem kunjungan yang efektif untuk mencegah tindakan penyiksaan dan perlakuan buruk lainnya sebagaimana diatur dalam Pasal 21 Konvensi. Namun, sistem kunjungan yang ada di Indonesia menghadapi beberapa kekurangan mengenai kejelasan mandatnya, tingkat kemandirian, dan keahlian yang tidak mencukupi. Fakta bahwa Indonesia tidak berpihak pada Protokol Opsional untuk Konvensi Perserikatan Bangsa-Bangsa Menentang Penyiksaan (OPCAT) mempersulit masalah ini. Sistem OPCAT telah dipuji sebagai cara paling efektif untuk memerangi penyiksaan, karena menggabungkan pendekatan nasional dan internasional. Tesis ini memberikan alternatif bagi Indonesia untuk meningkatkan sistem inspeksi ke tempat-tempat penahanan. Dengan mengambil pendekatan OPCAT sebagai modelnya, Indonesia akan sangat mungkin memiliki sistem pemeriksaan yang lebih efektif, karena sistem ini telah menetapkan standar yang jelas mengenai bagaimana sistem kunjungan harus dilakukan. Dengan memberikan Komnas HAM peran mekanisme pencegahan nasional (*national preventive mechanism* / NPMs) di bawah sistem OPCAT, Indonesia mungkin memiliki kesempatan lebih baik untuk menikmati sistem pemeriksaan yang lebih efektif. Setidaknya dengan membangun sistem pemeriksaan yang lebih baik, kepatuhan Indonesia terhadap kewajiban berdasarkan UNCAT, khususnya berdasarkan Pasal 2 (1) dapat dianggap dipenuhi, walaupun Pemerintah tidak dapat mengesahkan Protokol Opsional untuk Konvensi Menentang Penyiksaan.

Indonesia is not party to the OPCAT. Due to lack of ratification of OPCAT, Indonesia's fulfilment of the obligation in Article 2(1) of the UNCAT is perhaps more difficult to realize. Indonesia has several institutions dealing with human rights protection which could participate in torture prevention by undertaking visits to places of detention. Unfortunately, this effort does not seem to function well. The absence of an authorized institution to undertake unannounced inspections to detentions and the lack of power to scrutinize official or "unofficial" places of detentions can be seen as its weaknesses. And the fact that the number of allegations of acts of torture and ill-treatment committed by members of the police forces, the army (TNI) and other groups linked to authorities is still high suggests that the existing visiting system in Indonesia does not work properly.

As given the fact that Indonesia is not party to the OPCAT and the existing visiting system does not function satisfactorily, it raises a question as to whether there is a need to establish a visiting system modelled on the OPCAT in Indonesia. And an additional question would be how this visiting system à la OPCAT should be formed in Indonesia in order to comply with the obligations under the UNCAT, more specifically in term of prevention.

Since Indonesia is not party to the OPCAT, Indonesia is not obliged to establish a prevention system based on the OPCAT. However, Indonesia is bound to take measures to prevent torture and other inhuman treatments as stated in the UNCAT. Therefore, the goal of this study is to provide the best alternative visiting system other than the OPCAT system for Indonesia in order to comply with the obligations under the UNCAT especially regarding the obligation to prevent acts of torture and other inhuman treatment.

This thesis research will mainly be on library based approach. Primary, secondary sources, as well as other relevant sources will be analysed. Special attention will be paid to the domestic laws of Indonesia in the field of torture and related issues. The further elaboration will be on the conformity between Indonesia's regulations concerning torture and the international conventions, more specifically the UNCAT. This thesis apply inductive analytical approach in which relevant information will be observed and analysed to detect some patterns and regularities. Then, I will formulate a hypothesis that we can explore, and finally end up with some general conclusions. Documents either in the form of regulations, books, journals or articles which are relevant are presented as they provide reliable information to the topic and help the writer to substantiate his claims.

States Parties Obligations under the UNCAT

The UNCAT imposes obligations on Member States in several articles. Under Article 2(1) of the UNCAT, Member States are obliged to take effective measures to prevent acts of torture under their jurisdiction. The measurements comprise legislative, administrative, judicial and any other type of measures. Therefore, Article 2(1) can be seen as an umbrella provision, covering all other obligations to prevent this kind of treatment as explained in the Convention. Article 10 on the education and training of law enforcement and other personnel, Article 11 regarding systematic review of interrogation methods, Article 13 about investigation of allegations by torture victims, and Article 15 on non-admissibility of evidence extracted by torture, are the typical obligations to prevent torture because they are interrelated and indivisible to prevent torture. Thus, the obligation to prevent torture in Article 2 covers a broad scope, not only to reinforce the prohibition against torture through legislative, administrative and other actions but also includes all necessary measures-taken are effective in preventing the acts of torture and other ill-treatment.

The prevention of torture requires criminalisation of the acts of torture. Impunity of the perpetrators of torture is one of the reasons for the widespread practice of torture. Article 4 of the UNCAT comes in order to repress the practice of impunity by imposing an obligation for States Parties to criminalize acts of torture under domestic law. This article also requires Member States to punish torture with the appropriate penalties. The term "torture" in the Article 4(1) should be interpreted in accordance with the definition of torture in the Article 1, which means that not only acts of torture itself, but also the attempt, incitement, instruction from the superior, consent and acquiescence must also be criminalized. The idea that there is no need to qualify torture as a specific and separate offence has led to much confusion among States Parties. Some States argued that torture had already been included in their traditional offences.

ComCAT and Its Role in the Prevention against Torture

In order to monitor states parties' obedience to the obligations laid down in the UNCAT at an international level, a committee was formed. Article 17(1) of the UNCAT establishes the UN Committee against Torture (ComCAT). The ComCAT is comprised of ten independent experts with recognized competences in human rights and having a high moral standing. Although the members of the ComCAT are nominated and elected by States Parties, they are not representing the State of which they are citizens. They must act independently and impartially. However, in some cases it is difficult for Committee members to stay independent and critical. Members may be less critical of the States when re-elections are near and they are attempting to be re-elected or

are a citizen of a State which is the object of an inquiry. For example, El Ibrashi, an Egyptian and a former member of the Committee, withdrew his ComCAT membership during the inquiry procedure against Egypt.

The UNCAT provides the Committee with its functions explicitly in Articles 19, 20, 21, and 22. In order to make the Convention effective, the ComCAT can develop powers that are implied in the Convention but cannot be derived directly from its provisions. These implied powers should not violate the treaty text and other international charters. In the "Certain Expenses case", the International Court of Justice acknowledged that an international body can have implied powers. The United Nations General Assembly can take actions which are not expressly forbidden by the United Nations Charter to maintain peace and security, in the absence of enforcement measures by the Security Council. Therefore the powers by the Committee should also include for instance, if a State does not submit its report, the Committee can formally urge the State to do so.

Under Article 19, State Parties are obliged to submit a report to the ComCAT within a year of the UNCAT entry into force. Supplementary reports on new measures must also be submitted to the ComCAT every four years. Further reports and additional information may also be requested by the Committee. The ComCat then reviews the reports, and can issue a concluding observation on each regarding whether or not the State Parties' obligations have been discharged.

By virtue of Article 20 of the Convention, the Committee has a power to receive information and to conduct inquiries regarding allegations of systematic torture on the territory of a State Party. However, Article 28 of the Convention gives States Parties the option not to accept the inquiry procedure. In that case, the ComCAT may not exercise its power under Article 20 as long as there is no States Parties' consent.

Under Article 21 of the Convention, the Committee can investigate a complaint lodged by a State Party that another State Party is breaching the Convention by not fulfilling its obligations. With the same notion like Article 21, Article 22 of the Convention gives the ComCAT a mandate to process complaints from individuals concerning violations to the Convention. Both in Article 21 and 22 of the Convention, The Committee's power to intervene is conditional; it is up to the State Parties to accept the supervision by the Committee through inter-state complaints or individual complaints.

By making a reservation or declaration based on Article 20, 21, and 22 of the Convention stating disagreement to the Committee's supervision, the function of the Committee as a supervisory body would not be effective for non-cooperative states. Therefore, the Committee must use its resources and if necessary, develop resources to ensure its supervision effective even for resisting States Parties.

Aside from the independence and impartiality issue of the ComCAT which might still give room for potential sources of manipulation, the Committee also has contacts with other supervisory bodies. These contacts show the sense of the overlapping mandate among these supervisory bodies. On the other hand, these inter-

relationships between supervisory bodies can also be considered as complementary rather than conflicting. For example, the Committee and the Special Rapporteur on Torture can both make visits and ask for reports on the measures States have taken, but the Special Rapporteur does not intervene in situations under investigation by the Committee. Furthermore, they both can build cooperation by exchanging information and documents as well holding discussions over their mandates.

The Human Right Committee is more established in the area of the ban of torture in the context of the consideration of state reports and individual complaints. Therefore, the ComCAT must coordinate its activities with the Human Rights Committee. Potential coordination is also possible between the ComCAT and The Special Rapporteur on torture. The mandate between those supervisory bodies has the same characteristics. However, The Rapporteur's mandate is broader than the ComCAT's mandate which covers all the UN Member States, whereas the Committee's mandate is only applicable to the parties of UNCAT.

Within the framework of the reporting procedure and competency to conduct inquiries, the Committee could play a preventive role. For example, in the reporting procedure, the Committee is in the position to make observations on the progress made by States Parties on the implementation of the Convention. A negative observation is a serious matter for a State Party. Therefore, a State Party has no choice but to keep improving its compliance with the Convention. For States which do not recognize the competency of the Committee to carry out inquiries, the ComCAT can co-operate with other international supervisory bodies for example, the Special Rapporteur.

The Conformity between Indonesia's National Legislation with the UNCAT's Provisions

The Government of Indonesia claims that the above definition is in line with the Convention. In fact, according to the Government, Indonesia's torture definition is more advanced since it includes the acts conducted not only by public authorities but also by individuals. Unfortunately, there is no single provision in Law Number 39/1999 regulates punishment to the torture perpetrators. In addition, the Law Number 26/2000 on Human Rights Court in Article 9(f) also stipulates the definition of torture. Article 39 of the Law stipulates that every person who commits or is suspected of having committed, or attempts to, participates in, or accomplices torture, shall be punished by five to fifteen years imprisonment. Conversely, former UN Special Rapporteur for Torture Manfred Nowak in his report recommended that Indonesia should define torture in accordance with Article 1 and 4 of the UNCAT, as the definition of torture under the Law number 26/2000 is restricted to a massive, broad, and systematic attack against civilians. Therefore, in the view of above mentioned

laws, an individual attack as well as sporadic and unsystematic attacks would not fall under the definition of torture. The consequence of these phenomena is that it is difficult to charge perpetrators with committing acts of torture under these laws, which then leads to impunity practises.

Amid the vacuum of a torture definition which is in line with the Convention's definition, Indonesia's Penal Code offers a solution. Actions that result in physical or mental violence and other ill-treatment are punishable under the Indonesian Penal Code. Under Article 422, officials who, in a criminal case use means of coercion for the purpose of a confession or to get information shall be punished. However, the scope of Article 422 is limited only for investigations of criminal acts. It means that other offences not under the investigation process cannot be punished by this provision. Articles 351 to 358 of the code also punish acts which have elements similar to torture, but still miss several elements of the torture definition, such as elements of purpose and agency. Those offences are punished under "maltreatment" charges. As a result, torture offenders are charged with the offence of maltreatment, leading to less severe punishment.

From above points, it can be shown that Indonesia's legislation concerning acts of torture lack an appropriate form of punishment. This happens because the legislation concerning the acts of torture as stipulated in Law Number 26/2000, defines torture with higher thresholds than the one regulated in the UNCAT, as it requires the acts to be systematic, massive and broad. That definition has led to impunity since there have been no persons brought to court charged with torture under the Law Number 26/2000. In its penal code, Indonesia qualifies acts of torture as "maltreatment" which misses some important elements of what constitutes torture, and results in less severe punishments for the act of torture. Therefore, regarding Article 4(2) of the UNCAT, Indonesia is not yet able to comply with its obligation.

Indonesia has not yet declared the competency of ComCAT as indicated in Article 21 and 22. Under these provisions, the Committee would have the power to receive complaints and communications from other signatory countries, as well as individuals upon declaration. The absence of a declaration to acknowledge the competency of the ComCAT gives more space for the internal complaint mechanism within Indonesian system.

Under Indonesia's criminal system, any complaints shall be submitted to the Police. This raises a concern as most cases of torture are committed by members of law enforcement agencies; for example the Police in the case of Kedung Ombo in 1985 and the Talangsari case in 1989, yet at the same time we have to file complaints to these officials. This mechanism has difficulties to realise an impartial investigation. This fact is not in line with Article 13 of the UNCAT which stipulates the obligation to ensure a prompt and impartial complaint mechanism on torture allegation.

Issues upon Ratification of the OPCAT

The OPCAT visiting system comprises of two approaches, the international and domestic approach, which are regarded as an effective way to prevent the acts of torture and inhuman treatment. However, some States are reluctant to ratify and implement the OPCAT considering that international and regional torture-related bodies already exist. Those States argue that the OPCAT bodies will duplicate the work of existing institutions, such as the European Committee for the Prevention of Torture and Inhuman or degrading treatment or punishment (CPT). For many Asia-Pacific States including Indonesia, monitoring from the SPT as a representation of international monitoring bodies is considered controversial. The mandate of the SPT which could conduct announced or unannounced visits to places of detention might be seen as an infringement of State's sovereignty. In the traditional understanding, sovereignty means that only the State has the highest authority in its territory. Therefore, protection to the people in its jurisdiction should be undertaken by the State without any interference from any international bodies.

States sensitivity to sovereignty, as well as national security issues, has driven many States in Asia-Pacific to be hesitant as to whether they should or should not ratify the OPCAT. For example, the Philippines prior to ratifying the OPCAT, addressed the issue of sovereignty very seriously. They were questioning whether granting the SPT the right to access all places of detention could be seen as a form of sovereignty infringement. Finally, they ended up with the conclusion that it was not the case; the OPCAT system was deemed to support national sovereignty instead of violating it. The SPT works based on mutual trust and confidentiality rather than condemnation, but not all States share the same understanding in that respect.

Indonesia, to some extent, holds different views to the Philippines regarding the issue of international monitoring in relation to States' sovereignty. Upon the ratification of the UNCAT, Indonesia had already made a declaration to article 20(1), (2) and (3). Indonesia brought up the issue of sovereignty and territorial integrity upon the application of article 20 of the UNCAT. Under Article 20 of the Convention, the Committee can launch an inquiry into allegations of systematic torture. Indonesia also refused to recognise the competence of the ComCAT to investigate a complaint from another State by the absence of the declaration of intention in relation to article 20 and 21(1) of the UNCAT. This means that Indonesia rejected the competency of the ComCAT, which to some extent could play a role as an international monitoring body. Similarly, the OPCAT system, which allows outside monitoring conducted by the SPT to scrutinize places of detention, has many pros and cons. Therefore, the role of the SPT is crucial in explaining Indonesia's current position upon the ratification of the OPCAT.

The idea of outside scrutiny by the SPT being seen as a breach of a State's sovereignty is absolutely misleading as the visiting system under the Optional Protocol

is based on cooperation rather than confrontation. The work of the SPT is guided by the principle of cooperation between the Subcommittee and the State Parties. The principles of confidentiality, impartiality, and objectivity also become guidelines relating to how the SPT conduct its tasks. So, the visits by the SPT under the OPCAT system do not recognize the element of "naming and shaming". For example, The SPT communicates its recommendations and observations confidentially to the Member States. It cannot announce its reports or observations in public unless the State itself requests to do so, or the State refuses to cooperate with the Subcommittee. Furthermore, the decision to publish the report by the SPT should be decided by majority of the ComCAT members. If a State has a good will and they are willing to cooperate, they should not be afraid of ratifying this Optional Protocol; the signing the Optional Protocol should not be considered a threat to a States' sovereignty.

We could not say that Indonesia is totally resistant to outside world monitoring. The invitation of the Government to the UN Special Rapporteur on Torture to conduct visits to detention facilities demonstrates the willingness of Indonesia to open itself to visits from outside institutions. Indonesia is in the process of consultation within government and civil society regarding ratification of the OPCAT, indicating that this issue is to be taken seriously by the Government. Its ongoing discussions with all the stake holders also suggest that the final decision has not been concluded as of yet.

Aside from the sovereignty issue, the geographical, socio-cultural, religious, politics and ethnic diversities could be the reasons behind Indonesia's tardiness upon ratification of the OPCAT. As an example, Indonesia's geographical feature is very scattered; there are 17.000 islands in total and it is also prone to natural disasters. Therefore, the national priority in terms of places of detention is still to provide safe detention facilities and enough food for its whole population. However, regardless of the reasons behind this ongoing uncertainty upon ratification of the OPCAT, real action needs to be instituted promptly to bridge the gap between the high number of torture records and the absence of an effective prevention mechanism.

Memohon Pembelaan Negara: Analisis Perselisihan Vattenfall V. Jerman

Invoking State Defense: An Analysis of Vattenfall V. Germany Dispute

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ABSTRAK

Perselisihan antara Vattenfall dan Pemerintah Jerman, dipicu oleh keputusan pokok untuk mengubah Undang-Undang Energi Atom dan oleh karena itu tidak lagi menggunakan energi nuklir sebagai sumber kekuatan pada tahun 2022 mengakibatkan klaim Vattenfall di Pusat Internasional untuk Penyelesaian Sengketa Investasi (ICSID). Vattenfall mengklaim bahwa Jerman bertanggung jawab terhadap kerugian investasi saat ini dan masa depan. Diakui dengan baik bahwa setiap perubahan dan kebijakan satu negara mengakibatkan kerugian atau penghancuran investor asing terhadap kontrak investasi dapat ditantang melalui pengadilan arbitrase internasional. Namun, perjanjian investasi internasional berusaha untuk mempromosikan investasi langsung asing dengan hanya memusatkan perhatian secara eksklusif pada kepentingan investor. Arbitrase investor-negara semakin digunakan sebagai ukuran untuk melindungi kepentingan investor terhadap risiko politik. Sebagai konsekuensinya, ada ketegangan antara menerapkan hak investor dan melindungi kepentingan publik yang dapat menyebabkan kerugian yang merugikan. Pertanyaannya kemudian, apakah sebuah negara tidak dapat mengambil tindakan yang diperlukan untuk mengatasi situasi internal karena komitmennya kepada investor asing? Kemudian menarik untuk memeriksa bagaimana pemerintah Jerman dapat melindungi haknya untuk mengatur dan melegitimasi tujuannya untuk melayani tujuan publik tanpa harus mengkompensasi tindakan yang diperlukan. Tujuan disertasi ini adalah untuk mempelajari perselisihan antara Vattenfall dan Pemerintah Jerman dan mencari kemungkinan hasil dari kasus tersebut dalam proses arbitrase. Ini akan memeriksa apakah Jerman memenuhi prasyarat yang harus dipenuhi dalam meminta pembelaan negara dan oleh karena itu akan membiarkannya dibebaskan dari tanggung jawabnya. Keterlibatan tenaga nuklir sebagai objek perselisihan membuatnya lebih menarik, karena masalah keamanannya telah menjadi subyek debat panjang dan menegangkan di seluruh dunia.

ABSTRACT

The dispute between Vattenfall and the Government of Germany, triggered by the latter's principal decision of amending its Atomic Energy Act and therefore will no longer use nuclear energy as a source of power by the year 2022 resulted in Vattenfall's claim at the International Center for the Settlement of Investment Disputes (ICSID). Vattenfall claimed that Germany was liable towards the current and future losses of its investment. It is well acknowledged that any changes and policy of one state resulted in its foreign investors' losses or destruction to the investment contract can be challenged through international arbitration tribunals. However, the international investment agreements seek to promote foreign direct investment by focusing almost exclusively on the interest of the investor. The investor-state arbitration is increasingly used as a measure to protect the investor's interests against political risks. As a consequence there is a tension between exercising investor rights and protecting public interest that may leads to the detriment of the latter. The question then remains, should a state be unable to take necessary actions to cope with internal situations due to its commitments to foreign investors? It is then interesting to examine how the government of Germany may protect its 'right to regulate' and legitimize its aim to serve public purposes without having to compensate for any necessary measures taken. This aim of this dissertation is to study the dispute between Vattenfall and the Government of Germany and seek the possible outcomes of the case in arbitration process. These will examine whether Germany fulfilled the preconditions needed to be met in invoking state defense and therefore will allow it to be excused from its responsibility. The involvement of nuclear power as the object of the dispute makes it more interesting, as its safety issue has been subject of long and tense debate worldwide.

The dispute between Vattenfall and the Government of Germany was triggered by the latter's principal decision of amending its Atomic Energy Act and therefore will no longer use nuclear energy as a source of power by the year 2022. As a result of this decision, Vattenfall submitted a request for arbitration4 against Germany at the International Center for the Settlement of Investment Disputes (ICSID) in May 2012.5 Vattenfall claimed that Germany was liable towards the current and future losses of its investment at nuclear power plants at Krümmel and Brunsbüttel in northern Germany resulted from the nuclear phase-out policy. The policy amendment itself was a respond to intensive and controversial public debate that had been going on in Germany for decades about the use of nuclear energy which process had been expedited by the Fukushima Daiichi nuclear incident in Tokyo, Japan.

In the dispute between Vattenfall and Germany, the rights provided to Vattenfall as the foreign investors, as what has been set in the investment treaties, surpass the protections for the people of Germany as enshrined in Germany's Basic Law. It is then interesting to examine how the government of Germany may protect its 'right to regulate' and legitimize its aim to serve public purposes without having to compensate for any necessary measures taken. This aim of this dissertation is to study the dispute between Vattenfall and the Government of Germany and seek the possible outcomes of the case in arbitration process. These will examine whether Germany fulfilled the preconditions needed to be met in invoking state defense and therefore will allow it to be excused from its responsibility. The involvement of nuclear power as the object of the dispute makes it more interesting, as its safety issue has been subject of long and tense debate worldwide. This will also try to answer the question of to what extent the state defense can be invoked and used as an excuse without jeopardizing the international practice in energy investment. The findings of the research may be useful to be an analysis ground in similar upcoming cases.

In the process of analysis, this dissertation will look into several previous disputes in which state concerned use state defense as its counterargument and gained result in being exempted from liability towards investor's loss. The study will show that only a little number of investment arbitration tribunals have accepted a state defense. This research will conclude with invoking state of necessity as its suggested defense in settling the investment dispute between Vattenfall and the Government of Germany. A clear and restrictive use of the defense, however, should be put in attention to prevent the reckless practice of invoking state defense in energy investment disputes.

The Nuclear Phase-Out in Germany: A Brief Background

On the afternoon of 11 March 2011, Japan was hit by earthquake with the magnitude level of 9.0, which followed by tsunami with the 12 meter surge. The tsunami waves broke the record as the country's largest tsunami waves in the recorded history. It was so powerful that it caused widespread damages along the coastline of Honshu Island. The unfortunate event also crashed the Fukushima Daiichi nuclear power plant, which was designed to be immune to tsunami waves.

As the meltdown of nuclear reactors can cause dangerous radiological contamination to the environment and the people living surrounds it, on the next day after the disaster, the Japanese government order an evacuation for people living near the area. Fukushima is indeed located thousands of miles away from Germany. However, the swiftest political reaction to the Japanese nuclear crisis, even more than the internal response in Japan itself, happened in Germany. On 14 March 2011, Chancellor Angela Merkel announced that the Government of Germany apply a three-month moratorium on the plan of extending running lifetime of the country's nuclear power plants that were put into operation before the end of 1980. The government also decided that all of Germany's nuclear facilities would undergo new safety tests.

As the nuclear reactors meltdown in Japan, couple of weeks later, the massive amount of protesters went onto the streets. The demonstrator opinionated that Fukushima incident was a real evidence of the risks of nuclear power plants no matter how safe the facilities had been designed.20 As a respond to the protest, the Federal Government of Germany then formed an 'Ethics Commission for a Safe Energy Supply'. The works and deliberations of this Commission resulted in a recommendation for the nuclear energy phase-out and a shift towards a renewable energy-based economy. By the end of June 2011, the German Parliament (Bundestag) passed legislation that closing these eight reactors and set a schedule for the remaining nine nuclear power plants to be closed down in stages over the course of the next decade. As a further step, the Federal Government also reaffirmed its plans on reducing greenhouse gas emissions to almost fifty per cent of 1990 levels by year 2020 and to eighty per cent by year 2050. Meanwhile in Japan, although the incident has brought a weakened support for the usage of nuclear power, the strong industrial coalition has made a complete nuclear phase-out as an unrealistic solution. To sum up, in regards with the effect of Fukushima nuclear tragedy to the country's energy policy, Germany has more impacted than Japan.

The Amendment of Atomic Energy Act

Due to the lack of social acceptance, the former Chancellor Gerhard Schröder amended the Atomic Energy Act of Germany to phase-out all nuclear power plants by 2021. However, in October 2010, Chancellor Merkel initiated yet another amendment to the Act and allowed the nuclear power plants in Germany to operate for another twelve years. Prior to as well as after the amendment takes effect, massive protests from antinuclear activists poured back onto the streets.

It was agreed that a faster nuclear phase-out would speed the development of a renewable energy infrastructure, stimulate new innovations, and provide new job opportunities. It was also decided to implement the phase-out within a decade or earlier if possible. This recommendation was well received by the Chancellor and by the next day the ruling coalition announced the nuclear phase-out. The decision was supported by majority of the parliament and on August 2011, it amended the Atomic Energy Act and officially enacted the phase-out plans.

The Dispute of Vattenfall V. Germany

With the amendment of the Atomic Energy Act being enacted and the nuclear phase-out being a cornerstone of the policy of government of Germany, the nuclear power plants operators in the country will experience massive amount of losses. Following the enactment of the law, Vattenfall, the only foreign company amongst the nuclear provider in the country, initiate international arbitration under the Energy Charter Treaty to the ICSID. Vattenfall claims that the decision of shutting the nuclear power plants earlier has infringed their proprietary rights and therefore the Government of Germany should provide compensation.

The exact amount of the compensation that Vattenfall claims is not publicly published. However, in its financial report for 2011, the company stating that the estimation of the losses from the nuclear phase-out policy in the previous year is 1,18 billion euros.

As the new Atomic Energy act does not stipulate any procedure on liability towards the nuclear phase-out policy, Vattenfall also challenges the conformity of the Act with the Germany constitutional law. In a later stage if the constitutional complaint is accepted, the impacted energy operators are able to demand the Federal Government of Germany through the German domestic courts to provide compensations as required. Should the new Atomic Energy Act assessed as invalid by the Federal Constitutional Court, the parliament of Germany could either revoke the nuclear phase-out policy or amend the law and provide the necessary compensation.

The Law of State Responsibility

The laws of state responsibility has developed gradually over the years and is now set on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission. It establishes the basic rules of international law regarding the international responsibility of states. Rather than set forth any particular obligations on states; it defines rules, which determine the legal consequences of a failure to fulfil international responsibility.

State of Necessity

State of necessity is a circumstance where a breach of commitment or violation of a contract proven to be exercised out of a necessity and therefore can be excused from its following responsibility. The International Law Commission at its Thirty-second Session stated that the doctrine of necessity as reflected in customary international law could be accepted as a state defense. It must, however, be accompanied with very restrictive conditions.

The International Law Commission also establishes that "there is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by states and has been dealt with by a number of international tribunals." Unlike force majeure, there is no requirement for the state to be forced in conducting the necessary measure. The main aspect in defining the state of necessity is the involvement of free will.

Protecting the Essential Interest of the Host State

The first condition that must be fulfilled is that necessity may only be invoked if it is the only way for the state to safeguard an essential interest against a grave and imminent peril. In its Report of the Thirty-second Session, the International Law Commission considered that the first task was to determine which interests of a state must be in danger to justify an act breaching an international obligation. The International Law Commission considered that the best way of expressing this requirement was to indicate that an essential interest of the state must be involved.

An important point that has to be considered: an essential interest of a state does not mean that the very 'existence' of the state must be in danger. It should be stressed that the concept of self-preservation and necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other". According to the opinion that predominated at the time of the report, a state of necessity may be invoked to preclude the wrongfulness of a conduct that was

adopted under certain circumstances in order to protect an essential interest of a state, without its existence being in any way threatened.

The next question is what interests shall be considered 'essential'. The International Law Commission shows that the plea of necessity has been invoked to preclude wrongfulness of acts not in conformity with international obligation to protect a wide variety of interests, including safeguarding the environment or ensuring the safety of the civilian population. The International Law Commission considered that it was pointless to try to identify or categorize these essential interests. Whether a particular interest is or is not essential, according to this opinion, will depend on all the circumstances in a specific situation. Accordingly, they should be judged on a case by case basis. The Commentary considered this position and stated that the extent to which a given interest is essential depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the state and its people, as well as to the international community as a whole.

Serious and Imminent Peril

The Commission highlighted that the peril must be extremely serious, that it must be a threat to the interest at the actual time. It points out that only when the interest is threatened by a serious and imminent peril is the condition satisfied. According to the Commission, the danger has to be objectively established and not merely apprehended as possible. In addition, it has to be imminent. The Commission also stated that the term 'imminent' is used in the sense of 'proximate'. Furthermore, the International Law Commission explained that it is not enough to be facing a contingent or possible danger. The threat to that essential interest "has to be extremely serious, representing a present danger to the threatened interest." The International Court of Justice made a pronouncementčíkovo on this requirement in the Gab - Nagymaros case, asserting that the word 'peril' evokes the idea of risk and that is what distinguishes 'peril' from material damage. According to the ICJ, a state of necessity could not exist without a peril duly established at the relevant point in time; the mere apprehension of a possible peril is not enough. It also pointed out that the peril constituting the state of necessity must at the same time be 'grave' and 'imminent'.

The Conduct of the State does not Seriously Impair

Another issues that the ILC and Ago considered was the interest of the state towards the existing obligation. The interest protected by the international obligation must be inferior to the threatened interest of the state with which the necessity is alleged.

According to Article 25, the second condition for invoking necessity established in subparagraph 1(b), is that the conduct in question does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. The Commentary states that the interest relied on must outweigh all other considerations, not merely from the point of view of the acting state but on a reasonable assessment of the competing interests. Over and above the conditions in Article 25(1).

The Obligation does not exclude the Possibility

Subparagraph 2(a) concerns the cases where the international obligation in question excludes the possibility of invoking necessity. After defining what conditions shall be met for necessity to be invoked, the ILC dealt with the question of 'whether the invocation of a state of necessity should not be totally barred a priori in cases in which the conduct requiring justification in conflict with certain particular categories of international obligations."

There are some obligations of which have been especially established to be binding under special circumstances. Some of them expressly establish that necessity may not be invoked. But the simple silence of the international obligation as such does not necessarily mean that the obligation admits the allegation of necessity. The ILC concurred on this issue, "In the view of the Commission, the bar to the invocation of the state of necessity then emerges implicitly, but with certainty, from the object and the purpose of the rule, and also in some cases from the circumstances in which it was formulated and adopted."

The State has not contributed to the Situation of Necessity

Subparagraph 2(b) establishes that necessity cannot be invoked if the responsible state has contributed to the situation of necessity. The ILC explains that "for a plea of necessity to be precluded under subparagraph 2(b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Subparagraph 2(b) is phrased in more categorical terms than articles 23 (2) (a) and 24 (2) (a), because necessity needs to be more narrowly confined."

The ILC also highlighted that the state invoking a state of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity. Ago expressed the same idea in the Addendum to the Eighth Report indicating that the occurrence of a threat to such an essential interest must be entirely beyond the control of the state whose interest is threatened.

After analyzing the factors it will be noted that the above-mentioned conditions must coexist to create a situation that allows a state to invoke the plea of necessity. Regarding the question of who shall decide if the conditions have been met, the ILC stated that the state that is invoking necessity should not be the only judge of the occurrence of the conditions in a particular case. It is recognized, however, that at the time of adopting a particular plan of action in response to a situation of necessity, the state will be the only one to decide, since it does not have the time to submit the case to other authorities. Nevertheless, after that the affected state will be entitled to object that the conditions for the necessity defense have not been met.

Kewenangan Penetapan Kerugian Negara dan Perhitungan Kerugian Negara

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ABSTRAK

Pemulihan keuangan negara akibat kerugian negara merupakan hal yang harus diutamakan demi mengembalikan keadaan ekonomi negara untuk menunjang kesejahteraan masyarakat. Mekanisme pemulihan keuangan negara diatur dalam paket undang-undang keuangan negara mengenai tuntutan ganti rugi dan tuntutan perbendaharaan dimana penetapan nilai kerugian dilakukan berdasarkan subyek/ pelaku penyebab kerugian. Selain itu, penetapan nilai kerugian juga dilakukan melalui mekanisme peradilan pidana sehingga dapat menyebabkan terjadinya perbedaan nilai kerugian.

Metode penelitian yang digunakan dalam tesis ini adalah penelitian hukum, yakni sebuah proses untuk mengkaji peraturan perundang-undangan di indonesia yang berkaitan khususnya mengenai penetapan nilai kerugian negara.

Hasil penelitian dari analisa *Statute Approach* dan *Conseptual Approach* menunjukkan bahwa berdasarkan prosedur hukum administrasi dalam paket Undang-undang keuangan negara, penetapan nilai kerugian negara dilakukan berdasarkan subyek/ pelaku penyebab kerugian negara. Sedangkan dalam proses peradilan pidana, kewenangan penetapan nilai kerugian yang dimiliki oleh pengadilan adalah berdasarkan kekuasaan kehakiman. Namun, dalam Undang-undang nomor 1 Tahun 2004 tentang Perbendaharaan Negara dalam Pasal 64 ayat (2) disebutkan bahwa "Putusan pidana tidak membebaskan dari tuntutan ganti rugi", dimana hal tersebut sejalan dengan pasal 4 Undang-undang Nomor 31 Tahun 1999 yang menyatakan "pengembalian kerugian keuangan negara atau perekonomian negara tidak menghapuskan dipidananya pelaku tindak pidana sebagaimana dimaksud dalam pasal 2 dan pasal 3."

Kata kunci: Kerugian Negara, Kewenangan Penetapan Kerugian Negara, Kepastian Hukum

ABSTRACT

State loss recovery that caused of state loss is something that should be prioritized for returning state economic condition to support society prosperous. The mechanism of state loss recovery ruled under state monetary law on compensation and treasury prosecution where loss value determination had performed based on subject/doer who causing the loss. In addition, loss value determination also done through criminal judicature mechanism then be able to cause the loss value dissimilarity.

Research method that used in this thesis is law research, that is a process to studying rules of regulations in Indonesia related to state loss value determination in particularly.

The result of the research from Statute Approach and Conceptual Approach analysis indicated that based on administration law procedure performed based on subject/doer who causing the loss. While in the criminal judicature process, the authority of state loss determination and state loss calculation owned by the court grounded on justice power. However, in Law number 1 of 2004 on State Treasury in Article 64 paragraph (2) stated that "criminal verdict does not free from compensation prosecution," where it was in line with Article 4 Law Number 31 31 of 1999 which state that "state loss returning or state economic did not eliminate the punishment of wrongdoer as mentioned in Article 2 and 3."

Keywords: State loss, Authority of State Loss Determination, Law Certainity

Landasan konstitusional Badan Pemeriksa Keuangan (BPK) dalam melakukan pemeriksaan di atur dalam Pasal 23E ayat (1) UUD Negara Republik Indonesia yang menyatakan "Untuk memeriksa pengelolaan dan tanggungjawab tentang keuangan negara diadakan satu Badan Pemeriksa Keuangan yang bebas dan mandiri." Sedangkan lingkup pemeriksaan diatur dalam UU Nomor 15 Tahun 2004 tentang Pemeriksaan Pengelolaan dan Tanggungjawab Keuangan Negara dalam Pasal 2 ayat (1) yang berbunyi "Pemeriksaan keuangan negara meliputi pemeriksaan atas pengelolaan keuangan negara dan pemeriksaan atas tanggungjawab keuangan negara."

Dalam Pasal 4 UU Nomor 15 Tahun 2004 tentang Pemeriksaan Pengelolaan dan Tanggungjawab Keuangan Negara disebutkan bahwa pemeriksaan yang dilakukan oleh BPK adalah Pemeriksaan Keuangan, Pemeriksaan Kinerja dan Pemeriksaan dengan tujuan tertentu. Kemudian berdasarkan pasal 15 Undang-undang Nomor 15 Tahun 2004 tentang Pemeriksaan Pengelolaan dan Tanggungjawab Keuangan Negara disebutkan bahwa pemeriksa menyusun laporan hasil pemeriksaan setelah pemeriksaan selesai dilakukan.

Pengertian mengenai hasil pemeriksaan terdapat dalam Undang-undang Nomor 15 tahun 2006 tentang Badan Pemeriksa Keuangan dalam Pasal 1 angka 14 yang menyatakan "hasil pemeriksaan adalah hasil akhir dari proses penilaian kebenaran, kepatuhan, kecermatan, kredibilitas, dan keandalan data/informasi mengenai pengelolaan dan tanggungjawab keuangan negara yang dilakukan secara independen, objektif, dan profesional berdasarkan Standar Pemeriksaan yang dituangkan dalam laporan hasil pemeriksaan sebagai keputusan BPK."

Terkait dengan perhitungan kerugian negara oleh BPK, diatur dalam pasal 11 huruf c Undang-undang Nomor 15 Tahun 2006 Tentang Badan Pemeriksa Keuangan yang menyatakan bahwa BPK dapat memberikan keterangan ahli dalam proses peradilan mengenai kerugian negara/daerah. Dengan kata lain perhitungan kerugian yang dilakukan oleh BPK adalah dalam rangka melakukan pemberian keterangan ahli. Prosedur pelaksanaan pemberian keterangan ahli dan perhitungan kerugian negara tertuang dalam Peraturan BPK Nomor 3 Tahun 2010 tentang Tata Cara Pemberian Keterangan Ahli.

Undang-undang Nomor 15 Tahun 2004 tentang Pemeriksaan Pengelolaan dan Tanggungjawab Keuangan Negara dalam Pasal 13 juga menyebutkan bahwa "Pemeriksa dapat melaksanakan pemeriksaan investigatif guna mengungkap adanya indikasi kerugian negara/daerah dan/atau unsur pidana." Dalam pelaksanaannya pada saat proses peradilan, hasil perhitungan kerugian negara oleh BPK nilai kerugiannya dapat berbeda dengan putusan majelis hakim yang menangani proses peradilan. Hal tersebut dimungkinkan karena dalam proses peradilan bergantung kepada pembuktian dan keyakinan hakim.

Hasil perhitungan kerugian negara yang dilakukan oleh BPK juga pernah digugat, yakni hasil perhitungan kerugian negara atas divestasi saham Kaltim Prima

Coal (KPC) oleh Pemerintah Kabupaten Kutai Timur. Gugatan tersebut dilakukan di Pengadilan Tata Usaha Negara Samarinda Kalimantan Timur dengan tergugat BPK RI Cq. BPK RI Perwakilan Provinsi Kalimantan Timur.

Berdasarkan uraian pada latar belakang diatas, maka peneliti tertarik untuk menulis mengenai kewenangan penetapan kerugian negara dan perhitungan kerugian negara, kemudian peneliti merumuskan permasalahan dalam penulisan ini adalah sebagai berikut:

Keabsahan penetapan nilai kerugian negara melalui proses peradilan yang tidak sesuai dengan Undang-undang Nomor 15 Tahun 2004 tentang Pemeriksaan Pengelolaan dan Tanggungjawab Keuangan Negara dan Undang-undang Nomor 15 tahun 2006 tentang Badan Pemeriksa Keuangan.

Kekuatan Hukum Laporan Hasil Perhitungan Kerugian Negara

Adapun tujuan dari penelitian hukum ini antara lain untuk menelaah tentang aturan hukum apakah penerapan peraturan terkait dengan penetapan nilai kerugian negara telah sesuai dengan teori peraturan perundang-undangan.

Penelitian yang dilakukan merupakan penelitian hukum, yaitu sebuah proses untuk menemukan aturan hukum, prinsip-prinsip hukum, maupun doktrin hukum guna menjawab isu hukum yang dihadapi. Argumentasi, teori atau konsep baru yang dihasilkan dalam penelitian hukum merupakan perspektif untuk menyelesaikan masalah yang dihadapi. Peter Mahmud Marzuki menyatakan bahwa kegiatan penelitian hukum tidak sebagaimana kegiatan penelitian dalam ilmu-ilmu empiris yang bersifat deskriptif untuk menemukan kebenaran korespondensi, kegiatan penelitian hukum adalah untuk memperoleh kebenaran koherensi. Kegiatan ini berpangkal dari tolek ukur berupa moral. Norma yang berupa pedoman tingkah laku harus berlandaskan prinsip hukum yang selanjutnya berpangkal kepada moral.

Tata cara ganti kerugian terhadap pejabat negara atau pegawai negeri sipil bukan bendahara seharusnya diatur dalam Peraturan Pemerintah, tetapi sampai dengan saat dilakukan penulisan ini Peraturan Pemerintah tersebut belum ada. Kementrian/Lembaga maupun Pemerintah daerah selama ini dalam pelaksanaan tata cara ganti kerugian masih berpedoman pada Peraturan Menteri Dalam Negeri Nomor 5 Tahun 1997 Tentang Tata Cara Tuntutan Ganti Rugi, namun juga terdapat beberapa Kementerian/Lembaga maupun Pemerintah Daerah yang telah menerbitkan peraturan terkait tata cara ganti rugi yang berlaku untuk lingkungan instansi/pemerintahan masing-masing.

Pengenaan ganti kerugian negara/daerah terhadap bendahara ditetapkan oleh Badan Pemeriksa Keuangan. Tata cara mengenai pengenaan ganti kerugian negara terhadap bendahara diatur dalam Undang-undang nomor 15 tahun 2004 tentang

pemeriksaan pengelolaan dan tanggungjawab keuangan negara. Dalam undang-undang nomor 15 tahun 2004 tersebut tata cara pengenaan ganti kerugian negara secara umum diatur dalam Bab V tentang pengenaan ganti kerugian negara dalam Pasal 22. Mengenai tata cara penyelesaian ganti kerugian negara/daerah terhadap bendahara secara rinci diatur dalam Peraturan Badan Pemeriksa Keuangan Republik Indonesia Nomor 3 Tahun 2007 tentang Tata Cara Penyelesaian Ganti Kerugian Negara Terhadap Bendahara.

Terhadap pihak ketiga terdapat perbedaan tata cara penyelesaian kerugian negara/daerah. Dalam paket Undang-undang tentang keuangan negara tidak dibahas mengenai tata cara pengenaan ganti kerugian terhadap pihak ketiga. Namun, dalam Undang-undang Badan Pemeriksa Keuangan nomor 15 tahun 2006 dalam bab II bagian kedua tentang wewenang disebutkan bahwa salah satu kewenangan BPK adalah memantau pelaksanaan pengenaan ganti kerugian negara/daaerah yang ditetapkan berdasarkan putusan pengadilan yang telah mempunyai kekuatan hukum tetap (Pasal 10 ayat 3 huruf c). Menurut pendapat penulis, tata cara penyelesaian terhadap pihak ketiga tersebut berbeda karena pihak ketiga tidak memiliki kewenangan administratif dalam pelaksanaan pengelolaan keuangan negara, melainkan pada umumnya hanya berupa perikatan (kontrak pelaksanaan pekerjaan) oleh karena itu prosedur penyelesaian melalui peradilan.

Penyelesaian tuntutan ganti rugi dapat dilaksanakan dengan cara upaya damai dan/atau tuntutan ganti rugi biasa dan pencatatan (Pasal 13 Permendagri nomor 5 Tahun 1997). Dalam hal upaya damai, yang bersangkutan dapat melakukan dengan cara angsuran selambat-lambatnya dua tahun sejak ditandatanganinya SKTJM dan harus disertai dengan jaminan barang yang nilainya cukup dimana pelaksanaan eksekusinya (keputusan TGR) dilakukan oleh Majelis Pertimbangan TGR (Pasal 14 Permendagri nomor 5 Tahun 1997).

Sedangkan untuk tuntutan ganti rugi biasa dilakukan apabila usaha untuk mendapat ganti rugi melalui upaya damai tidak berhasil. Pada tuntutan ganti rugi biasa ini penyelesaiannya melalui Tim Majelis Pertimbangan TGR, namun untuk keputusan pembebanannya ditetapkan oleh Kepala Daerah. (Pasal 15, Pasal 16 dan Pasal 17 Permendagri nomor 5 Tahun 1997).

Terhadap pencatatan dilakukan kepada Pegawai Negeri yang meninggal dunia tanpa ahli waris atau melarikan diri tidak diketahui alamatnya, dalam pencatatan wajib dikenakan TGR dengan Keputusan Kepala Daerah setelah mendapat pertimbangan majelis (Pasal 19 Permendagri nomor 5 Tahun 1997).

Pada Peraturan BPK nomor 3 Tahun 2007 tentang tata cara penyelesaian ganti kerugian negara terhadap bendahara disebutkan bahwa informasi terkait dengan kerugian negara dapat diketahui dari pemeriksaan BPK, pengawasan aparat pengawasan fungsional, pengawasan dan/atau pemberitahuan atasan langsung

bendahara atau kepala kantor/satuan kerja, serta perhitungan ex officio (Pasal 3 Peraturan BPK nomor 3 Tahun 2007).

Sedangkan pada instansi terkait, wajib dibentuk TPKN yang akan bertugas untuk membantu pimpinan instansi dalam memproses penyelesaian kerugian negara terhadap bendahara yang pembebanannya akan ditetapkan oleh BPK (Pasal 6 Peraturan BPK nomor 3 Tahun 2007). TPKN bertugas untuk melakukan verifikasi terhadap kerugian negara dalam bentuk akhir berupa Laporan Hasil Verifikasi Kerugian Negara dan menyerahkan kepada pimpinan instansi. Selanjutnya pimpinan instansi menyampaikan Laporan Hasil Verifikasi Kerugian Negara dengan dilengkapi dengan dokumen kepada BPK. Kemudian BPK menyimpulkan apakah telah terjadi kerugian negara yang meliputi nilai kerugian negara, perbuatan melawan hukum baik sengaja maupun lalai dan penanggung jawab.

Berdasarkan Undang-Undang Dasar Negara Kesatuan Republik Indonesia Tahun 1945 dalam pasal 24 ayat (1) disebutkan bahwa kekuasaan kehakiman merupakan kekuasaan yang merdeka, bebas dari pengaruh kekuasaan lainnya untuk menyelenggarakan peradilan guna menegakkan hukum dan keadilan. Kekuasaan kehakiman terdiri atas kekuasaan kehakiman tertinggi dan kekuasaan kehakiman tingkatan lebih rendah. Kekuasaan kehakiman tertinggi dijalankan oleh Mahkamah Agung (beserta badan peradilan yang berada di bawahnya) dan oleh sebuah Mahkamah Konstitusi. Fungsi kekuasaan Mahkamah Agung adalah:

Melakukan kekuasan kehakiman yang merdeka untuk menyelenggarakan peradilan guna menegakkan hukum dan keadilan. Namun, DPR berperan untuk mengontrol kekuasaan Mahkamah Agung melalui penentuan pengangkatan dan pemberhentian hakim agung, yang diusulkan oleh Komisi Yudisial.

Kekuasaan kehakiman yang dijalankan oleh Mahkamah Agung bersama-sama badan-badan peradilan yang berada dibawahnya, adalah kekuasaan untuk memeriksa dan mengadili serta memberikan putusan atas perkara-perkara yang diserahkan kepadanya untuk menegakkan hukum dan keadilan berdasarkan perundang-undangan (Pasal 25 Undang-undang nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.

Kedudukan Majelis Tuntutan Perbendaharaan pada Badan Pemeriksa Keuangan dalam Sistem Peradilan Administrasi di Indonesia

The Treasury Prosecution Council of the Audit Board of the Republic Indonesia's Stands in the Administrative Court System of Indonesia

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ABSTRAK

BPK memiliki kewenangan berdasarkan peraturan perundang-undangan untuk menilai dan/atau menetapkan jumlah kerugian negara/daerah yang diakibatkan oleh perbuatan melawan hukum baik sengaja maupun lalai yang dilakukan oleh bendahara. Penyelesaian kerugian negara/daerah yang menjadi tanggung jawab bendahara diatur tata cara penyelesaiannya oleh Peraturan BPK Nomor 3 Tahun 2007, dimana dinyatakan dalam Pasal 41 Peraturan BPK Nomor 3 Tahun 2007 Badan Pemeriksa Keuangan dapat membentuk Majelis Tuntutan Perbendaharaan dalam rangka memproses penyelesaian kerugian negara terhadap bendahara. Sebagai bagian dari penyelesaian ganti kerugian negara/daerah yang bertujuan untuk pemulihan keuangan negara/daerah dan tertib administrasi dalam pengelolaan keuangan negara/daerah, Majelis Tuntutan Perbendaharaan pada BPK memegang peranan penting khususnya dalam penyelesaian ganti kerugian negara/daerah yang penanggungjawabnya adalah bendahara. Dengan menggunakan kajian kepustakaan dan perundang-undangan, penulisan ini bermaksud menjelaskan kedudukan Majelis Tuntutan Perbendaharaan dalam menilai dan/atau menetapkan kerugian negara/daerah terhadap bendahara dikaitkan dengan Sistem Peradilan Administrasi di Indonesia.

Berdasarkan analisis yang dilakukan dalam penulisan ini, disimpulkan bahwa kedudukan Majelis Tuntutan Perbendaharan dalam menilai dan/atau menetapkan kerugian negara/daerah terhadap bendahara dikaitkan dengan Sistem Peradilan Administrasi di Indonesia adalah bahwa Majelis Tuntutan Perbendaharaan tidak termasuk dalam Sistem Peradilan Administrasi di Indonesia karena pada proses menilai dan/atau menetapkan jumlah kerugian negara/daerah terhadap bendahara Majelis Panel dalam Majelis Tuntutan Perbendaharaan menjalankan fungsi quasi administratif atau berlaku selayaknya pimpinan instansi/lembaga terhadap pegawai dalam lingkungannya.

Kata kunci: Peradilan administrasi; BPK RI; perbendaharaan; kerugian negara/daerah

ABSTRACT

The Audit Board of The Republic of Indonesia (BPK RI), have the authority to assess and determine the amount of loss suffered by the state caused by a treasurer's illegal action both intended or by negligance. State assessments and state financial losses or the determination of which party is obliged to pay compensation determined by the decision of BPK RI. The settlements in which the treasurer obliged to, is ruled by BPK Regulations Number 3 Year 2007, in which Article 41 of the regulation stated that BPK RI can formed a Treasury Prosecution Council to process the state financial loss settlements to the treasurer. As a part of state financial loss settlements system that pursue the relieve of the state financial and an administration order in state financial management, BPK RI's Treasury Prosecution Council held an important role, especially in state financial loss settlements obliged to a treasurer. By using literatures and laws study, this research intented to explain and clearing the Treasury Prosecution Council's stand in the Administrative Judicature System of Indonesia. Based on the analysis conducted in this research, it is concluded that the Treasury Prosecution Council in doing assessments and/or determination of a state financial loss obliged to a trasurer is not a part of the Administrative Judicature System of Indonesia because it doesn't do any court function. The conclusion was higlighting that in the assessing and/or determining process, the Panel in the Treasury Prosecution Council was doing a quasi administrative function or in other word it act as if it were the head of the office in giving assessments and determinations.

Keywords: the Audit Board of the Republic of Indonesia; state financial loss; administrative judicature system; treasury

BPK sebagai lembaga negara diketahui secara umum dalam hal kewenangannya di bidang pemeriksaan keuangan negara. Selain kewenangan dalam bidang pemeriksaan pengelolaan dan tanggung jawab keuangan negara, BPK juga memiliki kewenangan lain yang tidak terlalu populer secara umum. Kewenangan tersebut berupa kewenangan untuk menilai dan/atau menetapkan jumlah kerugian negara yang diakibatkan oleh perbuatan melawan hukum baik sengaja maupun lalai yang dilakukan oleh bendahara, pengelola BUMN/BUMD, lembaga atau badan lain yang menyelenggarakan pengelolaan keuangan negara.

Uraian mengenai tugas dan fungsi BPK menunjukkan bahwa BPK selain memiliki kewenangan pemeriksaan keuangan negara, juga memiliki "kekuasaan yudikatif" untuk melakukan tuntutan perbendaharaan terhadap bendahara.

Berdasarkan perspektif Hukum Administrasi Negara, dapat dikemukakan bahwa dalam penyelenggaraan negara atau kegiatan pemerintahan telah lama atau bahkan sejak berlakunya *Indonesische Comptabiliteits Wet* (ICW) dikenal dua bentuk penyelesaian ganti kerugian negara, yaitu berupa Tuntutan Ganti Rugi (TGR) dan Tuntutan Perbendaharaan (TP). Bentuk penyelesaian kerugian negara tersebut merupakan upaya hukum yang dilakukan sesuai kewenangan yang berdasarkan undang-undang sebagai upaya pengembalian kerugian negara di luar peradilan. Tata cara penyelesaian kerugian negara yang demikian, tidak dikenal dalam mekanisme pada lembaga peradilan.

Bagian utama dari pelaksanaan tuntutan perbendaharaan adalah adanya penilaian dan/atau penetapan BPK mengenai nilai kerugian negara. Pasal 41 Peraturan BPK Nomor 3 Tahun 2007 tentang Tata Cara Penyelesaian Ganti Kerugian Negara Terhadap Bendahara menyatakan bahwa "Badan Pemeriksa Keuangan dapat membentuk Majelis Tuntutan Perbendaharaan dalam rangka memproses penyelesaian kerugian negara terhadap bendahara." Penilaian dan/atau penetapan tersebut dilakukan setelah melalui proses penyelesaian kerugian negara/daerah yang ditetapkan dengan Keputusan BPK.

Telah dikemukakan sebelumnya bahwa di Indonesia pada prinsipnya kekuasaan yudikatif dilakukan oleh sebuah Mahkamah Agung dan badan peradilan di bawahnya, dalam lingkungan Peradilan Umum, Peradilan Agama, Peradilan Militer, Peradilan Tata Usaha Negara, dan sebuah Mahkamah Konstitusi. Dari kekuasaan yudikatif tersebut terdapat sistem peradilan administrasi yang dilaksanakan oleh Peradilan Tata Usaha Negara, sementara kewenangan BPK untuk melakukan tuntutan perbendaharaan yang dilaksanakan oleh Majelis Tuntutan Perbendaharaan juga masih dalam lingkup administrasi negara. Sehingga dapat disimpulkan bahwa keberadaan Majelis Tuntutan Perbendaharaan adalah bagian dari sistem peradilan administrasi di Indonesia. Namun keberadaan Badan Pemeriksa Keuangan sebagai salah satu lembaga negara diluar lembaga legislatif, eksekutif, dan yudikatif menimbulkan pertanyaan mengenai

kedudukan Majelis Tuntutan Perbendaharaan dalam sistem peradilan administrasi di Indonesia.

Berdasarkan Latar belakang maka pertanyaan Permasalahan adalah Bagaimanakah kedudukan putusan dan Majelis Tuntutan Perbendaharaan dalam menilai dan/atau menetapkan kerugian negara/daerah terhadap bendahara dikaitkan dengan Sistem Peradilan Administrasi di Indonesia? Hal tersebut dikemukakan penulis karena berkaitan dengan tujuan kepenulisan ilmiah ini, yaitu untuk Mengetahui putusan dan kedudukan Majelis Tuntutan Perbendaharaan dalam menilai dan/atau menetapkan kerugian negara/daerah terhadap bendahara dikaitkan dengan sistem peradilan administrasi di Indonesia.

Bentuk penelitian dalam penulisan hukum ini adalah penelitian hukum normatif. Penelitian hukum normatif terdiri dari penelitian terhadap asas-asas, sistematika, taraf sinkonisasi hukum, sejarah dan perbandingan hukum. Penelitian hukum dilakukan dengan cara meneliti bahan-bahan pustaka atau data sekunder yang terdiri dari bahan hukum primer, bahan hukum sekunder dan bahan hukum tersier. Bahan-bahan tersebut kemudian disusun secara sistematis, dikaji, kemudian ditarik kesimpulan dalam hubungannya dalam masalah yang diteliti. Jenis data yang digunakan dalam penelitian ini adalah data sekunder yang diperoleh dari bahan pustaka berupa keterangan-keterangan yang secara tidak langsung diperoleh melalui studi kepustakaan, peraturan perundang-undangan seperti UUD 1945, peraturan perundangan lainnya yang terkait, arsip-arsip yang berhubungan dengan masalah yang diteliti seperti tulisan-tulisan ilmiah, sumber-sumber tertulis lainnya serta makalah-makalah yang menyangkut mengenai kedudukan Majelis Tuntutan Perbendaharaan dalam sistem peradilan administrasi di Indonesia.

Terdapat kecenderungan bahwa kekuasaan disalahgunakan sehingga mendorong pemikiran-pemikiran untuk membatasi dan mengawasi kekuasaan negara. Salah satunya melalui lahirnya teori kedaulatan hukum, diantara teori kedaulatan hukum yang kemudian berkembang dan menjadi dasar hingga dewasa ini adalah konsep rechtsstaat dan *rule of law*. Perbedaan pokok antara rumusan rechtstaat dan rumusan *rule of law* adalah dalam hal adanya peradilan administrasi sebagai akibat dua sistem hukum yang berbeda yang menopang konsep-konsep tersebut. Walau sesungguhnya peradilan administrasi dalam konsep *rechtstaat*, terwakili melalui prinsip equality before the law dalam konsep *rule of law*, karena *ordinary court* dalam konsep *rule of law* juga melaksanakan peradilan administrasi.

Konsep *rechtsstaat* dan konsep the *rule of law,* sama-sama dikemukakan untuk menjamin kekuasaan yang dimiliki oleh setiap penyelenggara negara akan dilaksanakan sesuai dengan alasan pemberian kekuasaan itu sendiri serta mencegah tidak terjadinya penyalahgunaan kekuasaan. Inilah makna prinsip negara hukum baik dalam konteks *rechtsstaats* maupun *rule of law* sebagaimana dikemukakan oleh Mahfud M.D. Kemudian memperhatikan pendapat Indroharto mengenai prinsip dasar cita-cita

sebuah negara hukum (Indonesia), maka penyelesaian sengketa secara musyawarah atau di luar peradilan tetap harus berdasarkan hukum. Dengan demikian pengawasan terhadap penggunaan kekuasaan dikaitkan dengan rumusan konsep negara hukum Indonesia oleh Ismail Suny, mensyaratkan adanya suatu peradilan administrasi.

Oleh Badan Pengadilan Umum (biasa), yakni Pengadilan Negeri Bagian Perdata, terutama mengenai gugatan ganti rugi eks Pasal 1365, Kitab Undang- Undang Hukum Perdata, oleh warga masyarakat yang merasa dirugikan oleh suatu perbuatan pejabat atau instansi Administrasi Negara melawan hukum (*onrechmatige overheidsdad*);

Oleh suatu Badan Pengadilan Administrasi di suatu Badan Pengadilan Pejabat (atau tim pejabat) yang mengambil keputusan berstatus sebagai hakim. Hakim adalah pejabat negara yang memiliki wewenang sebagai berikut:

a) menilai fakta-fakta berdasarkan sarana-sarana bukti sebagaimana ditentukan oleh undang-undang;
b) melakukan interpretasi yuridis terhadap undang-undang (intrepretasi yang memiliki kekuatan undang-undang); dan
c) menjatuhkan putusan yang pada waktunya mempunyai kekuatan hukum mutlak (*kracht van gewijsde*)

Putusan Majelis Tuntutan Perbendaharaan adalah sebagaimana dimaksud ketentuan Pasal 35 Keputusan BPK Nomor 5/K/I-XIII.2/7/2011 mengenai Putusan Majelis Tuntutan Perbendaharaan yang dapat disimpulkan sebagai berikut:

a. Putusan Majelis terdiri atas Putusan Sidang Majelis, Putusan Majelis Panel, atau Putusan Majelis Keberatan;
b. Bentuk Putusan Majelis tersebut dapat berupa Putusan dan/atau Keputusan;
c. Bentuk Putusan Majelis tersebut merupakan Keputusan BPK;
d. Putusan Majelis mengikat penanggung jawab kerugian negara/daerah.

Sebagaimana telah diuraikan sebelumnya, keberadaan Badan Pemeriksa Keuangan sebagai instansi di lingkungan kekuasaan negara di luar lingkungan eksekutif yang memiliki tugas dan fungsi dan pelaksanaannya sebagai suatu proses teknis penyelenggaraan undang-undang Undang-Undang Nomor 17 Tahun 2003, Undang-Undang Nomor 1 Tahun 2004, Undang-Undang Nomor 15 Tahun 2004, dan Undang-Undang Nomor 15 Tahun 2006 khususnya mengenai pelaksanaan kewenangan untuk mengenakan ganti kerugian negara/daerah terhadap bendahara yang pada mulanya timbul sebagai suatu bentuk pengawasan terhadap pengelolaan dan tanggung jawab keuangan negara/daerah, sesungguhnya telah mengambil alih dan melaksanakan tugas pemerintahan (eksekutif) karena pada kenyataannya bendahara melaksanakan tugas dalam bidang pemerintahan.

Ketentuan Pasal 62 ayat (1) menyatakan bahwa pengenaan ganti kerugian negara/daerah terhadap bendahara ditetapkan oleh Badan Pemeriksa Keuangan, secara gramatikal dapat disimpulkan bahwa bentuk pengenaan ganti kerugian tersebut adalah penetapan. Merujuk kepada ada empat macam perbuatan-perbuatan hukum

(rechtshandelingen) Administrasi Negara menurut Prajudi, maka penetapan mengenai ganti kerugian negara tersebut merupakan penetapan (*beschikking, administrative discretion*).

Ketentuan Pasal 12 ayat (2) Peraturan BPK Nomor 3 Tahun 2007 menyatakan bahwa apabila dari hasil pemeriksaan terbukti ada perbuatan melawan hukum baik sengaja maupun lalai, BPK mengeluarkan surat kepada pimpinan instansi untuk memproses penyelesaian kerugian negara melalui SKTJM. Berkenaan dengan pengenaan ganti kerugian negara/daerah terhadap bendahara, maka surat BPK ini merupakan penetapan sebagaimana dimaksud Pasal 62 ayat (1) Undang-Undang Nomor 1 Tahun 2004.

Berkenaan dengan *beschikking*, menurut S.F. Marbun, keputusan (*beschikking*) merupakan salah satu objek studi penting dalam Hukum Admministrasi, karena keputusan merupakan objek sengketa yang menjadi kompetensi peradilan administrasi. Ketentuan Pasal 1 angka 9 Undang-Undang Nomor 51 Tahun 2009 menyatakan bahwa "Keputusan Tata Usaha Negara adalah suatu penetapan tertulis yang dikeluarkan oleh badan atau pejabat tata usaha negara yang berisi tindakan hukum tata usaha negara yang berdasarkan peraturan perundang-undangan yang berlaku, yang bersifat konkret, individual, dan final, yang menimbulkan akibat hukum bagi seseorang atau badan hukum perdata."

Putusan Majelis Panel dalam memeriksa dan memutuskan penyelesaian ganti kerugian negara/daerah terhadap bendahara, memenuhi unsur-unsur sebagai berikut:

a. Penetapan tertulis yang dikeluarkan Badan atau Pejabat Tata Usaha Negara. Tolok ukur pangkal sengketa dalam Peradilan Tata Usaha Negara adalah penetapan tertulis. Keputusan tertulis itu tidak ditujukan dalam bentuk formalnya, tetapi ada "isi." Dengan demikian bentuk penetapan Majelis Panel yang berupa surat BPK, memenuhi unsur sebagai suatu penetapan tertulis;
b. Berisi tindakan hukum dalam bidang Tata Usaha Negara (*decision of administration law*), sebagaimana telah diuraikan dalam bab sebelumnya bahwa pengenaan ganti kerugian negara/daerah merupakan bentuk quasi administratif BPK terhadap bendahara, sehingga dengan demikian unsur ini terpenuhi.;
c. Berdasarkan peraturan perundang-undangan yang berlaku, pengenaan ganti kerugian negara/daerah dilakukan oleh BPK kepada bendahara berdasarkan kewenangan yang bersifat atribusi dari ketentuan Pasal 62 ayat (1) Undang-Undang Nomor 1 Tahun 2004 sehingga unsur ini terpenuhi;
d. Bersifat konkret, individual, dan final;
e. Menimbulkan akibat hukum bagi seseorang dalam hal ini adalah bendahara yang dituntut untuk mengganti kerugian negara/daerah.

Berdasarkan uraian tersebut, maka Putusan Majelis Panel dalam Majelis Tuntutan Perbendaharaan adalah termasuk ke dalam penetapan (*beschikking*) yang

kedudukannya dalam Sistem Peradilan Administrasi adalah sebagai suatu objek sengketa dalam Upaya Administrasi, karena apabila bendahara tidak mau melaksanakan surat BPK mengenai penyelesaian ganti kerugian negara/daerah. Namun apabila memperhatikan perbandingan penyelesaian ganti kerugian negara/daerah pada bab sebelumnya dapat diketahui bahwa penetapan pengenaan ganti kerugian negara/ daerah terhadap pegawai negeri bukan bendahara diterbitkan melalui suatu Surat Keputusan menteri /pimpinan lembaga /gubernur /bupati /walikota, sementara penetapan pengenaan ganti kerugian negara/daerah terhadap bendahara diterbitkan dalam bentuk surat. Menjadi suatu pertanyaan bahwa pengambilan keputusan yang dilakukan oleh suatu Majelis 'hanya' menghasilkan surat, sementara pengambilan keputusan yang dilakukan oleh seorang menteri/pimpinan lembaga/gubernur/bupati/ walikota dituangkan dalam bentuk Surat Keputusan.

Majelis Keberatan dibentuk untuk memeriksa dan memutuskan keberatan yang diajukan bendahara/pengampu/yang memperoleh hak/ahli waris setelah menerima SKPBW. Majelis Keberatan dalam hal ini melakukan penilaian yang lengkap, baik dari segi penerapan hukum maupun dari segi kebijaksanaan yang telah ditetapkan sebelumnya oleh Majelis Panel. Berdasarkan ketentuan Pasal 25 ayat (2) Peraturan BPK Nomor 3 Tahun 2007, maka BPK mengeluarkan Surat Keputusan Pembebanan apabila keberatan bendahara ditolak. Sementara berdasarkan ketentuan Pasal 27 ayat (1) Peraturan BPK Nomor 3 Tahun 2007, BPK mengeluarkan Surat Keputusan Pembebasan, apabila menerima keberatan yang diajukan oleh bendahara/pengampu/ yang memperoleh hak waris.

Putusan Majelis Keberatan sebagaimana ketentuan Pasal 25 ayat (2) dan Pasal 27 ayat (1) Peraturan BPK Nomor 3 Tahun 2007 memiliki unsur yang sama dengan Putusan Majelis Panel, sehingga Putusan Majelis Panel dalam Majelis Tuntutan Perbendaharaan termasuk juga ke dalam penetapan (beschikking) yang kedudukannya dalam Sistem Peradilan Administrasi adalah sebagai suatu objek sengketa. Perbedaannya adalah apabila bendahara merasa tidak puas dengan Putusan Majelis Panel maka ia dapat mengajukan upaya administratif keberatan kepada Majelis Keberatan yang masih berada dalam Majelis Tuntutan Perbendaharaan. Sementara apabila bendahara masih belum puas terhadap Putusan Majelis Keberatan, maka berdasarkan ketentuan Pasal 51 ayat (3) maka bendahara dapat mengajukan gugatan melalui Pengadilan Tinggi Tata Usaha Negara karena upaya administratif yang telah ditempuh melalui Majelis Keberatan mempunyai keputusan sama dengan Pengadilan Tata Usaha Negara tingkat pertama.

Kedudukan Majelis Tuntutan Perbendaharan dalam menilai dan/atau menetapkan kerugian negara/daerah terhadap bendahara dikaitkan dengan Sistem Peradilan Administrasi di Indonesia adalah bahwa Majelis Tuntutan Perbendaharaan

tidak termasuk dalam Sistem Peradilan Administrasi di Indonesia karena pada proses menilai dan/atau menetapkan jumlah kerugian negara/daerah terhadap bendahara Majelis Panel dalam Majelis Tuntutan Perbendaharaan menjalankan fungsi quasi administratif atau berlaku selayaknya pimpinan instansi/lembaga terhadap pegawai dalam lingkungannya.

Kedudukan Putusan Majelis Tuntutan Perbendaharaan dalam Sistem Peradilan Administrasi di Indonesia adalah sebagai suatu penetapan (*beschikking*) yang dapat menjadi objek sengketa dalam Sistem Peradilan Administrasi di Indonesia atau dalam Undang-Undang Peradilan Tata Usaha Negara termasuk sebagai suatu Keputusan Tata Usaha Negara.

The Future of Bilateral Investment Treaties: Indonesia Perspective towards the International Investment Policy Regime and New Outlook for the New Investment Treaty

Masa Depan Perjanjian Investasi Bilateral: Perspektif Indonesia Menuju Rezim Kebijakan Investasi Internasional dan Prospek Baru dalam Perjanjian Investasi Baru

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ABSTRACT

The purpose of this Dissertation is to critic the implementation of IIAs key provisions in existing. Indonesia's BIT and their implication to policy space and sovereignty of this country. This Dissertation also seeks to find a solution for Indonesia international investment policy that provide the flexibility of country policy spaces. In order to reach this objective, several provisions need to be reformed in the manner of balancing between the public interests and the protection of the foreign investors and investments, such as Admission clause, FET, MFN, NT and ISDS clause.

ABSTRAK

Tujuan Disertasi ini adalah mengkritisi pelaksanaan ketentuan kunci IIA yang ada BIT Indonesia dan implikasinya terhadap ruang kebijakan dan kedaulatan negeri ini. Disertasi ini juga berusaha menemukan solusi bagi kebijakan investasi internasional Indonesia yang memberikan fleksibilitas ruang kebijakan negara. Untuk mencapai tujuan ini, beberapa ketentuan perlu direformasi dengan cara menyeimbangkan antara kepentingan publik dan perlindungan investor asing dan investasi, seperti klausula Pendaftaran, klausul FET, MFN, NT dan ISDS.

In the recent time, some of Indonesia BITs have expired, for example BIT with The Netherland, and Indonesia is considering to reviewing and terminating its existing BITs. The spirit of Indonesia's reform towards BITs is in line with the investment treaties development which initiated by UNCTAD. UNCTAD has analysed that allowing old bilateral agreements to coexist with other international investment regime heightens the risk of fragmentation and systemic coherence and this may be further exacerbated where some of clauses remain unreformed. Actually, Indonesia is not the one of countries following this step, developed countries such as U.S. and Europe have moved forward to the new their international investment policy.

Although at this moment is not clear whether Indonesia intention to terminate the 48 BITs will result in the removal of all such treaties in their entirety or just amendments to certain provisions in the next negotiation, Indonesia government has signaled its dissatisfaction towards the current BITs regime and is now in the middle of reviewing all existing BITs. This dissatisfaction is not without reason. To be sued by multinational companies with huge claims before investment arbitration tribunals due to 'breach of commitments' caused by exercising its own right to govern in the public interest sounds outrageous to Indonesia. Moreover, the government feels the need to adjust its international investment policy to come into line with its current national interest and to avoid further claims and problems.

Pertinent to the background above, this Dissertation, firstly will describe how international investment law is developed and what the nature of investment treaty. It also analyses how the investment treaty practice has raised concern regarding to the guarantee and right given by its provisions. This review is important to formulate a comprehensive understanding whether BITs achieve the balance of treaty party interests and enhance economic development to both home and host states or constrain the policy space of the country hosting foreign investment. Secondly, this Dissertation will discuss the recent development of investment treaty and UNCTAD analysis regarding the reformation of investment treaty.

In order to gain more comprehensive argument and limit the scope of this research, it is important to draw the core research question and the question of this Dissertation is:

"Should Indonesia cease the regime of BITs and propose the new legal framework which purpose to protect the foreign investment and at the same time give the country rights to regulate in the public interest? Other questions are to be answered in this dissertation are "What the provisions of Bilateral Investment Treaties that should be reviewed and reassessed by Indonesia in the purpose of improvement and reform its international investment regime?"

To answer these questions, this Dissertation will be divided into four chapters. The first chapter will describes the background and the reason of this research and provides the limit and scope of this dissertation. The second chapter will describe the

evolution and the nature of International Investment Agreements. It also will examine the general issues surrounding the enforcement and practice of BITs regime. The third chapter will focus on examination and evaluation of the implementation and practice of IIAs provisions in existing Indonesia's Bilateral Investment Treaties ("BITs"). It also will present the practical solution that could be taken by Indonesia to reform and construct their international investment policies that would present more balance between the foreign investment protection and the rights of country to regulate in the public interest. The last chapter contains the conclusions from this Dissertation and the author recommendation regard to the future Indonesian investment policies.

This chapter consists two sections. The first section will describe the evolution of IIAs. From this description, it can be understood that the objectivity of IIAs as the primary legal framework in international investment has created and developed by among the members of the world, especially after the 1990s. These legal frameworks are intended to be a mechanism for protection and treatment to the nationals of other states undertaking investment.

Furthermore, in the next section, it will discuss the general issues surrounding the implementation and practice of investment treaty. Since the proliferation of investment treaty in 1959, there are many concerns regarding the impact of investment treaty, such as limit the policy space of the host countries, no evidence for boosting economic development, and raise the skepticism against Investor-State Dispute Settlement (ISDS).

The protection of foreign investment in level of international law can be divided to customary international and treaty law. Customary international law consist the principles of diplomatic protection, the international minimum standard to protect aliens in foreign countries, and the Hull Rule. While, the investment treaty was began with the bilateral effort from the U.S. through a network of bilateral treaties of friendship, commerce, and navigation ("FCN"). However this effort did not widely accepted, especially from developing countries which had been skeptical towards the benefits of foreign investment. The effort of diffusion of investment treaty-making was continued by European countries which began to negotiate bilateral investment treaties that were unlike the FCN. They had developed a model or prototype treaty used in negotiations with other countries. Since 1959, when the first BIT was concluded, the world has witnessed the successful of BITs movement, hence the evolution of investment treaties in question still develops until now.

It has been mentioned earlier that the international investment law emerges to avoid and control many risks which can be suffered by the nationals of the country when they make an economy activity outside their territory. Prior to the World War era, the economic relationship between a national of states only relied on the diplomatic protection, while the foreign investment was not a major concern of international law at that time. In 1924 Permanent Court of International Justice (PCIJ) had recognized

a state's right to exercise diplomatic protection over its nationals as an 'elementary principle of international law.

In the early twentieth century, capital exporting states still maintained the view that international law requires a minimum standard of treatment. Capital importing states, however, continued to challenge the minimum standard of treatment, particularly with respect to compensation for expropriation. The disagreement between capital exporting and importing states over the international minimum standard was stimulated in an exchange of correspondence between Mexico and the US in 1938.

The US insisted on the 'Hull Rule' argued that 'adequate, effective and prompt' payment for the properties seized was required under international law.38 In the part of Mexico argued that, in the case of general and impersonal expropriation for the purpose of redistribution of land, it was only required to pay compensation in accordance with its national laws. Meanwhile, international law distinguished between expropriation resulting from a 'modification of the juridical organization and which affect equally all the inhabitants of the state and those otherwise decreed in specific case and which affect interest known in advance and individually determined. Although the Hull Rule focuses on the required standard of compensation under international law, the actual dispute between Mexico and US that gave rise the articulation of the rule concerned the types of measures

Given that BITs clearly uphold one end of their "grand bargain" that establish rules and enforcement mechanism reducing the risks of the foreign investments, BITs could be achieved the objectivity of the treaty party through their provisions. However, there is any global concern questioning its legitimacy and its impact on sovereignty. For instance, BITs delegate judicial review of countries public act affecting foreign investor to international tribunals and allow foreign investors to bring claims directly against host state.80Moreover, the question of legitimacy is also linked to the view that BITs have eroded the 'policy space' and the regulatory authority of countries hosting foreign investment.

This section will discuss the general concerns pertinent to the impact of the BITs implementation in the recent time. There are various debates questioning the validity of BITs regimes, such as the impact of BIT in enhancing economic development, the BITs provisions constrain policy space the host-countries, the distrust to the accountability of ISDS system, and the overlapping with other international agreements.

It cannot be denied that all international treaties put pressure on state sovereignty, in particular on "domestic sovereignty," where states have authority over their internal jurisdictions. As Sornarajah argues it, "investment treaties constrain sovereign rights of control over the intrusive process of foreign investment, which taking place entirely within the territory of the host states." Thus, the issued surrounding regulatory space is about the fact that the host state's right to control its internal public interests are vanishing because of certain commitments incurred in investment treaties.

Critics argue that investment treaty can constrain policy space in two ways; substantive provisions may limit a host country's ability to regulate foreign investments and procedural provisions that enforce substantive provisions, namely Investor-State Dispute Settlement (ISDS). The substantive provisions in BITs indeed provide a wide-ranging level of legal protection for foreign investors. BITs allowing the traditional European approach often include vaguely drafted and open-ended provisions that allow arbitral tribunals to interpret them in an overly investor-friendly manner.

Developing countries are not the only groups concerned about the implications of investor-state dispute settlement systems. Countries like Australia have expressed concern as well. In 2010 report, the Australian Productivity Commission recommended that the Australian government sought to avoid the inclusion of ISDS provision in future trade agreements. Subsequently, in 2011 the Australian Government announced its intention not to push for inclusion of Investor-State dispute settlement clauses in future investment agreements. In a Trade Policy Statement released on April 12, 2011, the Australian Government declared:

In the past, Australian Governments have sought the inclusions of investor-state dispute resolution procedures in trade agreement with developing countries at the behest of Australian business. The Gillard Government will discontinue this practice. If Australian business are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.

The Indonesian existing BITs would be examined and reviewed by its core provisions. In order to gain conclusion whether Indonesia BITs has reached the main objective of BITs, which is enhance economic development, or has constrained and limited the country policy spaces. From this review, it has been gained conclusion that the provisions in Indonesia's existing BITs lack clarity and can potentially lead to difficulties for tribunals in interpreting the provisions. It can also leave tribunals with wide discretion to interpret the provisions, thus making states feel unfairly bound by 'imposed obligations' that they did not envisage when they drafted their BITs.

Indonesian BITs apply a broad, "open-ended", asset-based definition of investment including an illustrative list, in line with the protection approach in investment treaties. Consequently, only few number the foreign investment that not covered by Indonesian BITs, if there are any at all, thereby limiting the flexibility of Indonesia's domestic laws to create particularities for certain types of investment.

Furthermore, Indonesia has constructed provision that required investments need to be conducted "in accordance with the laws and regulations of the host state". This approach is similar with definition of investor that constructed broadly and without clear exception or limitation. The provision of investor only distinguishes between "natural person" and "legal person" or "national" and "company". Some BITs provide limitation, including the need to have a substantial interest in the entity or investment,

and the possibility to exclude investors from third countries or the host country itself. Other BITs emphasize activities in host or home countries. Only one BIT tries to add precision to the fact that investors must come from the other contracting party, for example by adding that a legal entity must be "actually managed from the territory of that Party." 122 Although some of BITs adopted the clarifying sentence, the definition of investor in Indonesia BITs remains very broad and it will led to reduce the policy flexibility of domestic legislator to some extent.

Safeguarding the right of State to regulate Public Interest

According to UNCTAD, "flexibility is a central feature of development dimension of IIAS...because it allows signatories to preserve the necessary policy space for the pursuit of development-oriented policies. Flexibility could be created in the preamble, in the substantive provisions of the agreement, or in provisions allowing differentiated obligations as between parties at different levels of economic development.

Conclusion

This Dissertation firstly elaborates the reason and background behind the effort of foreign investment protection. It can be highlighted that prior to the world war, several efforts have been created by developed countries to protect their nationals undertaking economic activity in the other country. At that time, it was only customary international law existed to give an adequate safeguarding for investors. However, this principle is not accepted generally by other member of the world, particularly developing countries. As a result, several attempts had been exercised to the legitimacy and the content of traditional principle of international law. There was eminent the 'Calvo Doctrine' questioned the lack of clarity of international minimum standard.

Furthermore, the disagreement between the developed countries and the developing countries still continued after the world-war, particularly with the respect to compensation for expropriation. The newly emerging countries want to establish their sovereignty over the natural resources in their territory and their rights to expropriate without regard to appropriate compensation. However, the capital-exporting countries still impose to compensate in 'adequate, effective and prompt payment' that required under international law for foreign properties. This conflict is culminated in several UN resolutions that clarify the lack and clarity of customary law.

Moreover, the investment treaty program has gained momentum after 1959, which was preceded by the treaty program initiated by United States with its FCN in 1946 and 1968. Unlike the FCN which was not accepted by the developing states, the BITs gained a positive response. BITs has answered the concern of capital-importing

states regarding to the protection of their investments. They have incorporated many principles that was previously segregated in the Bilateral and Multilateral effort and have given foreign investor credibility assurances. Most importantly, BITs have established access to an international tribunal for foreign investors to enforce the BITs substantive provisions.

After four decades, the legitimacy of BITs as protection mechanisms has raised concerns, not only from the developing countries, but also from the developed countries like U.S and Australia. In relation, this research has found several issues, but the most important is BITs have undermined the policy space of countries hosting foreign investment. As a result, Australia has excluded the ISDS provision in its existing and future IIAs and U.S. has reformed and renewed its Model BITs.

Furthermore, general issues relating to the BITs regime, particularly to their provisions or clauses, have been linked and narrowed to Indonesia's perspective in order to provide a review to the effectiveness of the existing Indonesia's BITs. Using the provision of BITs as a tool for analysing, the research has found several inadequacy and disadvantage. For example, Indonesia's BITs have provided broad and wide scope to the protection of foreign investments and investors. Particularly, it has found similar purpose within the Fair Equitable Treatment (FET) and the Most-Favoured Nation (MFN) clause that they link to the non-arbitrary treatment.

Drawing form these findings, the author argues that the Indonesia's BITs need to revised and its existing BITs should be terminated. In this regard, the Indonesian Government could take several policy options to renew the provisions of BITs, such as limitation to the treaty scope by clearly defining the investment and investor. In addition, some provisions can be omitted, such as umbrella clause, survival clause, and national treatment clause. This reformation effort also can be adopted to national laws governing the international investment in order to extent the flexibility of the country to regulate in the public interests, and also give predictability legal protection in the level domestic laws.

The author believes that this research will contribute to both Indonesian government and investors. By reform international investment policy, the Indonesian Government could apply uniform treatment to investor and also could strength its domestic law. Although reform and termination would increase unpredictability of the protection of foreign investment, the effort to renew BITs regime could lead to create a better international investment law and could decrease the proliferation of IIAs and investment dispute. It also can be noted that it would be interesting if the future research would fill the gap and propose alternative solution for this research.

Kebijakan Kriminal Hukum Pidana Administratif di Indonesia

Criminal Policy of Administrative Penal Law in Indonesia

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ABSTRAK

Perkembangan yang menarik di Indonesia saat ini adalah banyaknya perundang-undangan administrasi yang bersanksi pidana. Undang-undang administrasi seperti perbankan, lingkungan hidup, dan lain-lain mengandung pidana yang sangat berat, yang mestinya khusus untuk rumusan deliknya dibuat undang-undang pidana tersendiri.Hukum pidana dalam perkembangannya ternyata semakin banyak digunakan dan diandalkan dalam rangka mengatur dan menertibkan masyarakat melalui peraturan perundang-undangan. Pencantuman bab tentang ketentuan sanksi pidana tersebut bagi beberapa kalangan menimbulkan keresahan karena dikhawatirkan akan menimbulkan *overkriminalisasi*. Kekhawatiran ini dikarenakan tidak adanya kebijakan kriminalisasi yang jelas yang dimiliki oleh pembentuk undang-undang. Penelitian ini ditujukan untuk menjawab pertanyaan bagaimanakan kedudukan administrative penal law di Indonesia dalam kerangka kebijakan kriminal, bagaimanakah kebijakan formulasi pemidanaan yang ada di dalam administrative penal law di Indonesia, dan upaya apa yang dapat dilakukan untuk mencegah overkriminalisasi dalam administrative penal law. Penelitian ini merupakan penelitian yuridis normatif. Dari hasil penelitian diketahui bahwa penggunaan sanksi pidana di dalam undang-undang yang bersifat administratif masih merupakan pilihan utama. Pola pemidanaan yang terdapat dalam berbagai *administrative penal law*, ternyata tidak memiliki keseragaman pola pemidanaan. Pidana penjara ternyata masih menjadi pilihan utama dalam pengenaan sanksi di dalam hukum administrasi. Perlu diupayakan re-evaluasi pada tahap formulasi sehingga tidak terjadi overkriminalisasi di dalam undang-undang yang bersifat administrasi.

Kata kunci: Kebijakan kriminal, kriminalisasi, administrative penal law

ABSTRACT

Currently, there is an interesting phenomena in Indonesia.There are so many administrative law containing criminal sanctions. Administrative law such as banking law, environmental law, and others contain many criminal sanctions, which suppose to be regulated specially. Criminal law used as a tool to control and regulate the society by the laws. Some of the expert thought that the use of criminal sanction in the administrative penal law, for some reasons can make overcriminalization condition. Overcriminalization can arise because the regulator (government and legislative) do not have no one clear criminal policy. This researchobliged to answer the research questions such as how is the position of administrative penal law in frame of criminal policy, how is the penal formulation in the administrative penal law in Indonesia, and what efforts can be done to prevent overcriminalization in administrative penal law. This is a normative juridical research.Based on the research, the use of criminal sanction in the administrative penal law is still the main choice for the regulator. There is no specific pena formulation that used in the administrative penal law. The prison sanction still become the main choice in admnistrative penal law. By the conditions, we need to re-evaluate the formulation step in order to prevent overcriminalization. The formulation step is a strategic step in criminalize or not a conduct.

Keywords: Criminal policy, criminalization, administrative penal law.

Dalam hukum pidana, persoalan penerapan hukum pidana yang terkait dengan perbankan sebagai tindak pidana korupsi masih menimbulkan polemik dan perbedaan pendapat para ahli hukum. Kasus Bank Lippo adalah contoh adanya polemik dan perbedaan pendapat apakah dalam aktivitas bisnisnya di Pasar Modal dapat didakwa sebagai tindak pidana korupsi.

Andi Hamzah mengatakan bahwa terhadap direksi Bank Lippo tidak dapat dikenakan dakwaan tindak pidana korupsi karena perbuatan direksi mutlak berada di bawah yurisdiksi UU Nomor 8 Tahun 1985 dan terhadap para pelaku pasar modal tetap diberlakukan undang-undang tersebut termasuk ketentuan pidana yang ada didalamnya, bukan undang-undang lain. Namun Remy Syahdeni berpendapat bahwa terhadap direksi Bank Lippo masih dapat didakwakan UU Nomor 31 Tahun 1999 jo. UU Nomor 20 Tahun 2001 tetang Pemberantasan Tindak Pidana Korupsi.

Permasalahan pencantuman sanksi pidana dalam hukum administrasi yang saat ini banyak ditemukan di dalam perundang-undangan Indonesia tentu saja memiliki tujuan adanya jaminan bahwa ketentuan perundang-undangan tersebut akan dipatuhi dan dilaksanakan oleh masyarakat.Namun demikian sebagian kalangan berpendapat bahwa kecenderungan meningkatnya berbagai perumusan peraturan perundang-undangan yang sebenarnya masuk dalam lingkup hukum administrasi mencantumkan ketentuan pidana adalah suatu kelatahan legislatif dan ekesekutif.

Sanksi pidana dalam perundang-undangan yang bersifat administrasi perlu untuk dikaji lebih dalam lagi terutama dalam sisi kebijakan kriminal agar dapat tercapai tujuan pemberian sanksi pidana itu sendiri. Pengkajian sendiri hendaknya dimulai pada saat pembuatan peraturan (kebijakan legislasi) yang merupakan salah satu kebijakan strategis dalam mewujudkan undang-undang yang lebih rasional.

Saat ini Indonesia banyak memiliki perundang-undangan yang bersifat administrasi namun selalu mencantumkan Bab mengenai "Ketentuan Pidana." Fenomena ini menurut penulis menimbulkan permasalahan hukum berupa tidak adanya keseragaman kebijakan dalam pemberian sanksi pidana di dalam perundang-undang administrasi serta dapat mengakibatkan terjadinya over criminalization apabila sanksi pidana diberikan pada semua bidang tanpa adanya criminal policy (kebijakan kriminal) yang jelas.

Dari latar belakang masalah tersebut maka pertanyaan penelitian ini adalah Bagaimanakah kedudukan kebijakan administrative penal law dalam kerangka kebijakan kriminal (criminal policy)?

Tujuan dari penelitian ini adalah sebagai salah satu bahan acuan bagi lembaga legislatif dan eksekutif mengenai pandangan administrative penal law dalam kerangka kebijakan kriminal, untuk membuat suatu produk perundang-undangan yang lebih komprehensif terutama dalam kerangka kebijakan kriminal nasional.

Melalui penelitian ini, diharapkan ada beberapa manfaat yang dapat dihasilkan dan diperoleh. Manfaat penelitian ini diharapkan dapat memberi manfaat secara teoritis dan praktis. Metode penelitian yang digunakan di dalam penelitian ini adalah metode penelitian yang bersifat yuridis normatif. Pada penelitian yuridis normatif, data utama adalah data sekunder. Namun untuk lebih menunjang penelitian ini, juga dibutuhkan data yang didapat secara langsung melalui teknik wawancara.

Sebagaimana uraian di atas, bahwa penelitian ini merupakan penelitian normatif, yaitu penelitian hukum yang dilakukan dengan cara meneliti bahan pustaka atau data sekunder. Oleh karenanya, jenis data penelitian ini meliputi data sekunder disamping dibutuhkan juga data primer sebagai penunjang.

Hukum Pidana Administratif

Bentuk peraturan perundang-undangan administratif di Indonesia cukup banyak. Hal ini dikarenakan bidang hukum administrasi mencakup ruang lingkup yang sangat luas, tidak hanya bidang hukum pajak, perbankan, pasar modal, dan perlindungan konsumen. Akan tetapi mencakup pula bidang lainnya seperti di bidang ekonomi, lingkungan, kesehatan, pendidikan, kesejahteraan sosial, tata ruang, dan sebagainya. Philipus M.

Pada Tahun 2011 terdapat 15 (lima belas) dari 24 (dua puluh empat) undang-undang yang bersifat administratif yang memuat ketentuan pidana dan diantaranya terdapat satu undang-undang yang telah diajukan uji materiil ke Mahkamah Konstitusi terkait dengan ketentuan pidana yang tercantum di dalam undang-undang tersebut. Sedangkan pada Tahun 2012 terdapat 24 (dua puluh empat) undang-undang yang telah disahkan dan sebanyak 7 (tujuh) undang-undang memuat ketentuan pidana. Adapun ketujuh undang-undang tersebut adalah sebagai berikut:

1. Undang-Undang Nomor 2 Tahun 2012 tentang Pengadaan Tanah Bagi Pembangunan untuk Kepentingan Umum;
2. Undang-Undang Nomor 8 Tahun 2012 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah;
3. Undang-Undang Nomor 12 Tahun 2012 tentang Pendidikan Tinggi;
4. Undang-Undang Nomor 15 Tahun 2012 tentang Veteran Republik Indonesia;
5. Undang-Undang Nomor 16 Tahun 2012 tentang Industri Pertahanan;
6. Undang-Undang Nomor 17 Tahun 2012 tentang Perkoperasian;
7. Undang-Undang Nomor 18 Tahun 2012 tentang Pangan.

Dari ketujuh Undang-undang tersebut di atas, tidak seluruh undang- undang memuat ketentuan pidana di dalam Bab Ketentuan Pidana secara khusus. Selain itu, tidak seluruh undang-undang tersebut menjadikan sanksi pidana sebagai sarana

terakhir, sebanyak 2 (dua) undang-undang hanya memuat sanksi pidana tanpa adanya sanksi lain seperti sanksi administratif, ataupun perdata.

Banyaknya jumlah undang-undang yang bersifat administratif namun memiliki ketentuan sanksi pidana diantaranya disebabkan karena begitu luasnya cakupan bidang hukum administrasi. Hukum pidana sebagaimana dinyatakan oleh Roeslan Saleh memainkan peranan penting. *Ordeningsstrafrecht* atau *administrative penal law* adalah merupakan alat kebijaksanaan pemerintah. Menurut Roeslan Saleh, dalam *ordeningsstrafrecht* atau *administrative penal law* yang dikatakan sebagai perbuatan pidana bukanlah apa yang dipandang oleh masyarakat sebagai perbuatan yang layak dipidana, namun apa yang bertentangan dengan kebijaksanaan pemerintahlah yang ditetapkan sebagai perbuatan pidana itu. Pemerintah memiliki fungsi mengatur yang penting di bidang yang menyangkut kesejahteraan dan keamanan masyarakat umum, seperti di bidang kesehatan, dan lingkungan hidup. Pemerintah melakukan berbagai upaya dalam rangka mencapai kesejahteraan dan keamanan masyarakat umum, termasuk melalui pembuatan Undang-Undang yang mengatur sanksi pidana bagi para pelanggarnya.

Bentuk-Bentuk Hukum Pidana Administratif di Indonesia

Berdasarkan hal tersebut, penulis mengambil beberapa contoh undang-undang yang bersifat administratif namun memuat ketentuan pidana. Sebagaimana telah diuraikan pada bab terdahulu, pemilihan keempat undang- undang ini didasari pada beberapa pertimbangan diantaranya, dikarenakan memiliki kesamaan tujuan pembentukan undang-undang, mengatur mengenai perlindungan profesidan dalam lingkup masalah administrasi berupa perizinan. Alasan lain adalah bahwa hampir semua ketentuan pidana di dalam undang- undang tersebut diajukan uji materiil ke Mahkamah Konstitusi karena dianggap bertentangan dengan Hak Asasi Manusia. Lebih lanjut, pembahasan akan dikhususkan pada tujuan pembentukan undang-undang, subjek tindak pidana, perbuatan yang dipidana, dan jenis sanksi yang diancamkan. Adapun keempat undang-undang tersebut adalah sebagai berikut:

- Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran
- Undang-Undang Nomor 44 Tahun 2009 tentang Rumah Sakit
- Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat
- Undang-Undang Nomor 5 Tahun 2011 tentang Akuntan Publik

Hak Asasi Manusia dan Kriminalisasi

Berdasarkan hasil penelitian dan pembahasan di atas, dapat dikatakan bahwa kebijakan penggunaan sanksi pidana dalam undang-undang yang bersifat administratif merupakan bagian dari kebijakan kriminal. Penggunaan sanksi pidana bukan hanya terhadap suatu perbuatan yang pada dasarnya dianggap memiliki sifat jahat, namun juga telah digunakan terhadap berbagai perbuatan yang berisfat administratif seperti masalah perizinan, kontrak, dan pembentukan organisasi.

Hukum pidana administrasi (administrative penal law) pada hakikatnya merupakan perwujudan dari kebijakan menggunakan hukum pidana sebagai sarana untuk menegakkan/melaksanakan hukum administrasi. Hal tersebut merupakan bentuk "fungsionalisasi/operasionalisasi/instrumentalisasi hukum pidana di bidang hukum administrasi." Menurut Barda Nawawi Arief, masalah penggunaan hukum/ sanksi pidana dalam hukum administrasi pada hakikatnya termasuk bagian dari "kebijakan hukum pidana" (penal policy).

Sedemikian luasnya hukum administrasi serta begitu banyaknya undang-undang yang bersifat administrasi yang mengatur mengenai ketentuan pidana, sehingga dirasakan perlu pengaturan lebih lanjut yang menyeluruh mengenai perbuatan apa yang akan dikriminalisasi, bentuk pertanggungjawaban pidana, dan sanksi pidana yang akan dikenakan. Pembahasan mengenai kebijakan formulasi pidana akan dibahas pada bahasan selanjutnya.

Perbandingan dengan Undang-Undang di Belanda

Perbuatan yang dapat dipidana di dalam undang-undang ini adalah perbuatan yang melanggar hak privat seseorang, dan perbuatan yang dianggap dapat membahayakan negara dan Uni Eropa melalui transfer data.Penggunaan sanksi yang dilakukan di Belanda lebih banyak menggunakan sanksi administratif khususnya denda. Proses pemberian sanksi pidana dapat gugur apabila subjek tindak pidana telah dikenakan sanksi administratif berupa denda. Pandangan serupa dinyatakan pula oleh Indriyanto Seno Adjie yang menyatakan bahwa pada prinsipnya, seseorang tidak dapat dihukum dengan 2 (dua) jenis hukuman dalam disiplin ilmu hukum yang berbeda untuk pelanggaran yang satu dan sama bentuknya. Dengan demikian, pemberian sanksi pidana di dalam undang- undang yang bersifat administratif diberikan secara selektif dan ditujukan untuk perbuatan yang memang dianggap patut untuk dikriminalisasi.

Pola Pemidanaan dalam Hukum Pidana Administratif

Dari sudut pengertian yang luas tentang pidana dan pemidanaan, pola pemidanaan merupakan acuan, pegangan atau pedoman untuk membuat atau menyusun sistem sanksi (hukum) pidana. Penekanan pada istilah "membuat atau menyusun" sistem sanksi (hukum) pidana dimaksudkan untuk membedakan "pola pemidanaan" dengan "pedoman pemidanaan" (guidenceof sentencing). Pedoman pemidanaan lebih merupakan pedoman bagi hakim untuk menjatuhkan atau menerapkan pemidanaan, sedangkan pola pemidanaan lebih merupakan acuan atau pedoman bagi pembuat undang-undang dalam membuat atau menyusun perundang-undangan yang mengandung sanksi pidana.

Pola Pemidanaan Hukum Pidana Administratif di Indonesia

Pola pemidanaan di dalam undang-undang yang bersifat administrasi yang mengandung sanksi pidana bermacam ragam, dan tidak terdapat kesesuaian satu dengan yang lainnya. Berikut hasil penelitian yang didapatkan penulis mengenai pola pemidanaan dari pembahasan 4 (empat) undang-undang yang bersifat administratif namun memuat sanksi pidana.

- Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran
- Undang-Undang Nomor 44 Tahun 2009 tentang Rumah Sakit
- Undang-Undang Nomor 5 Tahun 2011 tentang Akuntan Publik
- Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat

Berdasarkan hasil penelitian terhadap keempat undang-undang tersebut di atas, maka dapat diketahu bahwa pola pemidanaan di dalam undang-undang yang bersifat administrasi tidak memiliki keseragaman. Ketidakseragaman pola di dalam undang-undang yang besifat administrasi bukan hanya mengenai masalah pola pemidanaan, namun juga mengenai kedaluwarsa penuntutan sebagaimana diatur di dalam Undang-Undang Nomor 5 Tahun 2011 tentang Akuntan Publik, selain itu masalah perbedaan mengenai proses penyelidikan sebagaimana diatur dalam Undang-Undang Nomor 5 Tahun 1999 tentang Laragan Praktek Monopoli dan Persaingan Usaha Tidak Sehat.

Penggunaan Pidana Penjara dalam Hukum Pidana Administratif

Berdasarkan hasil penelitian terhadap keempat undang-undang, diketahui bahwa peranan sanksi pidana dirasa sangat penting sehingga menimbulkan kesan bahwa sanksi pidana justru berperan sebagai sarana utamadibandingkan sarana pencegahan lainnya. Meski pola formulasi pemidanaan berbeda-beda, namun dapat diketahui

bahwa jenis sanksi pidana yang utama dan banyak digunakan adalah sanksi pidana badan, yaitu pidana penjara atau kurungan.

Pola Perumusan Pidana Penjara

Tujuan pemidanaan merupakan gambaran dari kebijakan pidana yang dimiliki oleh suatu bangsa. Tidak adanya suatu tujuan pemidanaan yang jelas berdampak pada arah kebijakan pidana. Hal ini tercermin dari pemilihan jenis atau berat sanksi pidana dalam berbagai perundang-undangan yang tidak berpola.

Pidana penjara lahir setelah sebelumnya masyarakat hanya mengenal pidana mati dan pidana siksa badan. Pidana penjara dianggap kemudian sebagai suatu bentuk pemidanaan yang lebih modern karena memberikan kesempatan kepada seseorang untuk memperbaiki dirinya. Dalam perjalanannya, harapan bahwa penjara mampu menjadi tempat resosialisasi ternyata tidak berjalan sebagaimana yang dibayangkan oleh pelopornya. Dalam kenyataannya, pidana penjara dipandang cenderung menghasilkan stigma dan nestapa serta akibat lain yang negatif.

Namun demikian, masih terdapat pandangan bahwa sanksi pidana penjara masih diperlukan untuk memberikan efek jera, termasuk menggunakan sanksi pidana penjara di dalam undang-undang yang bersifat administratif. Pidana penjara dianggap sebagai sarana yang ampuh untuk mencegah terjadinya kejahatan dan pelanggaran. Penggunaan sanksi pidana pada umumnya dan pidana penjara pada khususnya tetap harus memperhatikan asas-asas hukum yang berkaitan.

Pola pemidanaan yang beragam bukan hanya dalam pemberian pidana penjara, namun juga dalam pemberian sanksi pidana denda. Pembentuk undang-undang pada dasarnya diberikan kebebasan untuk menetapkan jumlah pidana denda. Selain jumlah ancaman, pembentuk undang-undang di luar KUHP juga bebas menentukan apakah pidana denda sebagai alternatif atau sebagai pemberatan dengan perumusan kumulatif atau ditentukan secara alternatif dan/atau kumulatif untuk memberikan lebih kebebasan kepada hakim dalam menjatuhkan pidana.

Dasar adanya kebebasan dalam menentukan pidana tersebut serta belum adanya satu pedoman mengenai pola pemidanaan, mengakibatkan beragamnya pola pemidanaan di dalam undang-undang. Sebenarnya dalam RKUHP ada beberapa pasal yang penting untuk menjadi pedoman dalam perumusan ketentuan pidana, yaitu antara lain: stelsel (sistem) pemidanaan, jenis-jenis pidana, adanya double track system (tindakan, maatregel), dirumuskannya tujuan pemidanaan, serta pedoman pemidanaan (sentencing guideleine).

Mengacu pada pendapat para ahli, maka penulis berpandangan bahwa penggunaan sanksi pidana khususnya pidana penjara pada undang-undang yang bersifat administratif hendaknya dilakukan secara berhati-hati dan hanya diberikan

pada kejahatan yang benar-benar dianggap serius. Tindakan selektif dalam penggunaan sanksi pidana di dalam undang-undang yang bersifat administratif termasuk upaya untuk menghindari terjadinya overkriminalisasi.

Luasnya cakupan hukum administrasi yang antara lain mencakup bidang perbankan, pajak, pasar modal, pelindungan konsumen, kesehatan, dan lingkungan hidup memerlukan suatu sarana yang dapat membantu memberikan jaminan terlaksananya dan dipatuhinya ketentuan di dalam perundang-undangan tersebut. Salah satu sarana yang dapat menjamin terlaksananya dan dipatuhinya ketentuan di dalam perundang-undangan tersebut adalah berupa pemberian sanksi pidana.

Salah satu upaya penanggulangan kejahatan ialah menggunakan hukum pidana dengan sanksinya yang berupa pidana. Namun demikian, usaha ini pun masih sering dipersoalkan. Perbedaan mengenai peranan pidana dalam menghadapi masalah kejahatan ini telah berlangsung ratusan tahun. Menurut L. Packer, usaha pengendalian perbuatan anti sosial dengan mengenakan pidana pada seseorang yang bersalah melanggar peraturan pidana, merupakan suatu problem sosial yang mempunyai dimensi hukum yang penting.

Menurut Sidin, sanksi pidana khususnya penjara akibat pelanggaran administratif sesungguhnya kehilangan basis kostitusionalnya karena kebebasan warga negara tidak bisa dicabut jikalau hanya karena menutupi kamalasan negara untuk memajukan kehidupan warga negaranya. Sebagai catatan bahwa pranata sanksi administratif perlu dikembangkan dalam proses legislasi di Indonesia agar kerja penegak hukum pidana tidak terlalu berat. Permasalahan dalam ranah administratif cukup diselesaikan dalam ranah administratif.

Saat ini terdapat kecenderungan dalam membuat suatu perundang-undangan untuk mencantumkan sanksi pidana. Hampir disetiap undang-undang yang sifatnya sebagai hukum administrasi, terdapat pula ketentuan pidana. Sifat komplementer antara hukum pidana dan hukum administrasi dalam bentuk administratif penal law semakin marak dalam kehidupan modern. Hal ini tampak dari semakin intensifnya kriminalisasi terhadap perbuatan-perbuatan yang sebenarnya masuk wilayah hukum administrasi. Dalam konteks ini dibutuhkan sanksi pidana untuk memperkuat sanksi administratif dalam rangka Irman Putra Sidin, Risalah Sidang Perkara Nomor 38/PUU-XI/2013, Perihal Pengujian Undang-Undang Nomor 44 Tahun 2009 tentang Rumah Sakit terhadap UUD Negara Republik Indonesia Tahun 1945, mendorong seseorang untuk tetap taat terhadap norma-norma yang mendasarinya, seperti dalam masalah lingkungan hidup, perpajakan, kearsipan, perlindungan konsumen, dan sebagainya.

Sanksi pidana di dalam Undang-Undang yang bersifat administrasi pada dasarnya berperan sebagai sanksi pinjaman (mercenary sanction), dimana penggunaan sanksi pidana merupakan langkah-langkah yang bersifat shock therapy yang harus dilakukan terhadap pelaku tindak pidana yang telah menimbulkan kerugian besar. Akan tetapi, pendekatan moral harus dilakukan terlebih dahulu, kemudian langkah

hukum adminstrasi. Apabila permasalahan yang ada masih belum terselesaikan, langkah hukum perdata yang memungkinkan akan dipergunakan terlebih dahulu, dimana penggunaan pidana dipertimbangkan sebagai upaya akhir (the last effort).

Kedudukan Peraturan Kepala Badan Kepegawaian Negara dalam Sistem Perundang-Undangan di Indonesia

Status of the Regulation of the Head of National Civil Service Agency in the Indonesia Legal Sytem

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ABSTRAK

Tesis ini akan menguraikan mengenai eksistensi dan kedudukan Badan Kepegawaian Negara dalam pembinaan manajemen kepegawaian negara, serta kedudukan Peraturan Kepala Badan Kepegawaian Negara dalam sistem perundang-undangan di Indonesia. Penelitian ini merupakan jenis penelitian hukum normatif, dengan menggunakan teknik penelitian kepustakaan (library research) dan penelitian lapangan (field research). Hasil penelitian menunjukkan bahwa Badan Kepegawaian Negara memiliki kedudukan yang jelas, penting, dan strategis dalam pembinaan manajemen kepegawaian negara. Badan Kepegawaian Negara memiliki fungsi pengaturan dalam bentuk Peraturan Kepala Badan Kepegawaian Negara yang memuat norma, standar, prosedur, dan kriteria di bidang kepegawaian. Peraturan Kepala Badan Kepegawaian Negara memenuh kualifikasi sebagai sebuah peraturan perundang-undangan dan memiliki kedudukan yang jelas, sehingga terhadap pelanggaran atas norma, standar, prosedur, dan kriteria yang diatur dalam Peraturan Kepala Badan Kepegawaian Negara dapat dijatuhi sanksi administrasi.

Kata kunci: Kedudukan, Badan Kepegawaian Negara, Peraturan Kepala Badan Kepegawaian Negara, Perundang-undangan

ABSTRACT

This thesis will describe the existence and status of National Civil Service Agency in the development of the civil service management, as well as the status of the Regulation of the Head of National Civil Service Agency in the Indonesia legal system. This research is a normative legal research, by using library research and field research. The results showed that the National Civil Service Agency has a clear position, important, and strategic in fostering civil service management. The National Civil Service Agency has a regulatory function in the form of the Regulation of the Head of National Civil Service Agency, which contains the norms, standards, procedures, and criteria in the field of civil service. The Regulation of the Head of National Civil Service Agency qualifies as a legislation and have a clear position, so that the infringement of norms, standards, procedures, and criteria that determined in the Regulation of the Head of National Civil Service Agency may be imposed to administrative sanctions.

Keywords: Status, National Civil Service Agency, the Regulation of the Head of National Civil Service Agency, Legislation.

BKN diberikan kewenangan melakukan pembinaan dan menyelenggarakan manajemen ASN secara nasional. Dalam melaksanakan tugas pemerintahan di bidang manajemen kepegawaian, BKN menyelenggarakan fungsi antara lain menyusun dan menetapkan kebijakan teknis di bidang manajemen kepegawaian. Berbagai kebijakan tersebut lazim dituangkan dalam bentuk peraturan perundang-undangan, yaitu dengan Peraturan Kepala Badan Kepegawaian Negara.

Sebagaimana telah diuraikan sebelumnya, salah satu fungsi yang diselenggarakan oleh BKN adalah penyusunan dan penetapan kebijakan teknis di bidang manajemen kepegawaian. Berbagai kebijakan teknis tersebut dituangkan dalam bentuk Peraturan Kepala Badan Kepegawaian Negara. Selain itu terdapat pula yang dituangkan dalam bentuk Surat (Edaran) Kepala, Memo Dinas, dan sebagainya. Kebijakan teknis tersebut memuat norma, standar, prosedur, dan kriteria, misalnya tentang pengangkatan Calon Pegawai Negeri Sipil (CPNS) dan PNS, kenaikan pangkat, pengangkatan dalam jabatan, pemberhentian dan pensiun, pengembangan dan penilaian kompetensi, penghitungan tunjangan, dan sebagainya.

Dalam praktiknya, masih terdapat pelanggaran yang dilakukan oleh pejabat pembina kepegawaian baik di pusat maupun di daerah yang menetapkan berbagai keputusan yang tidak sesuai dengan norma, standar, prosedur, dan kriteria yang telah ditetapkan, misalnya keputusan kenaikan pangkat sebelum waktunya, keputusan pengangkatan dalam jabatan yang tidak memenuhi syarat, dan keputusan-keputusan lain yang tidak sesuai dengan ketentuan peraturan perundang-undangan. Terhadap berbagai pelanggaran tersebut, dalam konteks pembinaan dan dalam rangka pengawasan dan pengendalian pelaksanaan norma, standar, prosedur, dan kriteria sebagaimana diamanatkan oleh undang-undang, BKN telah merumuskan beberapa Peraturan Kepala Badan Kepegawaian Negara mengatur mengenai penjatuhan sanksi administrasi bagi pejabat pembina kepegawaian yang melanggar.

Presiden sebagai pengejawantahan kekuasaan pemerintahan yang dimiliki oleh Presiden. Penelitian Andi Fauziah Nurul Utami membahas tentang fenomena kembalinya TAP MPR dalam hirarki peraturan perundang-undangan di Indonesia. Namun, penelitian mengenai kedudukan peraturan pimpinan LPNK, khususnya yang spesifik membahas mengenai kedudukan Peraturan Kepala Badan Kepegawaian Negara dalam sistem perundang- undangan di Indonesia belum pernah dilakukan sebelumnya, sehingga menarik untuk diteliti.

Selain untuk menegaskan kedudukan Peraturan Kepala Badan Kepegawaian Negara dalam sistem perundang-undangan, penelitian ini penting untuk dilakukan untuk mengakomodasi berbagai perkembangan di bidang kepegawaian setelah ditetapkannya Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara, juga untuk menegaskan eksistensi dan kedudukan Badan Kepegawaian Negara dalam pembinaan manajemen kepegawaian negara.

Berdasarkan latar belakang sebagaimana telah diuraikan sebelumnya, maka dapat dirumuskan pertanyaan penelitian sebagai berikut:

a. Bagaimanakah eksistensi dan kedudukan Badan Kepegawaian Negara dalam pembinaan manajemen kepegawaian negara?
b. Bagaimanakah kedudukan Peraturan Kepala Badan Kepegawaian Negara dalam sistem perundang-undangan di Indonesia?

Adapun tujuan penelitian ini adalah untuk menganalisis dan mengkaji eksistensi dan kedudukan Badan Kepegawaian Negara dalam pembinaan manajemen kepegawaian negara.

Teori Negara Hukum

Istilah negara hukum di Indonesia mulai dipakai secara resmi dalam Konstitusi Indonesia 1949 (Konstitusi RIS) dan dalam Konstitusi Indonesia 1950 (Undang-Undang Dasar Sementara tahun 1950 atau biasa disingkat UUDS 1950) pasal 1 ayat (1). Dalam kepustakaan hukum Eropa Barat, maka dalam bahasa Inggris dipergunakan istilah *rule of law* atau *government of justice* untuk menyatakan negara hukum. Seperti dapat diperhatikan, maka dalam kedua istilah itu tidak terselip perkataan negara (*state*), melainkan syarat peraturan hukum itu dihubungkan kepada pengartian kekuasaan (*rule*) atau pemerintah (*government*).

Philipus M. Hadjon mengemukakan bahwa negara hukum Indonesia mengandung unsur: a) Keserasian hubungan pemerintah dan rakyat; b) Hubungan fungsional dan proposional antara kekuasaan negara; c) Penyelesaian sengketa melalui musyawarah, dan peradilan sebagai sarana terakhir; dan d) Keseimbangan antara hak dan kewajiban.

Teori Sumber Kewenangan Pemerintahan

Asas legalitas merupakan pilar utama negara hukum (*legaliteitsbeginsel* atau *het beginsel van wet matigheid van bestuur*). Berdasarkan prinsip ini, wewenang pemerintahan berasal dari peraturan perundang-undangan, artinya sumber wewenang bagi pemerintah adalah peraturan perundang-undangan. Secara teroretis, kewenangan yang bersumber dari peraturan perundang-undangan tersebut diperoleh melalui beberapa cara, diantaranya menurut pendapat Indroharto pada umumnya terdapat dua cara pokok dari mana para Badan atau Jabatan TUN itu memperoleh wewenang pemerintahan, yaitu dengan jalan atribusi dan delegasi. Sedangkan menurut pendapat Irfan Fachruddin, dalam hukum administrasi negara dikenal tiga sumber kewenangan pemerintah, yaitu atribusi, delegasi, dan mandat.

Atribusi adalah kekuasaan pemerintah yang langsung diberikan oleh undang-undang. H.D. van Wijk memberikan pengertian: "*attributie: toekenning van een bestuursbevoegdheid door een wetgever aan een bestuursorgaan*" (atribusi adalah pemberian wewenang pemerintahan oleh pembuat undang-undang kepada organ pemerintah). Dengan kata lain, pada atribusi terjadi pemberian wewenang pemerintahan yang baru oleh suatu ketentuan dalam peraturan perundang-undangan. Di sini dilahirkan atau diciptakan suatu wewenang pemerintahan baru.

Dijelaskan bahwa pembentukan perundang-undangan yang dilakukan baik oleh pembentuk undang-undang orisinil (*originaire wetgevers*) maupun pembentuk undang-undang yang diwakilkan (*gedelegeerde wetgevers*) memberikan kekuasaan kepada suatu organ pemerintah yang dibentuk pada kesempatan it atau kepada organ pemerintah yang sudah ada.

Terdapatnya pengaruh perubahan pandangan dari wetmatigheid van bestuur menjadi rechtmatigheid van berstuur mempengaruhi juga konsep atribusi. Sumber wewenang pemerintah tidak lagi mutlak semata-mata dari undang-undang sebagai produk originaire wetgevers, melainkan dari perundang-undangan sebagai produk gedelegeerde wetgevers yang dipegang pemerintah.

Menurut H.D. van Wijk delegasi adalah sebagai berikut: "*overdracht van een bevoegdheid van het ene bestuursorgaan een onder*" atau dapat diartikan sebagai penyerahan wewenang pemerintahan dari suatu badan atau pejabat pemerintah kepada badan atau pejabat pemerintah yang lain. Dengan demikian, setelah wewenang diserahkan, pemberi wewenang tidak mempunyai wewenang lagi.

Wewenang yang diperoleh melalui atribusi maupun delegasi dapat dimandatkan kepada badan atau pegawai bawahan apabila pejabat yang memperoleh wewenang itu tidak sanggup melakukan sendiri. H.D. van Wijk sebagaimana dikutip Irfan Fachruddin menjelaskan arti dari mandat yaitu: "*een bestuursorgaan laat zijn bevoegdheid namens hem uitoefenen door een ander*" yaitu suatu organ pemerintah mengizinkan kewenangannya dijalankan oleh organ lain atas namanya.

Jika organ yang secara resmi memiliki wewenang pemerintahan tertentu karena atribusi atau delegasi tidak dapat menangani sendiri wewenang tersebut, para pegawai bawahan dapat diperintahkan untuk menjalankan wewenang tersebut atas nama organ yang sesungguhnya diberi wewenang. Dalam hal ini kita dapat berbicara tentang mandat. Berbeda dengan delegasi, pada mandat, mandans atau pemberi mandat tetap berwenang untuk melakukan sendiri wewenangnya apabila pemberi mandat tersebut menginginkan, dan memberi petunjuk kepada mandataris mengenai apa yang diinginkannya. Mandans tetap bertanggung jawab atas tindakan yang dilakukan mandataris.

Dalam kajian Hukum Administrasi Negara, mengetahui sumber dan cara memperoleh wewenang organ pemerintahan ini penting, karena berkenaan dengan pertanggungjawaban hukum (rechtelijke verantwording) dalam penggunaan wewenang

tersebut, seiring dengan salah satu prinsip dalam negara hukum "geenbevoegdheid zonder verantwoordelijkheid" atau "there is no authority without responsibility" (tidak terdapat kewenangan tanpa pertanggungjawaban). Di dalam setiap pemberian kewenangan kepada pejabat pemerintahan tertentu tersirat pertanggungjawaban dari pejabat yang bersangkutan.

Sanksi Administrasi atas Pelanggaran Peraturan Kepala BKN

Terkait pengawasan dan penerapan sanksi, tentunya perlu melihat sejauhmana kewenangan yang dimiliki BKN secara yuridis normatif. Di di dalam Undang-Undang Nomor 8 Tahun 1974 tentang Pokok-Pokok Kepegawaian sebagaimana diubah dengan Undang-Undang Nomor 43 Tahun 1999 pengawasan dan pengendalian manajemen PNS mutlak menjadi kewenangan BKN. Sehingga BKN dapat menjatuhkan sanksi administratif terhadap pelanggaran atas ketentuan yang terkait dengan manajemen PNS. Sedangkan di dalam Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara kewenangan pengawasan dipecah dan diberikan kepada tiga institusi yaitu kepada:

a. Kementerian PAN dan RB, berupa pengawasan atas pelaksanaan kebijakan ASN;
b. KASN, berupa pengawasan terhadap penerapan asas serta kode etik dan kode perilaku ASN; dan
c. BKN, berupa pengawasan dan pengendalian pelaksanaan norma, standar, prosedur, dan kriteria manajemen ASN.

Secara sederhana pembagian kewenangan pengawasan dijelaskan sebagai berikut: Kementerian PAN dan RB mengawasi pelaksanaan atas kebijakan ASN yang sifatnya umum, misalnya pengawasan terhadap kebijakan penghentian sementara (moratorium) penerimaan CPNS, apakah instansi-instansi pemerintah menaati kebijakan tersebut atau tidak. KASN mengawasi penerapan kode etik atau kode perilaku ASN, misalnya pengawasan terhadap PNS atau pejabat negara dalam menggunakan fasilitas-fasilitas milik negara. Lihat Pasal 34 Undang-Undang Nomor 43 Tahun 1999. Meskipun pada kenyataannya, pengawasan dan pengendalian oleh BKN yang dilakukan berdasarkan UU ini belum berjalan maksimal dalam arti penegakan atau penerapan sanksi belum menyentuh sampai level yang tertinggi, utamanya karena pejabat pembina kepegawaian berasal dari jalur politik, seperti Gubernur/ Bupati/ Walikota yang memiliki senjata berupa otonomi daerah. Sedangkan BKN melakukan pengawasan atas norma, standar, prosedur, dan kriteria di bidang kepegawaian, misalnya apakah kenaikan pangkat PNS dilakukan sesuai waktunya atau tidak, atau apakah proses pemberkasan CPNS telah memenuhi persyaratan yang ditentukan atau tidak, dan lainnya.

Berdasarkan pembagian kewenangan tersebut, maka kewenangan penerapan sanksi administrasi yang dapat dilakukan BKN terbatas pada pelanggaran terhadap norma, standar, prosedur, dan kriteria atau kebijakan teknis di bidang kepegawaian. Norma, standar, prosedur, dan kriteria atau kebijakan teknis di bidang kepegawaian dituangkan dalam bentuk hukum Peraturan Kepala Badan Kepegawaian Negara. Dengan demikian, dapat dikatakan pula penerapan sanksi administrasi dilakukan oleh BKN terhadap pelanggaran atas Peraturan Kepala Badan Kepegawaian Negara.

Baik Undang-Undang Nomor 8 Tahun 1974 tentang Pokok-Pokok Kepegawaian sebagaimana diubah dengan Undang-Undang Nomor 43 Tahun 1999 maupun Undang-Undang Nomor 5 Tahun 2014 tidak mengatur secara eksplisit dan tidak memberikan delegasi kewenangan secara tegas mengenai pengaturan sanksi administrasi yang dapat diterapkan oleh BKN. Meskipun demikian, dengan berpijak pada kewenangan pengawasan dan pengendalian yang dimiliki BKN maka BKN tetap dapat merumuskan dan menerapkan sanksi administrasi tersebut. Secara teoretis, berdasarkan pendapat Maria Farida, delegasi kewenangan memang ada yang berbentuk tegas dan ada yang tidak tegas. Dalam hal ini, undang-undang tidak memberikan delegasi pengaturan secara tegas, namun tersirat dalam kewenangan pengawasan dan pengendalian yang dimiliki BKN. Sementara jika berpijak pada pendapat Hans Kelsen bahwa maksud diberikannya sanksi oleh suatu tatanan hukum adalah untuk menimbulkan suatu perbuatan yang dikehendaki oleh pembuat hukum atau oleh ketentuan hukum itu sendiri, maka dengan kata lain sanksi administrasi di bidang kepegawaian ini diterapkan agar isi, materi, subtansi, ataupun ketentuan-ketentuan yang diatur oleh BKN selaku pembuat Direktur Peraturan Perundang-undangan BKN, wawancara, dilakukan pada 15 November 2014 di Kantor BKN. Hukum (Peraturan Kepala Badan Kepegawaian Negara) dapat dilaksanakan dengan sebaik-baiknya. Sedangkan secara praktis pun penerapan sanksi administrasi yang dilakukan oleh pembuat hukumnya akan lebih mudah dan efektif daripada organ lain yang melaksanakannya. Dengan kata lain sanksi administrasi di bidang kepegawaian akan lebih mudah dilaksanakan, jika dilaksanakan sendiri oleh BKN selaku pembentuk Peraturan Kepala Badan Kepegawaian Negara.

Berdasarkan uraian tersebut, maka berdasarkan kewenangan yang dimilikinya, baik secara teoretis maupun secara praktis dapat dikatakan bahwa BKN dapat menjatuhkan atau menerapkan sanksi administrasi terhadap pelanggaran atas norma, standar, prosedur, dan kriteria di bidang kepegawaian. Dengan demikian, akan terlihat bahwa kewenangan BKN dalam pembinaan manajemen kepegawaian negara terjalin dengan padu, mulai dari kewenangan pengaturan, kewenangan pengawasan, sampai dengan kewenangan penjatuhan sanksi terhadap pelanggaran atas norma, standar, prosedur, dan kriteria di bidang kepegawaian.

Kedudukan Peraturan Kepala BKN Telah Diakui

Eksistensi BKN terus berkembang seiring berkembangnya pengaturan mengenai kepegawaian di Indonesia, mulai dari urusan pegawai yang berubah menjadi urusan administrasi kepegawaian, kemudian bertransformasi menjadi manajemen kepegawaian, hingga yang terkini berubah menjadi manajemen aparatur sipil negara. BKN memiliki kedudukan yang jelas, penting, dan strategis dalam pembinaan manajemen kepegawaian negara. Sebagai salah satu lembaga pemerintah nonkementerian (LPNK), BKN berkedudukan di bawah dan bertanggung jawab kepada Presiden untuk melaksanakan tugas pemerintahan di bidang kepegawaian. Mengingat penting dan strategisnya urusan kepegawaian, maka dalam pelaksanaan tugasnya, BKN memiliki dan membangun hubungan dengan lembaga pemerintahan yang lain, demi terlaksananya urusan pemerintahan di bidang kepegawaian dengan sebaik-baiknya.

Kedudukan Peraturan Kepala BKN dalam sistem perundang-undangan di Indonesia adalah diakui keberadaannya dan mempunyai kekuatan hukum mengikat, karena diperintahkan oleh peraturan perundang-undangan yang lebih tinggi atau dibentuk berdasarkan kewenangan pengaturan yang dimiliki oleh Badan Kepegawaian Negara. Secara teoritis Peraturan Kepala Badan Kepegawaian Negara juga memenuhi kualifikasi dan ciri-ciri dari peraturan perundang-undangan. Berdasarkan kedudukannya tersebut, maka terhadap pelanggaran atas norma, standar, prosedur, dan kriteria yang diatur dalam Peraturan Kepala Badan Kepegawaian Negara dapat dijatuhi sanksi berupa sanksi administrasi.

“Application of Good Corporate Governance Principle in Indonesia” A Comparative Study of Corporate Governance in the UK and Indonesia

“Penerapan Prinsip Tata Kelola Perusahaan yang Baik di Indonesia” Studi Komparatif Tata Kelola Perusahaan di Inggris dan Indonesia

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The development of modern Corporate Governance is tied to the economic development of industrial capitalism whereby different Governance structures evolved with different corporate forms designed to pursue new economic opportunities or resolve new economic problems. The first recorded instance of a non-financial company with a divided share capital was the Dutch East India Company established in the early seventeenth century when more than 1,000 investors put their money into it, and were thus rapidly confronted with the key Corporate Governance issues.

Interestingly, Adam Smith held an unfavourable view of the corporate forms proliferating in the eighteenth century as evident from the following passage from his writing:

> 'The directors of such joint-stock companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company." (Smith. A 1937: 300)

Such concerns were strengthened with the increased scale and complexity of enterprises with technological advances and the expansion of markets in the nineteenth century. The need for additional capital pushed the joint-stock company from the margins to the mainstream of economic activity. Since investors remained wary of staking their personal fortunes on the future of unincorporated joint-stock companies with unlimited liability, in the UK incorporation with limited liability was finally granted in 1862, with a surge in company incorporations followed by some early collapses and evidence of fraud (Tricker, R.I. 1984: 35).

Indonesia had done a lot of initiatives and efforts to implement good corporate governance, both from government side as well as private. Those initiatives and efforts include establishment of corporate governance institutions, adoption of new laws and amendments of existing ones to support corporate governance implementation process in the country. More specifically, Indonesia has taken several steps towards improving corporate governance standards and enhancing legislation.

Corporate governance has become a familiar and increasingly popular term in Indonesia. With the introduction of ICL 1995 (ICL adopted by the Indonesia House of Representatives dated 7 March 1995, as repealed and replaced by the Company Law adopted by the House of Representatives dated 16 August 2007), the role of the private sector in economic development and job creation in Indonesia began to accelerate. The following two decades brought increasingly sophisticated domestic production, private enterprise growth and increased global competition. The downside to these

developments has been the occurrence of major corporate scandals. While various domestic and international efforts have made corporate governance a household name, few Indonesian companies appear to truly appreciate the depth and complexity of this topic.

Indeed, corporate governance reforms are often introduced superficially and used as a public relations exercise, rather than as a tool to introduce the internal structures and processes that enable a company to hold the trust of its shareholders, increase the company's ability to access capital and reduce vulnerability to financial crises. But to successfully introduce these structures and processes, a company must fully and continually commit to the principles of fairness, transparency, accountability and responsibility.

The phenomenal growth of the Indonesia economy has diverted especially the attention of economists eastwards in search for the factors that led to such a change. For more than a century the western free-market theory of economic development has served as a model for nations around the world. With the failure of the developing world to achieve the same results with the western model and the serious economic problems now faced by the western economies, the new Indonesia market economic model challenges the long established fundamentals of economic development (www.ceicdata.com). As discussed above, commitment to principles of Corporate Governance and to maintaining a competitive market are key determinants of the sustainability of economic growth. A study of the Indonesia economic model from this perspective and a comparison with the developed world, especially the United Kingdom, as a pioneer in the establishment of modern corporate governance and competition standards, can therefore provide a constructive conclusion with regards to the merits and de-merits of the economic and legal framework in the developed and the emerging world respectively.

Such a study therefore requires that the empirically tested legal and regulatory framework of a developed country like UK be used as a model to test the effectiveness and sustainability of the Indonesia legal and economic framework. In addition to the legal codes, it is also important to analyse reports of actual practice to find whether an achievement or failure is attributable to the legal framework or purely business practice. It is also important that the experiences of other economies that have a similar philosophy and relevant history for economic development be analysed. The purpose of this paper is to compare corporate governance in the UK and Indonesia.

One-tier Board and Two-tier Board System

Different national models of board structure are found around the world. A majority of jurisdictions have one-tier boards. Other jurisdictions have two-tier boards

that separate the supervisory and management function into different bodies. EU regulation offers the choice of the two systems for European public limited-liability companies (Societas Europaea) (Council Regulation (EC), 2001) and some EU countries have established a framework that gives domestic listed companies the choice.

In a one-tier board system such as UK, the role of the supervisory board and managing board made in one container. The container is referred to as the board of directors (Ticker 2009: 10). There are four types of board structure in a one-tier board system. The first type, all executive director of the board members. Top managers are also included in board members. This kind of type widely used by small companies, companies family, and business start-ups. The second type, the membership of the board of directors is filled by executive directors as members of the majority and as a non-executive director members of the minority. The third type contrasts with the second type. The majority of members board are non-executive directors, most of whom are directors independent. In the latter type, all non - executive directors are board members. Type board this kind widely used by non-profit organizations. this structure actually similar to the two-tier structure that is widely used by countries European mainland.

Indonesian companies are not able to choose between different corporate governance frameworks, depending on the structure of the company's Board. Essentially, two opposite board models have been developed in Europe, the one-tier board (unitary board system) and the two-tier board (dual system).

In dealing with corporate governance issues, countries have used various combinations of legal and regulatory instruments on the one hand, and codes and principles on the other. In many jurisdictions, corporate governance standards are included in company law and securities law. Company laws set forth the default option concerning corporate structures whose detailed framework is determined by the company's articles and bylaws. Securities laws set forth binding requirements, making shareholder protection enforceable for regulators. This chapter is a high-level summary of certain key differences between UK and Indonesia law and practice with respect to corporate governance matters.

Corporate governance frameworks typically comprise elements of legislation, regulation, self-regulatory arrangements, voluntary commitments and business practices that are the result of country specific circumstances, history and tradition. The desirable mix between legislation, regulation, self-regulation, voluntary standards, etc. in this area will vary from country to country. As new experiences accrue and business circumstances change, the content and structure of this framework needs to be adjusted. Companies will need to carefully monitor such adjustments on a regular basis and update their governance systems accordingly (OECD Principles of Corporate Governance 5: 2014).

In the UK, the principles of good corporate governance for companies are set out in the UK Corporate Governance Code (the Code). Such companies may also be subject to the Companies Act 2006 (for companies incorporated in the UK), the Financial Services and Markets Act 2000, the Criminal Justice Act 1993, the Insolvency Act 1986, Prospectus Rules, Listing Rules (the LR, including the Model Code), Disclosure and Transparency Rules (the DTR, as contained in the Financial Services Authority's Disclosure and Transparency Rules Sourcebook'), the LSE Admission and Disclosure Standards, the City Code on Takeover & Mergers, and the company's articles of association (which, for companies incorporated in the UK, governs the internal management of the company and the rights of its shareholders).

Remuneration

The Combined Code states that 'the board should establish a remuneration committee of at least three, or in the case of smaller companies, two independent non-executive directors' (The Combined Code 2008 : 1). The remuneration committee should make recommendations to the board, within agreed terms of reference, on the company's framework of executive remuneration and its cost. It should determine on their behalf specific remuneration packages for each of the executive directors, including pension rights and any compensation payments (C. Mallin 2009: 170).

The level of remuneration must not be more than is necessary to motivate board members and rewards must be linked to performance. The process for developing remuneration policy must be transparent and no individual must be involved in deciding his or her own remuneration (Combined Code 2010). There is also further guidance on designing performance related remuneration in the Schedule to the Code (ibid.).

In June 2012, the British government outlined proposals to give investors a stronger say on executive pay. The measures would give shareholders a binding vote on a company's pay policy once every three years. The company would have to adhere to this, or seek approval for any change. This year's annual shareholder meetings in Britain and America have been notable for the high number of investor revolts over executive pay (The Economist 2012: 12).

Incentive remuneration schemes are common in many countries and come in many varieties. Few companies have such arrangements that are identical to one another. Executive remuneration plans are usually put in place in an effort to motivate executives, and better align their interests with the interests of shareholders. Normally include performance based bonuses. Incentive remuneration schemes may not be the most effective way of alleviating inherent conflicts of interests and, in any event, should always be subject to careful legal and financial examination and the approval of both the Board of Commissioners and the GMS.

Remuneration plans for non-executive directors will differ considerably. In Indonesia, the remuneration granted to each individual member of the Board of Commissioners and the Board of Directors over the relevant financial year should be disclosed as a separate item in the annual financial statements of the company and shall be reported to the GMS at its annual meeting.

Independence of Directors

In the UK there are different requirements for FTSE 350 companies, compared with those for smaller companies, regarding the minimum number of independent directors. For FTSE 350 companies, independent directors must make up at least half of the board, while smaller companies are only expected to have at least two independent directors. The UK Code requires the board to identify in the annual report each non-executive director it considers to be independent.

ICL sets out that the Board of Directors, as an executive unit, shall undertake its duty to manage the company for the interest of the company in the pursuit of its purposes and objectives (ICL, Article 92 paragraph 1). The Board of Directors shall have the authority to manage the company in accordance with the policy which is considered accurate, and shall be in accordance with the provision as regulated under the ICL and/or the AoA (ICL, Article 92 paragraph 2). Further, the CG Code stated that the Board of Directors as a company organ shall function and be responsible collegially for the management of the company. Each member of the Board of Directors can carry out its duty and take decisions in accordance with their respective assignments and authorities. However, the execution of tasks by each member of the Board of Directors remains to be a collective responsibility. The position of each respective member of the Board of Directors including President Director is equal

Nomination and Election of Directors

A UK company's articles of association generally provide the basis for the rules governing the election of the company's directors, who are typically proposed by the company's nomination committee and elected by the shareholders by an ordinary resolution carried by a simple majority of those voting.

In the Indonesia, The CG Code reinforced the provision above and stated that members of the Board of Directors are appointed and terminated by the GMS through a transparent process. For publicly listed companies, SOEs, province and region-owned companies, companies that raise and manage public funds, companies of which products or services are widely used by public, and companies with extensive influence on environment, the process of evaluating the candidates for the member of the Board

of Directors is carried out by the Nomination and Remuneration Committee prior to the GMS.

ICL does not set the maximum term, neither limit the re-election of the board of Directors' member for a certain number of terms. The company's AoA would specify the period. However, the common practice in Indonesia is that the terms usually 5 years and can be re-elected for maximum 2 times. Please note that members of the Board of Directors may be dismissed at any time by virtue of a GMS resolutions stating the reason therefor (ICL, Article 105 paragraph (1)).

For public listed company, Regulation Number IX.J.1 in Article 13(b) provides that term for the member of the Board of Director and Board of Commissioner must not exeeceds 5 (five) years for 1 period or until the end of the annual GMS at the end of 1 period of tenure.

Action at Board of Director Meetings

Under English law, there is no requirement for a fixed notice period in a company's articles of association regulating the calling of a meeting of the board of directors or of a board committee. Instead, the board decides the length of notice required and how notice may be given (whether in writing or by word of mouth). Similarly, the quorum required for a board meeting is usually left to the board to decide, although it is common for the articles to provide a default position of a quorum of two if no figure is set by the board. Typically a company's articles of association will provide that a vote of the majority of the directors present at a meeting at which a quorum has been established is required to take any action.

The Board of Directors is a governing body, which operates according to procedures defined by the ICL, the AoA, or the internal regulations of the company. The Board of Directors of a Company shall consist of 1 (one) member of the Board of Directors or more. For Companies engaging in mobilizing public funds, issuing debt instrument or an Issuer shall have a minimum of 2 (two) members of Board of Directors. In the event the Board of Directors consists of 2 (two) members of the Board of Directors or more, the distribution of duty and authority among the members of the Board of Directors shall be determined based on the GMS resolution.

New Issuances of Shares

Pre-emptive rights ensure that all shareholders of the same class are treated equally. They provide the opportunity to purchase new shares when the company wants to increase its capital. Pre-emptive rights help protect shareholders from dilution, which

can result in losing some of their rights due to the decrease of the percentage of shares they hold.

When increasing the charter capital from internal sources, additional shares must be distributed to all owners of shares of each type and class. In addition, the number of new shares of each type and class that are distributed to each shareholder must be pro rated to the number of shares already held by him/her. Market practice is that the number of additional shares issued will be rounded down to a unit of share. The GMS shall decide on how to treat the remaining shares due to rounding. Some companies may transfer the face value of those shares to fund for investment and development; some may repurchase those shares for treasury shares.

Reducing the nominal value of shares without changing the number of shares. By this mode, the company shall withdraw shares from shareholders and issue new shares with reduced par value. The company shall have to pay to their shareholders an amount of money equal to the number of shares of each shareholder times the difference between old and new par values.

Decreasing the charter capital by decreasing the nominal value of shares without changing the number of shares. By this mode, the company shall withdraw shares from shareholders and issue new shares with reduced par value. The company shall have to pay its shareholders an amount of money equal to the number of shares of each shareholder times the difference between old and new par values. Currently, there is no specific regulation or guidance on increasing the charter capital by increasing the nominal value or accountable par of shares.

Treasury Shares

There is a general rule prohibiting UK companies from acquiring their own shares. On- and off-market purchases by UK-incorporated listed public companies are permissible if carried out in accordance with the strict requirements of the Companies Act 2006 and the LR, which include obtaining shareholder consent, with certain additional limitations.

Subject to restrictions, a UK public company that is listed on the London Stock Exchange may acquire its own shares and hold them in treasury, unless the company's articles of association prohibit such shareholding or otherwise require any shares repurchased to be cancelled.

Required Information for the Decision

There are different means of regulating related party transactions. Prohibitions of specific types of transactions are found in the U.K., where the U.K. Companies'

Act prohibits directors from entering into certain transactions that are deemed detrimental to the company (Section 330(2), U.K. Companies' Act). The advantage of this first approach is clear, all practitioners know where the boundaries are. There is no definitive analysis on the possibilities to circumvent the prohibition. The disadvantage is the rule's lack of flexibility, even economically useful transactions may not come into being when the law contains a flat prohibition. Additionally, parties may also make great efforts to circumvent the rule.

In some jurisdictions there have been calls to change the approach and foster more substantive criteria of fairness. Transactions with conflicting interests should always be open to challenge on the basis of unfairness, at least gross unfairness. This second approach is frequently found in U.S. law and in the U.K. (Commonly seen in the U.K. See The Law Commission and The Scottish Law Commission's report "Regulating Conflicts of Interests and Formulating a Statement of Duties," September 1999, p.282, document Law Com. No. 261).

Indonesian Company Law and other regulations including decrees of the Chairman of OJK do not stipulate in details on the approving of affiliated transactions. ICL and the OJK Regulation only stated that transaction with value of more than 50% (fifty percent) of company's equity should be approved by the GMS.

Conclusion

The emergence of scandals affecting major companies in both UK and the United States in the 1980s more people aware of the need for corporate governance system. Previously, corporate governance was only growing in developed countries such as UK and America, but soon also growing in other countries, including Indonesia.

Many countries have sought to develop and improve the system to incorporate the principles of corporate governance. This is done, among others, both with reference to the guidelines or international standards that are made or to set up and establish a committee or a separate body which among other things serves to make corporate governance guidelines. For example the World Bank, the Organization of Economic Cooperation and Development (OECD). In Indonesia has also formed a committee in charge of good corporate governance, namely the National Committee on Governance (NCG). Since it was introduced by OECD, corporate governance principles are used as a reference by many countries in the world, including Indonesia. The principles were formulated as universe as possible, so it can be used as a reference for all countries or companies and can be harmonized with the legal system, rules, or values prevailing in each country.

The most fundamental difference in corporate governance in the UK and Indonesia is, England using one-tier system which is described as a structure in which there is no separation of their own leadership for supervisory functions and not

limitation in function. Obviously this system has shortcomings because of the lack of surveillance systems. However, if viewed from the positive side, this system makes the leader of the organization can freely give directives and orders based on the vision and mission of the company. While Indonesia which adopts a two-tier regulatory agency that controls are policies issued by a leader.

If we see in the United States and Britain are indeed ways of thinking, acting, and running a business as well as law enforcement is more advanced than Indonesia that is still laden with corruption and weakness of the law is suitable for wearing a one - tier system. In Indonesia it was not yet able to run a system like this because of the concentration of ownership by certain parties that allows the affiliate relationship between the owner, supervisor, and director of the company, the ineffectiveness of the commissioners, and weak law enforcement in Indonesia alone.

The Virtue and Problems of Indonesian Development Trust Funds

Keutamaan dan Permasalahan Dana Perwalian Pembangunan Indonesia

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ABSTRACT

Development trust funds emerged along with foreign aid itself. They emerged with the evolution of aid conditionality provided by international donors to the recipient countries. The Paris Declaration in 2005, signed by over a hundred donor agencies and recipient governments, attempted to change the nature of contemporary aid relationships by adopting ownership and harmonization as the key pillars of a new aid paradigm. The Paris Declaration changed the pattern of aid and the conditions attached to aid. Development trust funds are funds established using money from either foreign or domestic grants that legally set aside from the regular state budget. The funds will be used for the development purposes and managed by the national trustee institution. Development trust funds have only recently been permitted in Indonesia based on Presidential Regulation No. 80/2011 regarding the Establishment of Trust Fund (Perpres No. 80/2011). The enactment of Perpres No. 80/2011 was followed by the establishment of two national development trust funds in Indonesia: the Millennium Challenge Account-Indonesia (MCA-I) and the Indonesia Climate Change Trust Funds (ICCTF).

Using interviews with Development Trust Funds officers and case studies of the existing development trust funds, this article explores the problems with the Indonesian development trust funds as currently constituted. After providing introduction, this thesis discusses the historical background of the development trust fund, some precedents of development trust funds in several countries and development trust funds under international law. It also identify the key principles of the development trust funds which has been established around the world. Finally, this article evaluates the Indonesian development trust funds regulation as well as the implementation of the existing development trust funds.

This research concludes that the current trust fund regulation is missing from some substantial provisions regarding the legal status, and provisions related to good and accountable governance of Indonesian development trust funds. This work suggests the government of Indonesia should amend the current trust fund regulation in order to make the development trust fund operated more accountable, effective, and efficient.

Commonly, there are four major sources that can be used for the purpose of development funding: private savings, public savings, foreign trade or investment and foreign assistance. Public and private savings and foreign investment were all, however, insufficient to meet country capital needs. The next appropriate alternative is to intensify the foreign trade or to boost exports. However, this will take longer than just one, two or three years.

External financing such loans and grants could serve a strategic role to fill the gaps and to provide vital inputs, which often are not readily forthcoming from the domestic resources. One of the alternatives in which the government can effectively make best use of prevailing resources is through development trust funds. Development trust funds are a fund established using money from either foreign or domestic grants that legally set aside from the regular state budget. The funds will be used for the development purposes and managed by the trustee institution. The trustee institution is an ad-hoc government entity established by a ministerial regulation that governed by the Board of Trustee. The member of the Board of Trustee consists of government and non-government officials, including representatives of civil society.

Development trust funds have recently been permitted in Indonesia based on Presidential Regulation No. 80/2011 regarding Trust Fund (Perpres No. 80/2011). The enactment of Perpres No. 80/2011 was followed by the establishment of two national development trust funds in Indonesia: Millennium Challenge Account-Indonesia (MCA-I) and Indonesia Climate Change Trust Funds (ICCTF). Despite Indonesia's best effort to set up development trust funds to maximize its financial capacity for development, the legal and organizational framework of the trust funds has an uncertain conceptual foundation. This situation will lead to several fundamental problems such as uncertain legal status of the trust funds, inadequate governance procedure and lack of accountability of the organization's activity. This thesis explores the problems with the development trust funds as currently constituted. It then suggest that the government of Indonesia should amend its trust fund regulation to bring the rules governing the development trust funds into compliance with the international best practices.

This article discusses the origins of the development trust fund concept and the recent evaluation of development trust funds in Indonesia. It identifies the key principles of the development trust funds which has been established around the world and the technical issues to be addressed in designing the legal and organizational framework of new development trust funds. Finally, this article evaluates the Indonesian development trust fund regulation as well as the implementation of the existing development trust funds.

The IMF specified that PRSPs should be formulated according to five core principles. PRSPs should be: country driven; result-oriented; comprehensive; partnership-oriented; and based on a long-term perspective. More 'ownership' of the

development process is now strongly advocated as counterweight to conditionality, the thinking being that if recipient countries can develop and commit themselves to their own national development strategies, the could persuade donors to respond to their needs, rather than the other way around.

The big theme for aid and global development in the new era of millennium was the Millennium Development Goals (MDGs). In the Millennium Summit that organized by the UN in 2001 the World Bank, IMF, OECD and almost all world leaders adopted the MDGs. Poverty eradication, environment, human rights and good governance were included, bAid C g the United Nation. In September 2002, President Bush published a national Security Strategy establishing development as third pillar of US national security, together with defence and diplomacy. It was part of the US initiatives to the Global War on Terror after terrorist attack in September 2011. A new plan for foreign aid, the first one since Kennedy's proposal in the sixties, was proposed as Millennium Challenge Account (MCA). The Millennium Challenge Corporation (MCC) was established in the early 2004 to carry out the new initiatives. MCC was established separate from USAID and with a new aid delivered concept: supporting the only best development performers; low and low middle income countries, having demonstrated strong commitment to political, economic, and social reforms.

With full implementation of the principles aid effectiveness by developing and adopting exclusively a national action plan. Jakarta Commitment, which was signed by the GoI on January 12th, 2009 and adopted by the 26 development partners is a Road Map to implement the agenda of aid for development effectiveness in Indonesia. Jakarta Commitment is a strategic step initiated by the GoI to take advantage of a large agenda of the international aid effectiveness as expressed in the Paris Declaration to push reform process and develop a wider partnership to achieve development effectiveness.

The agenda of the Jakarta Commitment is based on the Paris Declaration principles and the Accra Agenda for Action through three underlying commitments including strengthening country ownership over development, building more effective and inclusive partnerships for development and delivering and accounting development results.

The commitment highlighted three area of reforms in the field of national development policy: (1) Planning and budgeting reform based on the Law No. 17 Year 2003 on State Budget and Law No. 25 Year 2004 on National Development Planning System; (2) Government Procurement Reform by enacted a new law regarding national procurement system and established a new agency called National Procurement Policy Agency; and (3)

The National Trust Fund (NTF) A4DES is prepared to serve as a nationally owned and administered trust mechanism for pooling external funding resources from various development partners in a manner that could improve alignment between external

assistance and national system. This is done in order to establish a stronger national ownership in defining aid architecture and processes consistent with Indonesia's Aid for Development Effectiveness agenda, particularly the Jakarta Commitment.

In the early stage, the trust fund will be administered by the UNDP (as a 'trustee'), in the form of Transitional Multi-Donor Fund (TMDF). The purpose of TMDF is to channel development partners' support for the implementation of A4DES work program in an effective, efficient, transparent and accountable manner, so that the impact of such assistance can be maximized. TMDF also serves as a mean to identify, select and develop the necessary capacity for a national entity as part of the step to form a Nationally Managed Trust Fund that is fully managed by Indonesian entity.

One important aspect which had been underlined by the WG on PFM was the idea to separate the administrative mechanism between foreign loans and grant arrangement. This is caused by fundamental differences in characters of foreign loans and grants. WG on PFM suggested that the government should amend the PP No. 2/2006 to simplify the government procedures especially for the foreign grants to be administered in the state budget. Additionally, WG PFM also tried to satisfy their second task to find alternative financing sources and/or new funding schemes. The WG on PFM had analyzed the operation of several multi donor funds in Indonesia. Some important findings include development trust fund requires a clear policy and regulation to ensure the smooth implementation of activities funded through this mechanism. The clarity of legal aspects in establishing a trust fund, such as the appointment of national trustee is also important. This was also become one of the most important recommendations from A4DES to the government of Indonesia to establish a national policy regarding a development trust fund. After conducted long discussion with various stakeholders, PP No. 10/2011 as a replacement of the PP No. 2/2006 finally was enacted by the President of Indonesia along with the provision regarding development trust fund within the regulation.

Since the increasing number of trust funds that are governed by international law, there are already desirable attempt to create a codification of the fundamental principles that should be observed in the administration of the trust funds. Many development practitioner, scholars and international donor agencies have issued guidebooks, handbooks or standard manuals in order to promote accountability in setting up, managing, monitoring, and evaluating a development trust fund in various area.

The legal status of the development trust funds may take one of two distinct legal forms. The most common form is without independent legal personality, involves setting up the trust fund under the auspices of the host institution. The other form of the trust funds is legally independent, involves setting up the trust fund as a legal entity under the national law.

Without Independent Legal Personality

From the international institutional law perspective, trust fund are technically a financial vehicles without independent legal personality, created by an administrative agreement between donor(s) and multilateral trustee. Donors maintain effective control over trust funds, which are not commingled with the general resources of multilateral agencies.

The legal person of the trust is distinct from that of the donor, as well as from the other assets of the trustee, even though the assets of the trust pass to the ownership of the trustee for the duration of the trust relationship. Due to this constrain, they generally cannot enter into contracts or to be subject of privileges and immunities. For that purpose, the international organization acting as trustee, or another organization or entity having legal personality under international or local law, must act on contractual matters.

Some example of non-legal personality trust funds are various trust funds administered by the United Nations, the Food and Agriculture Organization, the World Health Organization, the International Labor Organization, and the Inter-American Development Bank.

In the area of conservation trust fund, a study conducted by the Global Environment Facility found that in order to be successful, trust funds must be more than just financial mechanisms. They should be self-governing institutions and play key roles in the development of national conservation strategies.

Under this approach, donors create a new collective financing effort as an independent legal entity under the national law of a country whose location and legal provisions for non-profit entities meet donors' needs.382 They may be created by Deeds of Trust, chartered by the government383, by article of incorporation or by a statute.384 The establishing document not only will create a legal right for the board of trustees to initiate suits on behalf of the trust, it also forms the basis for removing the board when there is any wrong-doing or dissolving the trust when the objectives are not being carried out.

The independent legal status will effectively ensure the trust fund independence from government that has clear and well enforced laws concerning private non-governmental organizations (including foundations or trusts). Most international donors will only contribute to a Fund that is legally independent and not controlled by government. For example, in the interest of promoting and building civil societies, the United States Agency for International Development (USAID) and the Global Environmental Funds (GEF) refuse to contribute to the capital of a fund whose board has more than 50 percent government representation.

Trust fund with independent legal personality is emerged as a widely accepted option when the G8 countries set up the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in 2001. The alternative the Global Fund's donors selected was to set the Fund up as a non-profit foundation under Swiss law.

This study has explore the development of Indonesian Development Trust Funds. The most important conclusion is that there are set of guidelines or regulations that should be added in the future development trust funds in Indonesia such as regulation in the area of state budget that specially governed for development trust funds and tax regulation for development trust funds activity. A clear and reliable guideline and regulation will protect both the trust funds institution and donors, also to encourage efficient and fair use of development money.

The foundation of Indonesian development trust fund actually has already crystalized prior to the enactment of regulation regarding development trust fund in 2011. It is created from the government's experience with various multi-donor trust funds ranging from large multi-donor trust funds to quite small and ad hoc trust funds to support very specific government's activities. However, the current regulation is still absent from some substantial provisions regarding the legal status, and provisions related to good and accountable governance of Indonesian development trust funds. The lack of substantial provisions of the development trust fund has created some problems in the operational level such as an uncertain legal status, inadequate governance procedure, lack of efficiency and accountability of the organization's activity.

This work has made clear that the government of Indonesia should amend the current trust fund regulation in order to make the development trust fund operated more accountable, effective, and efficient.

Review of Investor-State Dispute Settlement Clauses under Bilateral Investment Treaty Regime in Indonesia

Tinjauan Klausul Penyelesaian Sengketa Investor-Negara pada Perjanjian Investasi Bilateral di Indonesia

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Latar Belakang

Penanaman Modal Asing (PMA) di Indonesia mulai berkembang sejak krisis ekonomi tahun 1997. Pada masa tersebut PMA dibutuhkan untuk meningkatkan perekonomian yang sedang terpuruk. PMA diharapkan dapat menciptakan multiplier effect di berbagai aspek untuk pertumbuhan dan stabilitas ekonomi Indonesia. Perkembangan PMA terus berlanjut hingga saat ini dimana Indonesia sebagai negara yang memiliki pangsa pasar yang luas dan sumber daya manusia yang besar telah menjadi salah satu negara utama sebagai tujuan penanam modal asing untuk membangun kegiatan usahanya. Didukung dengan pencapaian Produk Domestik Bruto yang baik, Indonesia menjadi negara tujuan yang paling populer di Asia dibandingkan dengan Singapura atau Malaysia. Namun demikian, tantangan terbesar bagi Indonesia untuk menjaga keberlangsungan PMA adalah menciptakan iklim investasi yang kondusif. Lebih lanjut mengatasi berbagai permasalahan terkait kebijakan hukum, kondisi ekonomi, ketidaksinkronan pengambilan keputusan akibat sistem desentralisasi, ketidaksinkronan regulasi, dan praktik korupsi. Dalam rangka menciptakan iklim investasi yang kondusif, Indonesia membangun berbagai perlindungan untuk PMA yang salah satunya dilakukan dengan menjadi anggota berbagai perjanjian investasi baik secara bilateral maupun multilateral. Di lain pihak, keterlibatan Indonesia dalam berbagai perjanjian meningkatkan terjadinya konflik antara Indonesia sebagai negara dengan penanam modal asing. Hal ini juga menjadikan Indonesia sebagai negara yang sering digugat oleh penanam modal asing melalui arbitrase internasional. Sehingga pada puncaknya, Indonesia mengkahiri hampir sebagian besar BITs dengan negara-negara penanam modal. Merujuk pada pandangan banyak pihak, konflik yang terjadi ditengarai sebagai akibat dari tidak ramahnya sistem Penyelesaian Sengketa Investor Negara (ISDS) dan klausul perlindungan pada BITs Indonesia yang telah usang. Sehingga pembahasan pada tesis ini akan menitikberatkan pada reviu klausul ISDS pada BITs antara Indonesia dengan negara-negara penanam modal, serta menawarkan opsi untuk merevisi klausul ISDS tersebut.

Metode Penelitian

Tesis ini menggunakan beberapa metode penelitian sebagai dasar penulisan. Metode pertama yang dilakukan adalah melakukan analisa terhadap Perjanjian Investasi Bilateral (BITs) antara Indonesia dengan negara-negara lain. Metode tersebut bertujuan untuk menganalisa interpretasi klausul penyelesaian sengketa antara investor dan negara di dalam BITs Indonesia. Selanjutnya penulis menggunakan metode penelitian berupa studi pustaka atau literature review yang berisi teori dan materi penelitian dari buku-buku, jurnal-jurnal internasional, perjanjian bilateral, uraian sengketa arbitrase internasional, dan bahan publikasi dari organisasi internasional. Data – data lainnya

yang didapat dari artikel, surat kabar, dan website juga akan digunakan sebagai bahan pendukung studi pustaka. Studi pustaka akan digunakan penulis sebagai landasan untuk menyusun kerangka pemikiran dan perumusan masalah yang akan dianalisa.

Perlindungan Substantif terhadap Investasi Asing

Pada prinsipnya penyelesaian Sengketa Investor–Negara (ISDS) diciptakan tidak hanya untuk mengakomodasi kepentingan investor namun juga mengakomodasi pihak negara-negara peserta (contracting states) dalam melaksanakan fungsi legislatifnya yang akan mempengaruhi kegiatan investasi. Indonesia menyediakan beberapa perlindungan untuk investasi asing, baik perlindungan yang berdasar pada hukum domestik maupun perlindungan yang berdasar pada hukum internasional. Perlindungan terhadap Penanaman Modal Asing (PMA) dan Penanaman Modal Dalam Negeri (PMDN) diatur dalam Undang-Undang Nomor 25 Tahun 2007 tentang Investasi. Dalam rangka melindungi investor asing beserta kegiatan investasinya, Indonesia juga meratifikasi Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID). Prinsip-prinsip perlindungan substantif terhadap investor asing terdiri atas i) definisi investor atau penanam modal dan investasi, ii) Fair and Equitable Treatment (FET), iii) Most Favored Nation (MFN), iv) National Treatment (NT), dan v) ekspropriasi.

Prinsip-prinsip perlindungan yang terdapat dalam BITs Indonesia dinilai memiliki banyak kekurangan yang membuat banyak investor asing menggugat Indonesia di Arbitrase International. Definisi investor dan investasi memiliki cakupan definisi yang terlalu luas. Hal ini mengakibatkan luasnya perlindungan yang dapat diberikan kepada investor dan aset aset yang mereka investasikan di Indonesia. Namun demikian, BITs Indonesia juga tidak cukup memuat pengecualian perlindungan untuk permasalahan kompleks yang muncul dari investasi tidak langsung atau indirect investment, misalnya membuat batasan yang jelas terkait perlindungan untuk kegiatan investasi yang dilakukan oleh perusahaan transnasional. Kekurangan yang sama juga berlaku untuk FET, dimana definisi yang terlalu luas memungkinkan munculnya interpretasi yang terlalu luas oleh tribunal arbitrase atas perlindungan tersebut. Sehingga hal ini dapat menciptakan standar yang baru dan hasil putusan yang seringkali tidak dapat diprediksi. Sedangkan, perlindungan yang diberikan oleh prinsip MFN dan NT seringkali tidak memiliki standard interpretasi yang sama dan konsisten dari tribunal arbitrase. Perlindungan yang diberikan kepada investor–investor dari negara penanda tangan BITs dapat diinterpretasikan secara berbeda tergantung dari bahasa yang digunakan dalam masing-masing BITs serta kondisi yang terdapat pada investor asing dan domestik. Lebih lanjut, ekspropiasi merupakan prinsip yang paling krusial di dalam ISDS. Hal yang paling kontroversial adalah kurangnya kepastian dan kejelasan perihal hak kepemilikan aset terkait ekspropriasi tidak langsung.

Sengketa Investasi yang Melibatkan Indonesia

Indonesia telah melakukan penghentian terhadap 67 BITs antara Indonesia dengan negara-negara lain. Hal ini dipicu oleh ketidakpuasan Indonesia terhadap rezim ISDS yang berlaku saat ini, dimana Indonesia banyak digugat secara langsung oleh investor asing ke arbitrase internasional. Sengketa investasi dengan Churchill Mining and Newmont dinilai oleh banyak pihak sebagai penyebab yang paling kuat untuk memberhentikan BITs Indonesia. Gugatan yang ditujukan kepada ICSID dibawah ketentuan ISDS yang mencapai jumlah yang sangat besar juga dianggap sebagai alasan bagi Indonesia untuk mereviu kembali dan memperbarui ketentuan ISDS dalam BITs nya. Terdapat 5 sengketa investasi yang sangat mempengaruhi Indonesia sejak tahun 1981 yaitu: Amco Asia Corporation and others v. Indonesia (ICSID Case No. ARB/81/1), Rafat v. Indonesia (ICSID Case No. ARB/11/13 on 19 May 2011), Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40), Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15), Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia.

Penghentian BITs dengan host countries tidak hanya dilakukan oleh Indonesia saja, beberapa negara dengan alasan serupa juga telah terlebih dahulu menghentikan BITs nya. Afrika Selatan menjadi negara yang mempelopori penghentian tersebut. Mereka telah menghentikan BITs dengan Spanyol, Jerman, Swiss, Belanda, Denmark dan dengan negara-negara Eropa lainnya. Demikan juga dengan Bolivia, Venezuela, dan Ekuador yang juga menghentikan BITs nya karena berpendapat bahwa ISDS tidak memberikan manfaat yang berarti dan lebih memilih menggunakan pengadilan domestik untuk menyelesaikan sengketa investasinya. Penolakan untuk terhadap ISDS yang paling disoroti oleh dunia internasional muncul dari Australia setelah mereka digugat oleh perusahaan Phillip Morris. Gugatan dari Phillip Morris dilakukan sebagai reaksi atas kebijakan pembatasan yang dilakukan oleh Australia terhadap iklan tembakau yang dianggap merugikan Phillip Morris. Walaupun hal ini tidak membuat Pemerintah Australia keluar dari ICSID, namun mereka membatasi penerapan ISDS sebagai langkah untuk mempertahankan penerapan kebijakan publik.

Klausa ISDS dalam BITs Indonesia

Dengan melihat cakupan ISDS pada BITs Indonesia, kita dapat memperoleh gambaran atas faktor-faktor lain yang membuat Indonesia mudah digugat oleh investor asing ke arbitrase internasional. Dengan demikian akan diperoleh jawaban apakah sistem ISDS di Indonesia merugikan atau tidak.Untuk mengukur keluasan cakupan dari ISDS dapat dipengaruhi oleh beberapa aspek. 1) subjek gugatan yang ditafsirkan dari bahasa klausanya, dimana hal tersebut tidak dapat berdiri sendiri namun dapat dipengaruhi

oleh interpretasi dari arbitral arbitrase internasional, penerapan applicable law, dan jenis gugatan yang dapat diajukan melalui ISDS. Namun, klausa ISDS dalam Indonesia BITs tidak menyediakan batasan tambahan yang dapat membuat cakupan subject gugatan lebih sempit. Tanpa adanya batasan yang cukup, dasar untuk mengguggat host states menjadi sangat besar.

Aspek penting yang lain dalam ISDS adalah state consent dimana Indonesia menyediakan automatic stase consent pada seluruh BITs nya. Consent ini adalah persetujuan yang diberikan oleh host states kepada investor asing untuk dapat menggugat secara langsung melalui arbitrase internasional. Dalam hal ini Indonesia sebagai host state tidak dapat menarik consent tersebut secara sepihak maupun mencegah investor asing melakukan gugatan terhadap mereka.

Kritik terhadap ISDS pada BITs Indonesia

Sebagian besar Indonesia BITs diratifikasi pada pertengahan tahun 1960 dan 1970an. Baik atau buruknya klausa pada ISDS bergantung pada kualitas dan kapabiliti dari pemerintah host states yang menyusun formulasi klausa tersebut pada BITs, serta kondisi dan tujuan dibalik pembuatan BITs tersebut. Dikarenakan kurangnya kemampuan pada proses penyusunan BITs oleh Pemerintah Indonesia pada masa itu, sehingga BITs yang dihasilkan hanya memuat klausa-klausa ISDS yang sangat sederhana, luas, dan tidak terlalu jelas cakupannya yang dapat membatasi gugatan dari investor asing. Hal ini dimanfaatkan oleh investor asing dalam menafsirkan prinsip-prinsip perlindungan dalam BITs Indonesia untuk diterapkan pada semua keadaan. Namun demikian, faktor ini tidak serta merta menjadi dasar untuk menyimpulkan bahwa ISDS tidaklah ramah bagi Indonesia. Hal ini terkait dengan pendapat bahwa putusan yang dibuat oleh arbitrase internasional, sebagai produk dari ISDS, dianggap selalu merugikan host states. Kenyataannya, tribunal arbitrase internasional tidak dapat memberikan interpretasi diluar yang telah ditentukan dalam BITs. Penafsiran tersebut terbatas pada yang telah ditentukan dalam klausul BITs, hal ini berlaku juga untuk kewenangan tribunal arbitrase internasional. Dengan demikian, kecenderungan digugatnya Indonesia dalam sengketa investasi bukanlah dikarenakan kewenangan yang luas dari tribunal arbitrase international, maupun kreativitas tribunal dalam membuat penafsiran. Dapat dikatakan bahwa luasnya kata-kata dalam klausul BITs Indonesia lah yang tidak memberikan batasan bagi tribunal arbitrase internasional dalam membuat penafsiran terkait sengketa investasi.

Kritik yang kedua adalah terbatasnya ruang bagi pemerintah dalam mengatur kebijakan publik sebagai akibat luasnya perlindungan bagi investor asing dalam Indonesia BITs. Hal ini dapat dijelaskan dalam dua hal: pertama, pemerintah cenderung akan menahan diri untuk membuat dan memberlakukan kebijakan publik yang

dirasa dapat memunculkan konflik dengan investor asing. Kedua, investor asing akan menjadikan perlindungan substantif yang terlalu luas dalam BITs sebagai dasar untuk menggugat Pemerintah Indonesia atas ketentuan dan kebijakan yang dianggap tidak mendukung kegiatan investasinya. Dalam hal ini FET dan ekspropriasi merupakan jenis perlindungan substantif yang banyak digunakan sebagai senjata oleh investor asing. Newmont dan Churchill Mining merupakan contoh sengketa investasi yang membuat Pemerintah Indonesia melunakkan ketentuan terkait pertambangan untuk melarang ekspor barang tambang yang tidak diolah terlebih dahulu.

Lebih lanjut, perbedaan kesempatan untuk menggugat antara host states dan investor asing merupakan kritik yang berikutnya. Dalam rezim ISDS, investor asing diberikan kesempatan untuk mengguggat host states melalui arbitrase Internasional. Namun kesempatan yang sama tidak dimiliki oleh host states untuk mengguggat investor asing. Hal ini dianggap memberatkan host states karena pada prakteknya, kapanpun investor asing merasa dirugikan oleh ketentuan dan kebijakan pemerintah mereka dapat langsung mengguggat ke forum arbitrase internasional. Sehingga host states harus mengeluarkan banyak biaya untuk membayar arbitrer maupun tim kuasa hukum. Sedangkan host states tidak memiliki kesempatan yang sama meskipun banyak investor asing yang tidak taat dengan ketentuan di negara tujuan investasi. Dihadapkan dengan kenyataan bahwa banyak investor asing yang melakukan pelanggaran, namun host states juga hanya memiliki ruang terbatas untuk mengatur kebijakan publiknya, membuat ISDS dianggap tidak mampu menyeimbangkan kebutuhan kedua belah pihak.

Menyusun Kembali Klausul ISDS dalam BITs Indonesia

Walaupun Indonesia BITs telah dihentikan, Pemerintah Indonesia telah memiliki rencana untuk mereviu dan menyusun kembali BITs dengan negara-negara lain termasuk klausa ISDS di dalamnya. Meskipun hingga saat ini Pemerintah Indonesia belum mengumumkan bagaimana bentuk BITs yang baru. Penyusunan kembali BITs mungkin dapat dicapai dengan membuat formula yang lebih jelas dan membatasi cakupan dari perlindungan substatif terhadap kegiatan investasi asing di Indonesia. Langkah pertama adalah memberikan batasan yang jelas mengenai konsep investasi dan investor asing pada draft BITs yang baru. Melalui kombinasi asset based dan enterprise based approach, mengkecualikan investasi portofolio, mengkecualikan perlindungan pada area-area kebijakan publik, kesehatan nasional, maupun yang menyangkut kesejahteraan rakyat Indonesia. Penyusunan definisi yang mengenai protected person dan legal person juga perlu dilakukan untuk membatasi definisi investor yang dapat dilindungi dan menjawab masalah terkait kewarganegaraan ganda maupun transnational corporate group structures. Pembatasan juga perlu dilakukan terhadap konsep FET dan ekspropriasi yang selama ini banyak dijadikan dasar bagi investor asing dalam mengajukan gugatannya. Pemerintah perlu untuk membuat

standar yang jelas terkait dengan legitimate expectation dengan menguji konteks, alasan, dan akibat yang dihasilkan oleh tindakan host states. Langkah berikutnya, apabila berkaca dari kasus Churchill Mining Pemerintah Indonesia perlu membatasi perlindungan terhadap indirect expropriation dengan memperhatikan tiga aspek: 1) dampak ekonomi dari ketentuan pemerintah, 2) sejauh mana akibat dari ketentuan tersebut mengganggu harapan investasi yang masuk akal dari investor asing dan kegiatan usahanya, dan 3) karakter dari ketentuan yang dibuat oleh pemerintah.

Menyusun kembali klausul ISDS dalam BITs Indonesia dapat dilakukan dengan memperhatikan jenis-jenis pelanggaran apa saja yang dapat digugat oleh investor asing melalui ISDS. Dalam hal ini, gugatan yang diajukan kepada arbitrase internasional dapat dilakukan apabila peserta kontrak melanggar tiga aspek penting, yaitu kewajiban dalam perjanjian tersebut, hak investasi, dan perjanjian investasi. Dalam hal pelanggaran substantif terhadap BITs maupun kontrak terjadi, investor asing baru dapat menggugat melalui arbitrase internasional. Namun hal-hal diluar itu terutama terkait dengan masalah administrasi, sengketa investasi harus diselesaikan melalui pengadilan domestik.

Lebih lanjut, menerapkan pembatasan prosedural melalui state consent sebagai prasyarat untuk membawa sengketa investasi ke arbitrase internasional. Pemerintah perlu meniadakan autoic state consent di dalam konsep ISDS yang baru, dan memberikan state consent atas dasar case-by case basis. Sehingga dalam hal tidak dperolehnya states consent, sengketa investasi harus diselesaikan di pengadilan domestik. Langkah terakhir yang dapat penulis tawarkan adalah memasukkan konsep consolidated claim untuk mencegah terjadinya gugatan dengan dasar yang sama. Dalam konsep ini beberapa gugatan dengan dasar yang sama akan digabungankan dan diproses bersama di dalam tribunal arbitrase yang sama. Sehingga akan menghemat waktu maupun biaya bagi Pemerintah Indonesia sebagai *host states*.

Kesimpulan dan Saran

Berdasarkan hasil pembahasan diatas, penulis menyimpulkan bahwa klausa ISDS dalam Indonesia BITs yang sudah usang cenderung lebih berpihak kepada investor asing. Dalam hal ini perlindungan substantive yang terdapat di dalam BITs mungkin ditafsirkan secara luas karena formulasi teksnya. Formula klausa perlindungan substantif yang kurang jelas dan terlalu luas juga menimbulkan kesulitan dalam menentukan apakah Pemerintah telah merugikan investor asing dan kegiatan investasiny atau tidak. Selain itu tidak terdapatnya formula yang memuat aspek-aspek penting untuk menyeimbangkan kepentingan kedua belah pihak baik pemerintah maupun investor asing. Hal tersebut melatarbelakangi Pemerintah Indonesia menghentikan hamper seluruh BITs nya.

Terkait dengan hal tersebut, menjadi krusial bagi Pemerintah Indonesia untuk menyusun klausa yang spesifik dan jelas dalam BITs nya. Hal ini diperlukan untuk memberikan kepastian dalam melindungi kepentingan Pemerintah Indonesia mengatur kepentingan nasionalnya, di lain pihak juga memberikan perlindungan bagi investor asing. Upaya menyusun kembali BITs dapat dicapai dengan mengambil masukan dari berbagai pihak dan mengambil pelajaran dari berbagai klausa ISDS pada perjanjian-perjanjian investasi milik negara lain untuk membentuk formulasi perjanjian investasi internasional yang lebih baik.

Analysis on Bridging UNCLOS and UNCTOC to Combat IUU Fishing within the EEZ: International Environmental Law Perspective

Analisis pada UNCLOS dan UNCTOC untuk Memerangi Perikanan IUU di dalam ZEE: Perspektif Hukum Lingkungan Internasional

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The main concept of the IPOA-IUU is to combat the deteriorating stage of the worldwide fisheries resources, by acknowledging that IUU fishing is the major factor for such perturbing condition. However, the legal nature of IPOA-IUU as a voluntary legal instrument is the main constraint to provide significant effect through binding decision in addressing IUU fishing. In order to make IPOA-IUU to be up for its task and purpose, it will require full implementation and harmonization with other provisions related to IUU fishing. It means that despite of its extensiveness, IPOA-IUU still necessitates States to implement other legal instruments which eventually may lead into States reluctance, as well as fragmentations and overlaps between one legal provision and another.

In practice, on December 2014, the newly elected President of the Republic of Indonesia through one of his inaugural policy condoned a punitive action dealing with the foreign vessels conducted acts of IUU fishing activities within the Indonesia's territorial sea, by way of sinking the perpetrating foreign vessels, executed by the national Navy forces. In total, there are estimated 41 ships being sunk for engaging in IUU fishing activities within the Indonesian territorial water. This policy was proposed by the new Indonesia's Maritime Affairs and Fisheries Minister, who had already initiated the sinking of the illegal fishers vessels, respectively: three vessels carrying Vietnam flag on 5 December 2014, two vessels carrying Papua New Guinea flag on 21 December 2014, and two vessels carrying Thailand flag on 28 December 2014, after previously evacuated all of the vessels crew. These measures were carried out in reference to Article 73 of the UNCLOS which stipulates that a coastal State shall perform prompt release of the convicted vessel and their crews upon the posting of reasonable bond or other security. It further regulates that "penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment [...] or any other form of corporal punishment". Article 73 is explicitly regulates the rights of the coastal state in the EEZ. Therefore, if the IUU fishing activities were conducted in areas other than the EEZ (territorial sea, internal waters and archipelagic waters), then the coastal State may resort to other measures not regulated under Article 73. In this case: sinking the vessels following the evacuation of the illegal fishers.

"Illegal fishing is a crime. When crime crosses borders, so must law enforcement," claim Gunnar Stølsvik, head of the Norwegian national advisory group against organized IUU-fishing. For most of coastal States, especially developing archipelagic States, the IUU fishing has always been the major concern in terms of maintaining the sovereign rights and law enforcement within its oceanic territory, particularly in the EEZ. Some of the coastal States are already resorted to one may say non-conservative measures, if not regarded as drastic efforts.

The absence of prevailing regulation to address IUU fishing has evidently increasing the unlawful environmental destruction and worsening the depletion of global fish stocks. The deep concern of the international community over environmental

degradation has been repeatedly raised since Stockholm Declaration 1972. Ironically, forty years after such acknowledgement of IUU fishing as a detrimental problem, during the 2002 World Summit on Sustainable Development, IUU fishing remain to be considered as a deteriorating and persistent threat to sustainable development of many countries. Even up until the 2012 UN Conference on Sustainable Development (hereinafter UNCSD) also known as the Rio+20, the lacking of seriousness shown by the international community to engage with IUU fishing, by means of the full implementation of IPOA-IUU's "all States responsibilities" was still seen as a mere normative statement which needed to be recommitted repetitively with alarming level of compliance.

During the commencement of the Rio+20, member States decided to launch a process to develop a set of Sustainable Development Goals (hereinafter SDGs), which will be built upon the Millennium Development Goals (hereinafter MDGs) and converge with the post 2015 development agenda. Clearly, by failing to comprehensively eliminate IUU fishing, the international community is having difficulty to satisfy the commitment set out within the MDGs, mainly in connection with the protection of common environment (including those laid down in Agenda 21). One of the SDGs" commitments is to conserve and sustainably use the oceans, seas and marine resources for sustainable development. The attempt to achieve this goal will be ineffective without firstly addressing the problem of IUU fishing, which in turn may affect the completion of SDGs as a whole.

This thesis would like to discuss IUU fishing activities particularly within the EEZ of coastal States under the context of environmental protection provided by the United Nations Convention on the Law of the Sea (hereinafter UNCLOS). From that discussion, due to its transnational and organized nature, it will be analyzed whether IUU fishing as an environmental crime and threat to maritime security, could also be regarded as one of the emerging TOC and therefore may fall under the provisions of the United Nations Convention on Transnational Organized Crime (hereinafter UNCTOC). The UNCTOC is a widely accepted and legally binding law instrument related to TOC, which may increase the deterrent effect by the implementation of criminal sanctions toward the IUU fishing perpetrators. The UNCTOC offers a firm and unilateral framework which will escalate law enforcement cooperation globally and coherently, inter alia by requiring State parties to afford one another the widest measure of mutual legal assistance in investigations allowing the establishment of a basis for extradition, and encouraging State parties to consider Trans boundary joint investigations. Therefore, to classify IUU fishing under the UNCTOC by way of regulatory amendments and the inclusion of a new protocol would be potentially effective to address IUU fishing problems.

The wide-ranging applicability of the IPOA-IUU explains the far-reaching implementation of the said plan of action, involving all stakeholders within the fisheries management compare to other international instruments. The stakeholders

that fall under the measures of IPOA-IUU not only consist of the comprehensive "all States responsibilities," but also covers the specialized responsibilities of flag States, coastal States, port States, and the consumer States (States which take part in the international trade in fish). The flag States measures cover the adequate practice of flag States" jurisdiction over foreign fishing vessels by, inter alia, the exercise of registration and licensing system of the fishing vessels. This measure enables the flag States to control and supervise the conduct of the authorized fishing vessels flying their flag in compliance with any existing legal instruments (bilateral, regional, or multilateral) and preservation management agreements. The flag States may resort to enforcement measures starting from engaging investigation, establishing interstates cooperation, to the establishment of legal proceedings versus the violating fishing vessels under their flag.

The coastal States measures concentrate on actions related to monitoring, controlling, and surveillance, including practices of boarding, inspection, arrest of violating fishing vessels, and imposition of fines. The port States measures involve the obligation of early notification before entering the port, inspection, and prohibition of entry to the port of the State. The trade States measures comprise the identification, certification and documentation of the catch. The IPO-IUU also covers the all States responsibilities; the fairly coherent efforts form all of the stakeholders in fishing activities. The all States measures include:

- Adoption and implementation of relevant international agreements;
- Adoption of national legislation addressing the IUU fishing;
- Effective control over the nationals;
- Appropriate measures towards the vessels without nationality, and sanction according sufficient severity;
- The IUU fishing prevention measures for non-cooperating States;
- The economic incentives detachment off the parties involved in IUU fishing;
- Thorough measures of monitoring and surveillance; Adoption of national plans of action, the cooperation between States;
- Proper publicity of action combating IUU fishing, and lastly
- The States endeavors to enable the sufficient capacity to implement the IPOA-IUU.

In this sense, the IPOA-IUU enables States, whether unilaterally or collectively, to adopt the most relevant and appropriate measure according to their special condition. Despite of its innovative measures and even though the separate meaning and scope of IUU fishing has been determined in it, however, IPOA-IUU does not provide the comprehensive definition nor elaborative exhaustive list of the unlawful activities which may fall under each aspect of IUU fishing. More critically, the legal nature of IPOA-IUU as a voluntary legal instrument is the main constraint to provide significant effect through binding decision in addressing IUU fishing. Although many of

its provisions may have binding effect through global or regional fisheries agreements, including the FAO Code of Conduct and the Compliance Agreement, legally IPOA-IUU is a non-binding instrument. In order to make IPOA-IUU to be up for its task and purpose, it will require full implementation and harmonization with other provisions related to IUU fishing. It means that despite of its extensiveness, IPOA-IUU still necessitate States to implement other legal instruments101 which eventually may lead into States reluctance, as well as fragmentations and overlaps between one legal provision and another.

The fragmentation of responsibilities between various legal instruments often means that the origins of environmental crime, in this case IUU fishing, are not properly addressed. Whereas IUU fishing holds complex influences that necessitates real deterrents in order to make IUU fishing activities less attractive. The following sub-chapter will discuss about the reasoning that lead to the requirement to treat IUU fishing within a comprehensive and coherent global measures. Such requirement is very essential since the transnational nature of IUU fishing as an environmental crime may result to significant threat to maritime security.

The UN seems to be having further preferences in qualifying the violations that may be classified as menaces to maritime security, respectively: protection from immediate threats to a State territorial; protection from potential crimes at the ocean; and deliberate and unlawful harm to the marine environment. Moreover, the UN elaborated seven definite issues regarded as threats to maritime security, one of which is the IUU fishing by virtue that food insecurity has been identified as one of the major threats to international peace and security, since it may be the major challenge to achieving sustainable fisheries, and thus contributes to food insecurity around the world.

Furthermore, the international community has agreed upon the fact that direct threats to the territorial integrity of a State (including towards its maritime security) is not only attributable to crimes at sea (piracy, armed robbery, terrorists acts, etc.), but also may be attributable to the tangible threat from intentional and unlawful damage to the marine environment, including the depletion of natural resources, such as from IUU fishing. The global community formally categorizes IUU fishing as one of the specific threat to maritime security, owing to its multidimensional consequences, including: food insecurity, deteriorating sustainable livelihoods, and instigating poverty within the fishing communities.

During the conclusion of the 3046th meeting of the Security Council (hereinafter SC) on 31 January 1992, the President of SC in his note delivered "The responsibility of the Security Council in the maintenance of international peace and security." One of the remarks during the event was interestingly regarding the urgency of the UN Member States in order to work together through the appropriate bodies as a whole, to give the highest priority of dealing with new challenges in search for peace:

"The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian, and ecological fields have become threats to peace and security."

In this regard, the global society has acknowledged the gravity of the non-military sources such as financial crisis, discrimination, pandemic and endemic diseases, and also ecological issues. Those concerns are ranging from nuclear proliferation, climate change, to the food security over the management of natural resources, one of which through the combating of IUU fishing.

The illegal nature of the IUU fishing has consequently required illegal means in order to accomplish its goals. Several of the affected aspects are the recruit of its workforce leading into trafficking in person and the depletion of fish stocks, resulting to alternative means in search of livelihoods from smuggling people and illicit drugs trafficking. These facts clearly illustrate IUU fishing, not only can be considered as one of the emerging transnational environmental crime, but also be the main root cause for many aggravating TOCs constituting threats towards the maritime security. Therefore, it requires comprehensive and coherent measures to deal with this issue. The most relevant and widely accepted instrument, with binding power to combat IUU fishing is the UNCLOS. The next chapter will discuss about the international fishing legal framework in general, as well as its effectiveness in addressing IUU fishing.

The degrading impact of IUU fishing as an emerging environmental crime has eventually fabricates its characteristics of serious, transnational and organized crime. IUU fishing is currently may be considered as one of the serious and cross-border environmental offense through its economic, social and environmental consequences. Its highly profitable and low risk criminal activity has also attracted the involvement of organized crime groups. The transnational and organized nature of IUU fishing was generally further discussed during the 9th meeting United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (hereinafter "UNICPOLOS") in 2008, which generated one of the proposal claiming that several illegal fishing related activities are directed by transnational organized criminal network. Nonetheless, the parties of the UNICPOLOS were divided into two contrasting debates: one side emphasized the direct correlation between IUU fishing and other illegal activities, versus those that consider that such connection is inadequate to establish IUU fishing as transnational organized crime (hereinafter "TOC") and that further studies and clarifications are still required.

The global consent regarding the awareness of the close-connection between IUU fishing and international organized crime in certain regions of the world apparently has been further recognized by the member States of the UN subsequent to the statement of the General Assembly repetitively. The impact of IUU fishing may initiate the concrete and grave conduct of aggression, which can lead into the tangible threat of

peace and security. Due to the difficulty to provide detailed information relating to IUU fishing without adequate monitoring or reporting systems, the Security Council urges States individually or within the framework of competent international organizations to positively consider investigating any new allegations related to IUU fishing.

In practice, many of IUU fishing activities are having causal effects, whether directly or indirectly, with the practices of transnational criminal groups (due to the inadequate fishing management framework) and other illegal activities such as fuel smuggling, fish smuggling, and trafficking of fishing crew. The debate on the correspondence between IUU fishing and other TOC might be well-observed from the related perspective between piracy and IUU fishing within the EEZ of the Somalia. In his report pursuant to Security Council resolution 2020 on 22 October 2012, the Secretary General of the UN expressed his amazement on the allegations of illegal fishing and illegal dumping, including of toxic substances, off the coast of Somalia as one of the factors responsible for forcing Somali youths to resort to piracy and attack foreign vessels because such activities deprive them from engaging in gainful employment opportunities.

This report then further elaborated through the Resolution 2077 of the Security Council which acknowledges difficulty in providing detailed information related to illegal, unreported, and unregulated fishing and dumping off Somalia's coast without adequate monitoring or reporting systems, and states that the UN has received little evidence to date to justify claims that illegal fishing and dumping are factors responsible for forcing Somali youths to resort to piracy.

Interestingly, the UN Secretary General seem to be denying the facts finding completed by his appointed Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, Jack Lang, emphasized in his report that part of the counter-piracy response of States and regional organizations should be to support sustainable economic growth in Somalia, one of which is via the establishment of coherent efforts to strengthen the fishing sector of Somalia.

This includes efforts to develop Somalia's fisheries and port activities, which would help expand economic opportunities in the country and contribute to the eradication of piracy. Furthermore, within the official reports of the Special Adviser it proclaims that one of the genesis for the large-scale development of piracy off the coast of Somalia is the need for the Somali population to protect its territorial waters and marine resources against illegal fishing.

The effort of "avoiding" preservation regulation and management of the fisheries resources, by means of neglecting the responsibility to report and/or in compliance to the regulated fishing activities, can be considered as the starting effort to manipulate the applicable laws and regulations. This deceitful measure may already been regarded as the early phase of the whole process of contravention. Moreover, to embody the IUU fishing with the concept of transnational environmental crime may be derived

from White's definition: "Transnational environmental crime involves the trading and smuggling of plants, animals, resources and pollutants in violation of prohibition or regulation regimes established by multilateral environmental agreements and/or in contravention of domestic law."

Bridging UNCLOS and UNCTOC?

In the exercise of combating IUU fishing by way of correlating the UNCLOS and the UNCTOC will require the analysis to determine the compatibility between the legal instruments. First, from the perspective of the UNCLOS, it does not recognize the imprisonment as means of consequence of the breach of its provisions, particularly within part V of the UNCLOS. This means that although IUU fishing may satisfy the characters and significant nexus with other TOCs, nonetheless the "prompt release" procedure of the violating parties in terms of IUU fishing in UNCLOS, is contradictory to the provision of UNCTOC. Secondly, which is related to the first one, from the UNCTOC point of view, it requires the "serious crime" clause for a crime to be considered fall under the UNCTOC which entails a minimum deprivation of liberty of at least four years or more.

In principle, the prompt release procedure is independent from any kinds of proceedings available and may only be excluded through an agreement between the concerned States. Rainer Lagoni claims that the main purpose of the prompt release procedure is to provide a balance between the interests of the detaining State (in its measures against the flag States) and the interests of the flag State in preventing an excessive detention of vessels flying its flag. This procedure is generally intended to put limitation for the coastal States and at the same to ensure the economic and/or the humanitarian interests of the vessel's crews of the impact resulted from the EEZ regime. Article 73 of the UNCLOS is substantially discussed about the uniqueness in the prompt release procedure will only be available if the detaining States has not complied with the provisions of the UNCLOS for the prompt release of the violating vessels and its crews.

Finally, according to the analysis provided in the previous chapters, it may be concluded that the IUU fishing is clearly fulfils the definition of the TOC under the UNCTOC. Moreover, it also acknowledged that IUU fishing has significant connection with other recognized TOCs. However applying UNCTOC in respect to overcome IUU fishing under the UNCLOS has proven to encounter several challenges. Despite of the fact that it possesses close connection to be classified as one of the emerging TOC, empowered by the reality that IUU fishing may be known as the breeding ground of various other crimes, admittedly the provisions between the UNCLOS and the

UNCTOC are having contradictions. This conflict mainly requires further research and recommendation of adjustments in order to address IUU fishing properly. Interestingly, such attempt for engaging further inquiry, was already been recognized by the founding father of the Stockholm Declaration.

Particularly in the case of IUU fishing, depart from the its interconnection with general aspects of human's life in general, its irreversible detrimental environmental impacts, and its causal effects firm measures are require to be taken immediately. Several recommendations and alternative measure which are relevant to address IUU fishing are:

Inaugurating the common global awareness on the necessity to establish legal framework in combating IUU fishing as one of the recognized transnational organized crime, by ways of: enhancing "the all States measures" and cooperation in a consistent manner to establish the common practice in guarding the sustainable fisheries resources.

Amending of the UNCTOC and the national laws reinforcement. It requires the annexation of another protocol regarding the environmental crime with rules of IUU fishing as serious crime in particular, followed by the amendments of the national laws by significantly raise its legal requirements and level of punishment to criminalized IUU fishing activities.

It requires the amendments which accommodate the fair balance between the necessity of freedom of navigation (through prompt release procedure) and proportional weigh on sustainable fisheries management.

Improving the capacity building of the IUU fishing transparency, monitoring and enforcement methods, through: conducting the comprehensive multi-dimensional cooperation between the enforcement agents of the States, whether bilaterally, regionally, or multilaterally through sharing of knowledge, information, technology, and strategy. Granting wide access for the all of the extensive stakeholders within the fisheries resources management, including civil society (NGOs, researchers, et cetera) to increase the surveillance of IUU fishing activities.

Sistem Rekrutmen Hakim Konstitusi yang Transparan, Partisipatif, Obyektif, dan Akuntabel oleh Presiden

Recruitment System of Constitutional Judges which is Transparent, Participatory, Objective, and Accountable by the President

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ABSTRAK

Hakim konstitusi mempunyai sifat yang khusus karena mekanisme pengangkatannya berbeda dari hakim biasa dan hakim agung. Undang-Undang Nomor 24 tahun 2003 juncto Undang-Undang Nomor 8 Tahun 2011 tentang Mahkamah Konstitusi, yang merupakan tindak lanjut dari Pasal 24C ayat (6) UUD 1945, tidak mengatur secara detail tentang sistem rekrutmen hakim konstitusi. UU MK hanya menyebutkan prinsip-prinsip umum bahwa pencalonan hakim konstitusi dilaksanakan secara transparan dan partisipatif serta pemilihannya dilakukan secara obyektif dan akuntabel. UU MK menyerahkan sepenuhnya tata cara seleksi, pemilihan dan pengajuan hakim konstitusi pada masing-masing lembaga, yaitu Mahkamah Agung, Dewan Perwakilan Rakyat, dan Presiden. Ketidakjelasan pengaturan tentang sistem rekrutmen hakim konstitusi mengakibatkan masing-masing lembaga menggunakan caranya sendiri-sendiri dalam merekrut hakim konstitusi dan tidak diketahui apakah prinsip transparan, partisipatif, obyektif dan akuntabel yg menjadi prinsip utama dalam perekrutan hakim konstitusi telah terpenuhi.

Penelitian ini menggunakan jenis penelitian hukum normatif, dengan pendekatan undang-undang dan studi kasus. Tehnik analisa data yang digunakan adalah deskriptif kualitatif. Kesimpulannya, pengaturan sistem rekrutmen hakim konstitusi dalam UU MK belum sesuai dengan kehendak UUD 1945 atau dengan kata lain sistem rekrutmen hakim konstitusi sebagaimana diamanatkan dalam UUD 1945 belum diatur secara jelas, rinci dan komprehensif di dalam UU MK, terutama dalam hal seleksi, syarat dan masa jabatan hakim konstitusi. Selain itu terdapat inkonsistensi dalam proses rekrutmen hakim konstitusi yang dilakukan oleh Presiden, prinsip transparan, partisipatif, obyektif dan akuntabel hanya terpenuhi dalam proses rekrutmen hakim konstitusi periode 2008-2013 dan tahun 2014.

Kata kunci: Rekrutmen hakim konstitusi

ABSTRACT

Constitutional judges have special characteristic since their recruitment system is different from ordinary judges and justices. Law Number 24 Of 2003 juncto Law Number 8 Of 2011 on the Constitutional Court, which is the follow up of Article 24C Paragraph (6) UUD 1945, does not regulate in detail about the recruitment of constitutional judges. Constitutional Court Law mentions only general principles, that the nomination of constitutional judges should be transparent and participatory as well as the election is done in an objective and accountable. Constitutional Court Law fully gives all the procedures of selection, election and submission of constitutional judges to each institution, which is the Supreme Court, the House of Representatives, and the President. The obscurity of recruitment system of constitutional judges makes each institution uses its own way in recruiting constitutional judges and it is unknown whether the principle of transparent, participatory, objective, and accountable which is a fundamental principle in the recruitment of constitutional judges have been met.
This research uses normative legal research, with statutory approach and case study. Data analysis technique used is descriptive qualitative. In conclusion, the recruitment system of constitutional judges in Constitutional Court Law is not in accordance with the will of UUD 1945, or in other words the recruitment of constitutional justice system as mandated in UUD 1945 has not been arranged in a clear, detailed and comprehensive in Constitutional Court Law, especially in selection, terms and period of the constitutional judges. In addition, there were inconsistencies in the recruitment process of constitutional judges conducted by the President, the principle of transparent, participatory, objective, and accountable only met in the recruitment of constitutional judges in the period of 2008-2013 and in 2014.

Keywords: Recruitment of constitutional judges

Praktek rekrutmen hakim konstitusi di lembaga lainnya yaitu MA dinilai juga bermasalah. MA selama ini dikenal lebih tertutup dalam merekrut calon hakim konstitusi yang akan diajukan kepada Presiden, tidak jelas bagaimana proses rekrutmen itu dilakukan. Dalam praktek rekrutmen hakim konstitusi pada tahun 2003, meskipun sebelumnya telah didesak agar MA mengumumkan calon hakim konstitusi untuk mendapat penilaian dari masyarakat sesuai prinsip transparansi dan partisipasi, namun ketua MA saat itu, Bagir Manan, beralasan bahwa proses rekrutmen itu urusan dirinya dengan Presiden, tidak ada ketentuan harus mengumumkan atau melakukan fit and proper test. MA sudah melakukan secara transparan bukan mengambil dari orang gelap. Nampaknya, ketua MA telah mempersonifikasi urusan rekrutmen hakim konstitusi bukan menjadi urusan atau kewenangan kelembagaan.

Selanjutnya, bagaimana dengan proses rekrutmen hakim konstitusi oleh Presiden? Proses rekrutmen hakim konstitusi oleh Presiden juga tidak kalah bermasalah. Pengangkatan hakim konstitusi Patrialis Akbar dan Maria Farida Indrati berujung pada gugatan oleh Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI) dan Indonesia Corruption Watch (ICW) di Peradilan Tata Usaha Negara (PTUN) Jakarta. Penunjukan Patrialis Akbar oleh Presiden sebagai hakim konstitusi dinilai tidak transparan dan dibatalkan oleh PTUN Jakarta lewat putusan nomor: 139/G/2013/ PTUN-JKT. Patrialis sendiri telah melayangkan banding atas putusan tersebut. Pada dasarnya putusan PTUN tersebut bukan mempermasalahkan kewenangan Presiden dalam mengajukan hakim konstitusi untuk diangkat, tetapi yang menjadi permasalahan adalah transparansi di balik kewenangan itu. "Dalam hal ini Presiden dinilai tidak transparan, dimana seharusnya calon hakim MK diumumkan di media massa agar masyarakat bisa menilai dan mestinya tidak hanya satu, dan ini tidak dilakukan oleh Presiden," kata pengamat hukum tata negara Refly Harun.

Keputusan TUN yang dibatalkan oleh PTUN Jakarta itu berupa Keputusan Presiden (Keppres) bernomor 87/P Tahun 2013 yang berisi pemberhentian hakim konstitusi Maria Farida Indrati dan Achmad Sodiki dan pengangkatan Maria Farida Indrati dan Patrialis Akbar sebagai hakim konstitusi. Dalam hal ini Maria Farida Indrati diangkat kembali sebagai hakim konstitusi untuk menjaga kesinambungan tugas-tugas di MK. Sementara Achmad Sodiki diberhentikan karena yang bersangkutan telah memasuki usia pensiun dan sebagai gantinya Presiden menunjuk langsung Patrialis Akbar. Penunjukan secara langsung ini yang dinilai telah melanggar prinsip-prinsip dalam sistem rekrutmen hakim konstitusi.

Namun dalam perkembangannya, Pengadilan Tinggi Tata Usaha Negara (PTTUN) mengabulkan permohonan banding yang diajukan oleh Presiden selaku Tergugat I dan Patrialis Akbar selaku Tergugat II Intervensi, sehingga putusan PTUN dibatalkan. Melalui putusan No 55/B/2014 PT.TUN-JKT pada 11 Juni 2014, beberapa pertimbangan hakim yang mengabulkan banding adalah penggugat tidak mengalami kerugian langsung dan tidak mempunyai kepentingan untuk mengajukan gugatan. Atas

putusan PTTUN tersebut, Aliansi Masyarakat Sipil Untuk Konstitusi (AMUK) berencana akan mengajukan kasasi ke MA. Berangkat dari permasalahan-permasalahan tersebut, dalam penelitian ini penulis tertarik untuk mengupas lebih dalam tentang rekrutmen hakim konstitusi, khususnya yang dilakukan oleh Presiden dari sejak terbentuknya MK sampai dengan saat ini. Ketidakjelasan pengaturan tentang sistem rekrutmen hakim konstitusi mengakibatkan masing-masing lembaga menggunakan caranya sendiri-sendiri dalam merekrut hakim konstitusi dan tidak diketahui apakah prinsip transparan, partisipatif, obyektif, dan akuntabel yang menjadi prinsip utama dalam perekrutan hakim konstitusi telah terpenuhi. Hal ini tentu saja menimbulkan permasalahan terhadap terselenggaranya transparansi, partisipasi, obyektivitas, dan akuntabilitas dalam perekrutan hakim konstitusi oleh Presiden khususnya dan oleh kedua lembaga lainnya yaitu DPR dan MA. Dalam perekrutannya, lembaga yang berwenang mengajukan hakim konstitusi harus mampu melaksanakan amanat undang-undang dengan mampu mempertanggungjawabkan proses rekrutmen dan pengangkatan hakim konstitusi tersebut kepada publik.

Berdasarkan latar belakang tersebut, maka penulis terdorong untuk melakukan penelitian mengenai Sistem Rekrutmen Hakim Konstitusi yang Transparan, Partisipatif, Obyektif, dan Akuntabel oleh Presiden.

Tujuan penelitian ini adalah untuk mengetahui sistem rekrutmen hakim konstitusi di Indonesia sehingga dapat menjawab rumusan masalah, Adapun rumusan masalah penelitian ini adalah Apakah pengaturan sistem rekrutmen hakim konstitusi dalam UU MK telah sesuai dengan kehendak UUD 1945?

Syarat Hakim Konstitusi

Mengenai syarat hakim konstitusi, Pasal 24C ayat (5) UUD 1945 menentukan bahwa hakim konstitusi harus memiliki integritas dan kepribadian yang tidak tercela, adil, negarawan yang menguasai konstitusi dan ketatanegaraan, serta tidak merangkap sebagai pejabat negara. Sedangkan dalam UU MK, perihal persyaratan ini kemudian dibedakan menjadi syarat untuk hakim konstitusi (Pasal 15 ayat 1) dan syarat calon hakim konstitusi (Pasal 15 ayat 2). Yang menjadi permasalahan adalah UU MK tidak menjelaskan lebih lanjut perihal syarat hakim konstitusi yang telah ditentukan oleh UUD 1945. Bagaimana mengukur seorang hakim konstitusi telah memiliki integritas dan kepribadian yang tidak tercela, apakah yang dimaksud bahwa hakim konstitusi harus negarawan yang menguasai konstitusi dan ketatanegaraan. Pengaturan dalam UU MK seperti memisahkan antara syarat atau keharusan hakim konstitusi dengan syarat calon hakim konstitusi, sehingga seolah-olah syarat pencalonan hakim konstitusi adalah sesuatu yang berbeda dengan keharusan ketika seseorang sudah menjabat sebagai hakim konstitusi.

Pasal 15 ayat (2) UU MK menentukan bahwa seorang calon hakim konstitusi harus memenuhi syarat: (a) warga negara Indonesia; (b) berijazah doktor dan magister dengan dasar sarjana yang berlatar belakang pendidikan tinggi hukum; © bertakwa kepada Tuhan Yang Maha Esa dan berakhlak mulia; (d) berusia paling rendah 47 (empat puluh tujuh) tahun dan paling tinggi 65 (enam puluh lima) tahun pada saat pengangkatan; (e) mampu secara jasmani dan rohani dalam menjalankan tugas dan kewajiban; (f) tidak pernah dijatuhi pidana penjara berdasarkan putusan pengadilan yang telah memperoleh kekuatan hukum tetap; (g) tidak sedang dinyatakan pailit berdasarkan putusan pengadilan; dan (h) mempunyai pengalaman kerja di bidang hukum paling sedikit 15 (lima belas) tahun dan/atau pernah menjadi pejabat negara. Syarat-syarat tersebut belum cukup tepat dan representatif untuk menjelaskan persyaratan keharusan menjadi hakim konstitusi yaitu memiliki integritas dan kepribadian yang tidak tercela, adil, negarawan yang menguasai konstitusi dan ketatanegaraan, serta tidak merangkap sebagai pejabat negara. Dengan kata lain, persyaratan calon hakim konstitusi itu kurang mendekati kualifikasi persyaratan ideal hakim konstitusi sebagaimana diinginkan oleh UUD 1945. Persyaratan hakim konstitusi yang diatur lebih lanjut pada Pasal 15 ayat (1) UU MK, rumusannya juga kurang sesuai dan tidak konsisten dengan rumusan ketentuan Pasal 24C ayat (5) UUD 1945. Pasal 15 ayat (1) UU MK hanya menyebutkan bahwa hakim konstitusi harus memenuhi syarat memiliki integritas dan kepribadian yang tidak tercela, adil, dan negarawan yang menguasai konstitusi dan ketatanegaraan. Sedangkan syarat tidak merangkap sebagai pejabat negara ditentukan terpisah dalam Pasal 17 UU MK.

Praktek Rekrutmen Hakim Konstitusi di Indonesia

Penulis memfokuskan penelitian pada praktek rekrutmen hakim konstitusi yang dilakukan oleh Presiden dari awal terbentuknya MK sampai dengan saat ini dan menganalisanya melalui indikator atau tolok ukur. Penulis mencoba untuk membandingkan pelaksanaan prinsip-prinsip dalam perekrutan hakim konstitusi dari periode pertama (2003-2008) terbentuknya MK sampai dengan periode sekarang ini (tahun 2014) dan diperoleh hasil sebagai berikut:

- Prinsip transparan
- Prinsip partisipatif
- Prinsip obyektif
- Prinsip akuntabel

Pengaturan sistem rekrutmen hakim konstitusi dalam UU MK belum sesuai dengan kehendak UUD 1945 atau dengan kata lain sistem rekrutmen hakim konstitusi sebagaimana diamanatkan dalam UUD 1945 belum diatur secara jelas, rinci dan

komprehensif di dalam UU MK. Berdasarkan pembahasan melalui pasal-pasal dalam UU MK, hal-hal yang belum sesuai dengan kehendak UUD 1945 adalah:

Dalam hal seleksi hakim konstitusi, UU MK tidak menindaklanjuti amanat dari Pasal 24C ayat (6) UUD 1945 yang mengamanatkan untuk mengatur pengangkatan dan pemberhentian hakim konstitusi, hukum acara, serta ketentuan lainnya tentang MK dalam UU MK. UU MK justru menyerahkan sepenuhnya kepada lembaga yang berwenang (MA, DPR, dan Presiden) untuk mengatur tata cara seleksi, pemilihan, dan pengajuan hakim konstitusi. UU MK hanya menekankan bahwa proses pencalonan hakim konstitusi dilaksanakan secara transparan dan partisipatif dan proses pemilihan hakim konstitusi harus dilaksanakan secara obyektif dan akuntabel. Pada prakteknya, masing-masing lembaga menggunakan caranya sendiri-sendiri dalam menentukan calon hakim konstitusi yang diajukan kepada Presiden untuk ditetapkan dan hal ini jelas mereduksi prinsip transparan, partisipatif, obyektif dan akuntabel.

Syarat calon hakim konstitusi dalam UU MK secara keseluruhan belum mencerminkan kualifikasi persyaratan ideal hakim konstitusi sebagaimana diinginkan oleh UUD 1945. Pasal 24C ayat (5) UUD 1945 menentukan bahwa hakim konstitusi harus memiliki integritas dan kepribadian yang tidak tercela, adil, negarawan yang menguasai konstitusi dan ketatanegaraan, serta tidak merangkap sebagai pejabat negara. Dalam UU MK, perihal persyaratan ini kemudian dibedakan menjadi syarat untuk hakim konstitusi (Pasal 15 ayat 1) dan syarat calon hakim konstitusi (Pasal 15 ayat 2). Pengaturan dalam UU MK seperti memisahkan antara syarat atau keharusan hakim konstitusi dengan syarat calon hakim konstitusi, sehingga seolah-olah syarat pencalonan hakim konstitusi adalah sesuatu yang berbeda dengan keharusan ketika seseorang sudah menjabat sebagai hakim konstitusi. UU MK tidak menjelaskan lebih lanjut perihal syarat hakim konstitusi yang telah ditentukan oleh UUD 1945. Syarat calon hakim konstitusi. Pada Pasal 15 ayat (2) UU MK belum cukup tepat dan representatif untuk menjelaskan persyaratan menjadi hakim konstitusi pada Pasal 15 ayat (1).

Selain itu, persyaratan hakim konstitusi yang diatur pada Pasal 15 ayat (1) UU MK, rumusannya kurang sesuai dan tidak konsisten dengan rumusan ketentuan Pasal 24C ayat (5) UUD 1945, terutama dalam poin tidak merangkap sebagai pejabat negara diletakkan tersendiri di Pasal 17 UU MK.

Pasal 22 UU MK menentukan masa jabatan hakim konstitusi adalah 5 (lima) tahun, dan dapat dipilih kembali hanya untuk 1 (satu) kali masa jabatan berikutnya. Terdapat kelemahan terhadap adanya periodisasi masa jabatan hakim konstitusi, yaitu mempengaruhi independensi MK sebagai pelaku kekuasaan kehakiman, mendorong terjadinya penyimpangan, dan menganggu kinerja MK dalam menangani dan memutus perkara.

Terdapat inkonsistensi dalam proses rekrutmen hakim konstitusi yang dilakukan oleh Presiden. Inkonsistensi ini mempengaruhi terpenuhi atau tidak terpenuhinya

prinsip transparan, partisipatif, obyektif dan akuntabel dalam perekrutan hakim konstitusi. Pada periode 2008-2013 dan tahun 2014, prinsip-prinsip dalam perekrutan hakim konstitusi dapat terpenuhi. Presiden membentuk panitia seleksi hakim konstitusi masing-masing di Wantimpres dan Setneg serta ada tahapan-tahapan dalam seleksi hakim konstitusi yang mencerminkan prinsip-prinsip sebagaimana disebut dalam Pasal 19 dan Pasal 20 ayat (2) UU MK. Sebaliknya pada periode 2003-2008, tahun 2010, dan periode 2013-2018, prinsip-prinsip dalam perekrutan hakim konstitusi tidak terpenuhi. Hal ini disebabkan selain tidak ada panitia seleksi hakim konstitusi, juga karena tidak ada proses seleksi hakim konstitusi pada ketiga periode tersebut. Untuk periode 2003-2008, keterbatasan waktu yang hanya tersisa 3 (tiga) hari sejak disahkannya UU MK menjadi kendala utama tidak terlaksananya prinsip transparan, partisipatif, obyektif dan akuntabel. Meskipun Presiden telah mengumumkan nama-nama calon hakim konstitusi, bahkan beberapa nama merupakan usulan dari masyarakat, namun proses penilaian terhadap calon hakim konstitusi dilakukan secara tertutup. Sedangkan untuk tahun 2010 dan periode 2013-2018, Presiden menunjuk langsung calon hakim konstitusi sehingga tidak ada proses seleksi hakim konstitusi karena hanya ada satu dan dua calon tunggal. Secara otomatis, prinsip transparan, partisipatif, obyektif dan akuntabel menjadi tidak terpenuhi dan hal ini jelas melanggar UU MK.

Penerapan Hak Atas Tanah untuk Permukiman di Atas Air pada Perairan Pesisir Kota Tanjungpinang dalam Perspektif Hukum Tanah Nasional

Implementation of Land Rights for Settlements on the Coastal Waters of Tanjungpinang in the Perspective of National Land Law

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ABSTRAK

Kota Tanjungpinang merupakan salah satu kota pesisir yang memiliki permukiman di atas air pada perairan pesisir dengan pelantar-pelantar sebagai aksesnya. Kondisi tersebut sudah terjadi sejak lama, turun-temurun, bahkan sudah menjadi bagian kekhasan budaya dari masyarakatnya. Sayangnya pengaturan mengenai hak atas tanah di kawasan tersebut belum ada. Permasalahannya adalah penerapan hak atas tanah di perairan pesisir tidak dapat begitu saja disamakan dengan daratan, mengingat rezim yang terkait tidak hanya bidang pertanahan, tetapi juga kelautan, lingkungan, dsb. Penelitian ini memiliki tiga tujuan, pertama, menjabarkan konsep Hukum Tanah Nasional dalam memenuhi penerapan hak atas tanah di perairan pesisir. Kedua, menjabarkan penerapan Hak Milik, Hak Guna Bangunan, dan Hak Pakai yang sudah dilakukan Kantah Kota Tanjungpinang selama ini untuk permukiman di atas air perairan pesisirnya. Ketiga, menganalisis dan meberikan rekomendasi pengaturan terkait hak atas tanah untuk permukiman di atas air perairan pesisir Kota Tanjungpinang (sebagai antisipasi). Adapun metode yang digunakan adalah yuridis normatif, yaitu meneliti bahan pustaka atau data sekunder yang terkait. Kesimpulannya, hak atas tanah yang paling tepat adalah Hak Pengelolaan yang diserahkan kepada Pemerintah Kota Tanjungpinang, kemudian diberikan kepada masyarakat yang bermukim di sana baik dengan Hak Milik, Hak Guna Bangunan, maupun Hak Pakai di atas Hak Pengelolaan. Hal ini bertujuan agar pemerintah daerah setempat memiliki kekuasaan yang efektif dalam melakukan fungsi kontrol terhadap pemilikan dan penguasaan tanah di kawasan permukiman tersebut, sehingga kondisi lingkungan dan berbagai aspek lainnya tetap terjaga.

Kata kunci: Hak Atas Tanah; Pemilikan Tanah; Hukum Tanah Nasional; Permukiman di Atas Air; Perairan Pesisir.

ABSTRACT

Tanjungpinang is one of the coastal cities that have settlements on the coastal waters with "pelantar" as an access. The condition has been going on since long, hereditary, and become part of the cultural distinctiveness of the community. Unfortunately arrangements regarding land rights in the region does not exist. The problem is the application of the right to land in the coastal waters can not be equated with the mainland, given the associated regime not only in land, but also marine, environment, etc. This study has three objectives, first, describes the concept of the National Land Law in the implementation of land rights in coastal waters. Second, describe the application of Hak Milik, Hak Guna Bangunan, and Hak Pakai that has been given during Kantah Tanjungpinang for settlement on coastal waters. Third, gave the recommendations related to land rights arrangements for settlement on coastal waters in Tanjungpinang (as anticipation). The method used normative that is checking library materials or secondary data related. The conclusion, Hak Pengelolaan submitted to the Government Tanjungpinang, then given to the people who live there either with Hak Milik, Hak Guna Bangunan, and Hak Pakai above Hak Pengelolaan. It is intended that local governments have the authority to perform the functions of effective control over the ownership and control of land in the settlement area, and keep the environmental conditions and various other aspects remain intact.

Keywords: Land Rights, Land Ownership, National Land Law, Settlement in Water, Coastal waters.

Wilayah pesisir merupakan wilayah yang unik, karena dalam konteks bentang alam merupakan transisi bertemunya daratan dan lautan. Wilayah pesisir juga memiliki ekosistem yang beragam dan produktif, sehingga mempunyai nilai ekonomi yang besar,2 dan Indonesia merupakan negara yang memiliki kekayaan tersebut. Indonesia adalah negara kepulauan terluas di dunia dengan 17.504 pulau besar dan kecil, panjang garis pantai mencapai kurang lebih 104.000 km, dan luas laut sekitar 3,5 juta km2,3 maka dapat dibayangkan betapa luas wilayah pesisir di Indonesia. Negeri ini juga memiliki 324 Kota/Kabupaten pesisir, 4 yang mana lebih dari 60% jumlah penduduknya bertempat tinggal di wilayah tersebut.

Masyarakat pesisir Kota Tanjungpinang mendirikan rumahnya di atas tonggak-tonggak kayu pada daerah pantai, yang mengalami pasang-surut permukaan air laut. Pada beberapa waktu setiap harinya, bagian kolong dari permukiman tersebut akan tergenang air, dan pada beberapa waktu lainnya bagian kolong permukiman tersebut menjadi kering. Keberadaan mereka menjadi suatu bagian yang mewarnai kehidupan masyarakat Kota Tanjungpinang, namun tidak dipungkiri permasalahan yang diakibatkan juga banyak terjadi. Rusaknya ekosistem adalah permasalahan yang timbul pertama kali dari berkembangnya permukiman dan pelantar tersebut. Kumuhnya lingkungan pun terlihat nyata, terutama di daerah pesisir pantai dan daerah dengan kepadatan tinggi, bahkan kepadatan di beberapa kawasan permukiman di atas air di Kota Tanjungpinang mencapai lebih dari 500 jiwa/ha29 dengan kondisi yang sangat padat dan jarak antar bangunan yang tidak memadai. Kondisi ini tidak hanya dikarenakan adanya permukiman di atas air itu sendiri, namun juga pola hidup masyarakat setempat yang sering membuang sampah di laut.

Saat ini pemerintah Kota Tanjungpinang mulai membuat beberapa kebijakan terkait dengan permukiman di atas air tersebut, antara lain perkembangan permukiman yang mengarah ke perairan/laut dibatasi, perizinan pendirian bangunan untuk permukiman di atas perairan/laut tidak diberikan lagi, serta memberikan kemudahan dalam proses relokasi bangunan untuk permukiman di atas perairan/laut. Dengan adanya kebijakan tersebut tidak serta merta menghapus permasalahan yang ada, keberadaan masyarakat pesisir yang sudah bermukim lama di sana tentunya tidak dapat diabaikan begitu saja, mereka tetap membutuhkan kepastian status akan hak atas tanahnya, sehingga masih harus dilindungi hak-haknya karena bagaimana pun itu bagian dari hak asasi mereka.

Terkait dengan status kepemilikan tanah, Kantah Kota Tanjungpinang selama ini telah memberikan sertipikat hak atas tanah pada sebagian rumah dan bangunan di perarian pesisir setempat, dimana hak atas tanah yang telah diberikan antara lain Hak Milik, Hak Guna Bangunan, dan Hak Pakai, namun itu hanya sebagian kecil, selebihnya masih belum terdaftar.

Hal yang perlu dikaji dari uraian di atas adalah apakah penerapan Hak Milik, Hak Guna Bangunan, dan Hak Pakai yang diberikan sudah tepat atau belum, mengingat pemberian hak atas tanah tersebut sebenarnya tidak kuat, karena dasar pengaturan hak atas tanah di perairan pesisir belum ada. Perlu digarisbawahi juga, walaupun permukiman di atas air perairan pesisir Kota Tanjungpinang sudah ada selama turun-temurun, namun mereka yang menempati bukanlah Masyarakat Hukum Adat, sehingga kawasan permukiman tersebut pun bukan merupakan Hak Ulayat.

Saat ini BPN RI sedang memfokuskan pada rancangan pengaturan penerapan Hak Guna Bangunan dan Hak Pakai untuk permukiman di atas air perairan pesisir, yang dituangkan dalam Rencana Peraturan Kepala Badan Pertanahan Nasional (Perkaban) tentang Penataan Pertanahan Wilayah Perairan Pesisir dan Pulau-Pulau Kecil. Rancangan tersebut sudah dimulai sejak tahun 2012. Dalam rancangan tersebut dikatakan wilayah perairan pesisir hanya akan diberikan Hak Guna Bangunan dan Hak Pakai. Perkaban tersebut sebenarnya kurang menjawab apa yang diamanahkan oleh PP No.40/1996, yang mana dalam PP ini diharapkan pengaturan akan penguasaan dan pemilikan di wilayah pesisir adalah berupa Peraturan Pemerintah, bukan hanya level Perkaban.

Dalam membuat peraturan terkait, pengetahuan akan status, fungsi, dalam kepemilikan tanah pada wilayah pesisir menjadi sangat penting, terutama untuk mengupayakan koordinasi terpadu dalam pengelolaan wilayah pesisir secara berkelanjutan. Keberlanjutan tersebut bukan hanya keberlanjutan secara ekologi fisik, tetapi tentunya keberlanjutan masyarakatnya. Pengaturan mengenai pemilikan tanah untuk permukiman di atas air juga adalah keharusan, karena dengan tersedianya konstruksi hukum dan tata cara pengaturan pertanahan yang jelas akan memberikan kepastian hukum, yang tentunya tetap harus mengikuti konsep Hukum Tanah Nasional. Hal ini sesuai dengan amanat Pasal 60 PP 40/1996 dimana pemerintah harus membangun dasar kebijakan di bidang pertanahan, yang harusnya lebih kuat daripada Surat Edaran ataupun Perkaban, yaitu berbentuk Peraturan Pemerintah. Dengan demikian, pengaturan tersebut dapat menjadi instrumen yang penting bagi terselenggaranya pelaksanaan pembangunan, khususnya pada bidang pertanahan. Instrumen tersebut tidak saja diperlukan oleh pemerintah pusat sebagai elemen pengendali pertanahan secara nasional, namun tentunya bagi pemerintah daerah yang merupakan ujung tombak dari pelaksanaan pembangunan pertanahan.

Dari berbagai penjabaran di atas, maka diketahui bahwa hak atas tanah untuk permukiman di atas air pada perairan pesisir Kota Tanjungpinang perlu penelitian dan kajian lebih lanjut. Penelitian mengenai pemberian hak atas tanah di wilayah perairan pesisir Kota Tanjungpinang memiliki tujuan, yaitu untuk menjelaskan konsep Hukum Tanah Nasional dalam memenuhi penerapan hak atas tanah di perairan pesisir.

Pentingnya Penerapan Hak Atas Tanah Untuk Permukiman di Atas Air Perairan Pesisir Kota Tanjungpinang Sebagai Perwujudan Kepastian Hukum dan Asas Manfaat.

Pemberian status pemilikan hak atas tanah bagi permukiman di atas air perairan pesisir Kota Tanjungpinang bukanlah sekedar wacana yang dapat dibiarkan berlarut-larut. Saat ini berbagai Kantor Pertanahan di Indonesia sudah banyak melakukan penerbitan sertipikat hak atas tanah di perairan pesisir dengan hak atas tanah yang beragam serta pertimbangan yang tidak baku, termasuk di Kota Tanjungpinang. Kantah Kota Tanjungpinang pernah mengeluarkan sertipikat hak atas tanah untuk permukiman di atas air perairan pesisir dengan sertipikat Hak Guna Bangunan, Hak Pakai, bahkan Hak Milik.

BPN RI memang sedang memfokuskan pada rancangan pengaturan penerapan Hak Guna Bangunan dan Hak Pakai untuk permukiman di atas air perairan pesisir yang saat ini masih dibahas dalam Rancangan Peraturan Kepala Badan Pertanahan Nasional. Rancangan tersebut sudah dimulai sejak tahun 2009, dan saat ini tahapan yang sedang dilakukan adalah menyusun Rancangan Peraturan Kepala Badan Pertanahan Nasional (Perkaban) tentang Penataan Pertanahan Wilayah Perairan Pesisir dan Pulau-Pulau Kecil, dan dalam rancangan tersebut dikatakan wilayah perairan pesisir hanya akan diberikan Hak Guna Bangunan dan Hak Pakai. Menurut peneliti, penerbitan Perkaban tersebut sebenarnya belum menjawab amanat oleh Pasal 60 PP No.40/1996, dimana pengaturan penguasaan tanah untuk wilayah pesisir seharusnya ditindaklanjuti dalam tingkat Peraturan Pemerintah.

Setelah melewati berbagai pembahasan mengenai bagaimana penguasaan atas tanah menurut Hukum Tanah Nasional, bagaimana penerapan Hak Milik, Hak Guna Bangunan, dan Hak Pakai pada permukiman di atas air perairan pesisir Kota Tanjungpinang selama ini, serta berbagai analisis baik dari segi teori maupun peraturan perundangan yang terkait, maka peneliti membuat rekomendasi pengaturan dalam penerapan hak atas tanah untuk permukiman di atas air perairan pesisir Kota Tanjungpinang.

Menurut peneliti, kriteria yang digunakan oleh Kantor Pertanahan Kota Tanjungpinang dalam pemberian hak atas tanah tersebut di atas tidaklah kuat. Untuk Hak Guna Bangunan dan Hak Pakai, seharusnya kriteria yang digunakan adalah berdasarkan sifat dari hak itu sendiri, bukan dengan kriteria pasang surut mengingat kriteria tersebut kapan saja bisa berubah sebagaimana fisik lingkungan pesisir yang selalu mengalami perubahan sewaktu-waktu. Mengenai syarat dan ketentuan pemberian Hak Milik, Hak Guna Bangunan, dan Hak Pakai di atas Hak Pengelolaan tersebut, akan dibahas dalam sub bab selanjutnya.

Syarat dan Ketentuan Pemberian Hak Milik, Hak Guna Bangunan, dan Hak Pakai di atas Hak Pengelolaan Pada Permukiman di Atas Air Perairan Pesisir Kota Tanjungpinang (Sebagai Antisipasi) Hak Pengelolaan yang diberikan kepada Pemerintah Kota Tajungpinang pada dasarnya untuk memperkuat fungsi kontrol, karena segala perbuatan dan kegiatan terkait penguasaan, pemilikan, penggunaan, dan pemanfaatan atas tanah di tanah Hak Pengelolaan harus dengan izin pemilik Hak

Pengelolaan, dalam hal ini Pemerintah Kota Tanjungpinang. Hal inilah yang menjadi kontrol bagi pemerintah untuk menjaga eksistensi di perairan pesisir tersebut.

Setelah diberi Hak Pengelolaan, maka Pemerintah Kota Tanjungpinang dapat menyerahkan pengelolaannya kepada masyarakat yang bermukim di kawasan tersebut, baik Hak Milik, Hak Guna Bangunan, dan Hak Pakai di atas Hak Pengelolaan.

Beberapa pengaturan di atas hanya dapat diwujudkan jika antara instansi-instansi yang terkait sudah sepakat dalam memformulasikan pengaturan terhadap permukiman di atas air perairan pesisir Kota Tanjungpinang, dimana lokasi-lokasi teresebut juga harus diperhatikan oleh segenap pihak terkait, termasuk masyarakat di kawasan itu sendiri. Pengaturan ini pun harus disepakati dalam berbagai dokumen perencanaan dan pengendalian lingkungan, baik itu RTRW, RTBL, RDTRK, KLHS, sehingga akan memberi keseragaman dan harmonisasi, serta menjadi pertimbangan teknis bagi Kantor Pertanahan Kota Tanjungpinang dalam menerapkan Hak Milik, Hak Guna Bangunan maupun Hak Pakai di atas Hak Pengelolaan untuk permukiman di atas air perairan pesisir Kota Tanjungpinang, baik pemberian hak atas tanah untuk pertaman kali maupun untuk perpanjangan hak atas tanah.

Sayangnya dalam perkembangannya dokumen-dokumen tersebut banyak yang belum dibuat padahal sudah banyak pengajuan permohonan hak atas tanah untuk permukiman di atas air perairan pesisir Kota Tanjungpinang, sehingga untuk efektifitas sebaiknya perlu adanya surat-surat keterangan dari instansi terkait, sebagaimana sudah dijelaskan pada tabel di atas, baik itu surat keterangan dari Dinas Perhubungan, Dinas Kelautan dan Perikanan, dan Dinas Kehutanan/Badan Pemantapan Kawasan Hutan. Diharapkan segala pengaturan lebih lanjut di atas dapat menjadi pencegahan dalam berbagai kerusakan lingkungan, serta dapat mewujudkan tata ruang yang masih tertata di Kota Tanjungpinang.

Hukum Tanah Nasional adalah Hukum Tanah Indonesia yang berdasarkan alam pemikiran hukum adat (Falsafah Hukum Adat), khususnya mengenai hubungan hukum antara masyarakat hukum adat tertentu dengan tanah ulayatnya, yang menurut Boedi Harsono terwakili dalam satu kata kunci yaitu "Komunalistik Religius" dan dirumuskan sebagai: konsepsi yang memungkinkan penguasaan bagian-bagian tanah bersama sebagai Karunia Tuhan YME oleh para warga negara secara individual dengan hak-hak atas tanah yang bersifat pribadi sekaligus mengandung unsur kebersamaan.

Dengan demikian pemberian dan penerapan hak atas tanah di permukiman di atas air perairan pesisir Kota Tanjungpinang pun sebenarnya tidak melanggar konsepsi Hukum Tanah Nasional yang menerapkan Komunalistik Religius tersebut. Apalagi mereka sudah menempati kawasan tersebut turun-temurun, sehingga ikatan batin antara mereka dan tanah di perairan pesisir pun adalah ikatan yang sangat kuat, tidak dapat diabaikan begitu saja, pemberian hak atas tanah untuk masyarakat tersebut sudah merupakan kewajiban bagi Pemerintah

Berdasarkan Pasal 4 UUPA, tanah dalam pengertian yuridis adalah permukaan bumi, sedangkan hak atas tanah adalah hak atas sebagian tertentu permukaan bumi, yang berbatas, berdimensi dua dengan ukuran panjang dan lebar. Akan tetapi walau secara yuridis tanah adalah permukaan bumi, namun untuk keperluan apapun pasti diperlukan pula penggunaan sebagian tubuh bumi yang ada di bawahnya dan air serta ruang yang ada di atasnya. Oleh karena itu pada Pasal 4 ayat (2) juga dinyatakan bahwa hak-hak atas tanah bukan hanya permukaan bumi yang bersangkutan, tetapi juga tubuh bumi yang ada di bawahnya dan air serta ruang yang ada di atasnya.

Dari penjabaran konsep tanah menurut Hukum Tanah Nasional, maka pada penelitian ini, permukiman di atas air menggunakan tiang pancang sebagai penopang rumah-rumah, menggunakan tanah di bagian bawah permukaan bumi dan bagian atas permukaan bumi baik air laut (yang mengalami pasang surut) maupun udara, hal tersebut masih masuk dalam konsep tanah menurut Hukum Tanah Nasional, maka dari itu penerapan hak atas tanah di perairan pesisir bukanlah suatu permasalahan, namun yang perlu dikaji lebih lanjut adalah hak atas tanah seperti apakah yang tepat untuk kawasan perairan pesisir tersebut.

Dalam penjabaran penulis, Hak Milik, Hak Guna Bangunan dan Hak Pakai atas tanah pada permukiman di atas air perairan pesisir Kota Tanjungpinang dilakukan di delapan kelurahan yaitu Kelurahan Tanjungpinang Barat, Tanjungpinang Kota, Kemboja, Tanjung Unggat, Kampung Bulang, Kampung Bugis, Senggarang, dan Pulau Penyengat.

Dari hasil inventarisasi tahun 2011 oleh BPN RI, wilayah permukiman di atas air memiliki luas kurang lebih 855.800m2 atau ± 1,35% dari total luas delapan kelurahan tersebut, namun hanya sekitar 3,48% yang terdaftar.278 Dari sejumlah yang telah terdaftar tersebut, sebagian terbesar diberikan Hak Guna Bangunan 43,13%, sedangkan yang lainnya diberikan Hak Pakai 36,2%, dan Hak Milik 20,67%.

Syarat pengajuan permohonan hak atas tanah yang diterapkan Kantor Pertanahan pun tidak berbeda dengan persyaratan untuk tanah di daratan. Hal ini harus diperhatikan secara serius, mengingat permukiman di atas air perairan pesisir tidak sama rezimnya dengan daratan. Ada faktor-faktor yang perlu diperhatikan. Bukan hanya dari aspek pertanahan, namun juga dari aspek lingkungan, kelautan, perikanan, tata ruang, perhubungan laut, dsb. Adapun dasar pertimbangan pasang surut air laut yang dilakukan oleh Kantor Pertanahan Kota Tanjungpinang dalam menentukan kapan diberi Hak Guna Bangunan, dan Hak Pakai menurut peneliti kurang tepat. Seharusnya kriteria yang digunakan adalah berdasarkan sifat dari hak itu sendiri, bukan dengan kriteria pasang surut mengingat kriteria tersebut kapan saja bisa berubah sebagaimana fisik lingkungan pesisir yang selalu mengalami perubahan sewaktu-waktu.

Beberapa peraturan menjadi acuan dalam penentuan rekomendasi ini, baik bidang pertanahan maupun non pertanahan antara lain: UUPA, PP No.24/1997, PP No.40/1996, PP No.16/2004, SE KBPN No. 500-1197, SE KBPN No.500-1698,

UU No.26/2007, UU No.27/2007, UU No.1/2014, UU No.32/2009, UU No.6/1996, UU No.17/2008, UU No.32/2004, dan aturan terkait Reklamasi Laut. Dari berbagai peraturan tersebut, ditentukan bagaimana sebaiknya hak atas tanah yang sebaiknya diterapkan dalam kawasan permukiman di atas air tersebut, yaitu peneliti menyarankan agar hak atas tanah yang diterapkan dalam kawasan permukiman di atas air perairan pesisir Kota Tanjungpinang adalah hak atas tanah yang Pemerintah, dalam hal ini Pemerintah Daerah Kota Tanjungpinang, memliki kekuatan yang lebih leluasa dalam melakukan fungsi kontrol penguasaan, pemilikan, penggunaan, dan pemanfaatan tanah di kawasan tersebut.

Dengan demikian, melihat kebutuhan akan hak atas tanah yang memiliki sistem kontrol tersebut, maka peneliti merekomendasikan agar tanah di permukiman di atas air diserahkan kepada Pemerintah Daerah Kota Tanjungpinang berupa Hak Pengelolaan, dan di atas Hak Pengelolaan tersebut dapat diserahkan pengelolaannya kepada masyarakat yang membutuhkan baik itu Hak Milik, Hak Guna Bangunan, maupun Hak Pakai.

Adapun syarat pertama sebelum suatu kawasan perairan pesisir dapat diberikan hak atas tanah, sebaiknya dipastikan kembali bahwa lokasi permukiman di atas air sesuai dengan yang ditetapkan dan diakomodir dalam RTRW Kota Tanjungpinang sebagai kawasan pelantar (permukiman di atas air perairan pesisir). Kemudian permukiman di atas air sudah memiliki sanitasi yang baik, dan jalur pelantar yang sudah diberi perkerasan, bukan berupa kayu. Lokasi tidak masuk dalam kawasan lindung dan atau kawasan hutan. Lokasi sudah dikaji dalam LKHS, tidak berada di kawasan budidaya perikanan. Lokasi tidak mengganggu alur-pelayaran umum dan perlintasan, alur-pelayaran masuk pelabuhan, serta zona keamanan dan keselamatan sarana bantu pelayaran yang terdapat pada wilayah perairan tersebut.

Reform of the European Court of Human Rights: Achievements and Challenges

Reformasi Pengadilan Hak Asasi Manusia di Eropa: Prestasi dan Tantangan

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ABSTRACT

The right of individual complaint is the important part of the European Convention on Human Rights (ECHR) regime and acknowledged as a cornerstone of the Convention system. But, it has also caused a notorious problem to the European Court of Human Rights (ECtHR) regarding the high number of applications. This backlog has brought a serious threat to the effectiveness and credibility of the ECtHR. Several measures therefore have been taken to overcome it, which consists of the reform by Protocol No. 11 and Protocol No. 14. Furthermore, since the problem of the workload remains, the reform then has continued taking place by the adoption of Protocol No. 15 and No. 16. There are two points then, addressed to be discussed in this dissertation. Firstly, it tries to assess the effectiveness of two former protocols during the 'first' and the 'second' reform of the ECtHR by emphasizing its achievements and the further problems. It argues that there were certain achievements brought by those, even though the caseload problem remained. Secondly, with regard to the latter two protocols, this dissertation aims to examine whether those protocols could be taken to deal with the further challenges faced by the ECtHR throughout the 'third' period of the reform. It argues that several challenges could be answered by these protocols, particularly in terms of enhancing the State Parties' role, even though there are still some concerns in which should be considered.

ABSTRAK

Hak pengaduan individu merupakan bagian penting dari rezim Konvensi Eropa tentang Hak Asasi Manusia (ECHR) dan diakui sebagai landasan dari sistem Konvensi. Tapi, hal itu juga menyebabkan masalah yang terkenal ke Pengadilan Tinggi Hak Asasi Manusia Eropa (ECtHR) mengenai banyaknya jumlah aplikasi. Besarnya jumlah yang belum diproses ini telah membawa ancaman serius terhadap efektivitas dan kredibilitas ECtHR. Beberapa tindakan telah diambil untuk mengatasinya, yang terdiri dari reformasi oleh Protokol No. 11 dan Protokol No. 14. Selanjutnya, karena masalah beban kerja tetap ada, reformasi kemudian berlanjut dengan penerapan Protokol No. 15 dan No. 16. Ada dua poin kemudian, ditujukan untuk dibahas dalam disertasi ini. Pertama, ia mencoba menilai keefektifan dua protokol sebelumnya selama reformasi 'pertama' dan 'kedua' dari ECtHR dengan menekankan pencapaian dan masalah lebih lanjut. Ini berpendapat bahwa ada beberapa prestasi yang diraih oleh mereka, meskipun masalah beban tetap ada. Kedua, sehubungan dengan dua protokol terakhir, disertasi ini bertujuan untuk memeriksa apakah protokol tersebut dapat diambil untuk menghadapi tantangan lebih lanjut yang dihadapi oleh ECtHR selama periode 'ketiga' dari reformasi. Ini berpendapat bahwa beberapa tantangan dapat dijawab oleh protokol ini, terutama dalam hal meningkatkan peran negara-negara pihak, meskipun masih ada beberapa masalah yang harus dipertimbangkan.

There were several factors, considered as causes of the increase in the number of applications. First of all, as stated by Paraskeva, before 1998, the ECHR system was extraordinary 'complex'. The mechanism for human rights complaints had been comprised by three organs of the Council of Europe (CoE): the European Commission of Human Rights, the ECtHR and the Committee of Ministers within two-tiered, three-stage process. On the one hand, the Commission decided on the admissibility of a complaint. On the other hand, the Committee and/or the Court determined the merits of cases that came before them and reached a conclusion as to whether there had been a violation or not. The Commission was capable of rejecting the application before passing it on to the Court, or it could even pass it to the Committee of Ministers, avoiding the Court altogether. In this regard, Nicola Rowe and Volker Schlette argued that this procedure was causing a considerable overlap between the competencies of the various organs, which meant that work was often duplicated and there was a risk that the various organs would reach different decisions in substantially similar cases. With regard to this factor, there was an attempt to address it by the entry into force of Protocol No. 11 in 1998. This protocol created a new permanent Court which handles both the admissibility and merits phases of application. Nevertheless, even with the reform brought by Protocol No. 11, the caseload had remained continuing to rise sharply since this protocol entered into force, as 30,069 and 44,128 applications were lodged in 2000 and 2004 respectively. It seemed that the Court has rather been a victim of its own success. Because one of the new provision stated in Protocol No. 11, guarantees the right of individual applications thereby opening the tap of human rights cases of every individual within the ECHR sphere.

Nevertheless, after having two Protocols specifically in order to deal with the caseload problem in ECHR system, it seems that the conundrum remained. The number of applications, allocated to a judicial formation have increased approximately 53% between 2004 and 2008: from 32,500 to 49,700. Therefore, several attempts subsequently have been taken to determine the further reform including by Protocol No. 15 and 16, resulted from various conferences in the long span of about three years, from Interlaken to Brighton in 2010 and 2013 respectively. Each of those protocols also has significant efforts in dealing with the burdensome, assessed within the 'third' period of the reform, in particular, concerning the measurement at the national level. In this sense, Protocol No. 15 and 16 have pointed out the principle of margin of appreciation, principle of subsidiarity and the advisory opinions expecting that the effectiveness in domestic remedies could reduce the workload at the ECtHR level.

However, based on the figure described in the 'Analysis of Statistics 2014' by the Court, it can be seen that between 2011 and 2013, there had been a steady increase in the number of applications allocated to a judicial formation: 64,300 in 2011, 64,900 in 2012, and 65,800 in 2013. The rise was not as high as before compared to the period prior to 2011. Otherwise, surprisingly, it decreased to 56,300 in 2014. In addition, the

number of applications pending before a judicial formation had been reduced as well at the same period in which 2011 to 2014: 151,600 in 2011, 128,100 in 2012, 99,900 in 2013 and 69,900 in 2014.

Having seen those latest figures, one may argue that the Court has successfully overcome the workload problem, particularly, as the result of a new approach to Rule 47 of the Rules of Court, "which determines what applicants are required to be allocated for judicial decision." But, the new approach may not be the only one factor in reducing the workload since the number of applications has not increased significantly from 2011. It seems that the entry into force of Protocol No. 14 in 2010, has also contributed to this matter. Thus, it can be argued that the reforms hitherto taken have its own successes in measuring certain factors in the certain period, addressed as causes to the caseload problem. However, bearing in mind that there might be another challenge ahead to uphold human rights in European Countries. In line with Lucius Caflisch, it can be said that: 'there will have to be, after the reform of 1998 and 'reform of the reform' of 2004, a 'reform of the reform of the reform', in order to deal with the further challenges to the Court regarding its workload. Considering two latest adoptions of Protocol No. 15 and No. 16, it seems that the reform process will continue on the matter that Contracting Parties bear the primary responsibility for ensuring that the Convention is applied effectively at domestic level.

This dissertation, however, aims to assess the achievements of Protocol No. 11 and 14 whilst seek the challenges afterwards, in particular, by considering the adoption of Protocol No. 15 and 16. It focuses on the brief history, the main features and the further problem of each protocol. The first part assesses the effectiveness of Protocol No. 11, followed by Protocol No 14 on the second part with regard to the workload problem of the Court. The final part examines Protocol No. 15 and 16 by emphasizing the discussion prior to its adoption and whether those protocols could answer the further challenges to the reform of ECtHR.

Protocol No. 11 amended the Convention to make provision for a new wholly judicial system (Article 19 to 51 ECHR) of determination of applications and restructured the institutional framework. Jean-Paul Costa stated that this Protocol has created the new system and consisted of "abolishing the European Commission of Human Rights and the quasi-judicial role of the Committee of Ministers." The fundamental aim was that it would bring an improvement in the ECHR system leading to the examination of human rights complaints within a reasonable time. And ultimately, the purpose of the reform at that time was to enhance the efficiency of the means of protection and to maintain the high quality of human rights protection. Nonetheless, despite amending almost the entirely provisions for the Court, an understanding of the system of protection prior to the date of entry into force remains necessary since decisions made by the Strasbourg organs before the change continue to have an effect as authorities on the interpretation and application. Moreover, the Committee of Ministers of the CoE

will retain its competence under the former Article 54 (supervision of the judgment of the Court), whilst the competence in relation to former Article 32 regarding individual applications was abolished.

At last, Russia ratified Protocol No. 14 on 2 June 2010, thereby ceasing the Protocol No. 14bis to be in force or applied on a provisional basis. However, it was admitted that despite several changes, provided by Protocol No. 14 including single-judge formation, the extended competence of the three judges Committee and the new admissibility criterion, the Protocol would not be alone in resolving the problems concerning the volume of applications to the Court. As concluded by Steven Greer, Protocol No. 14 "may not solve the current case overload crisis, [it] has, nevertheless, probably bought extra time for further reflection on the Court's future." Bearing in mind the six years delay of Russia ratification as well since it was opened for signature, Protocol No. 14 was in questioned whether it could deal with the recent case load problem. Therefore, discussions on further reform has continued taking place in a lengthy series occasions of Inter-governmental Conferences, started from Interlaken to Izmir and Brighton in 2010 to 2012 respectively. The upcoming challenge faced by the Court is likely to enhance the responsibility of State Parties at the national level for ensuring that the Convention is applied effectively therein. This matter is apparently addressed during the discussions at those conferences above by which resulting Protocol No. 15 and No. 16. The following part then tries to emphasize the significance of those conferences (background and the main features), its results (Protocol No. 15 and No. 16) and examines the further challenges to the reform of ECtHR, in particular, concerning the workload problem.

As emphasized in advance, the reform taken by Protocol No. 11 and No. 14 has brought its own success during each period. Besides creating a single Court in order to shorten the process of individual application, Protocol No. 11 has a great impact to the productivity of the Court by giving 61,633 judgments in five years compared to a total of 38,389 decisions and judgments in the forty-four years up to 1998. The individual petition, insisted in this protocol whereby allowing the applicants to bring their cases directly before the Court without restrictions, has become entrenched as the 'cornerstone of the Strasbourg System' and also the "crown jewel of the world's most advanced international system for protecting civil and political liberties." Otherwise, Protocol No. 14 has been a success particularly with regard to the filtering by introducing the single judge formation, pilot judgment procedure and new admissibility criterion. This claim of achievement can be seen in the following numerical figure. As noted from the Court Analysis of Statistic 2014, between 2011 and 2013, there had been a steady increase in the number of applications allocated to a judicial formation: 64,300 in 2011, 64,900 in 2012, and 65,800 in 2013. The rise during that period is not as high as the previous years prior to 2011. It then decreased to 56,300 in 2014. In addition, the number of applications pending before a judicial formation has been reduced as well at the

same period in which 2011 to 2014: 151,600 in 2011, 128,100 in 2012, 99,900 in 2013 and 69,900 in 2014. The decrease in the number of applications is also acknowledged as a result of a new approach to Rule 47 of the Rules of Court under Article 34 of the ECHR. This new approach of rule was one of the main innovations in 2014 in which introducing stricter formal requirements for making an application to the Court. As come into force on 1 January 2014, it is designed to "make the Court more effective and to speed up the examination of cases."

However, there are at least two challenges that could be faced by the Court in terms of the 'third' period of reform. Firstly, the dilemma to balance between filtering cases and upholding the human rights protection is likely to be discussed further. As noted elsewhere, the right of individual application has played a significant role in the development of the ECHR system. It has enhanced the Court's legitimacy. Hence, the restriction of the individual applications to have direct access without giving reasons could lead the Court into a legitimacy problem. The new admissibility criterion brought by Protocol No. 14 and the new approach to the Rule 47 of the Rules of Court could be seen as a restriction of the protection of human rights. For instance, this concern was raised by NGOs across Europe when opposing the new admissibility criterion. They feared that 'the new admissibility criterion 'will give the ECtHR too wide a discretion to reject otherwise meritorious cases, and will also create real uncertainty amongst applicants and their advisers as to the prospects of the success of their applications to the ECtHR'. Moreover, NGO also opposed the removal of the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" in Article 35 ECHR by Protocol No. 15. They argued that the deleted clause is important since "the principal value of this safeguard clause was to avoid a denial of justice, a fundamental principle of the rule of law." Although this protocol has not entered into force yet, this such concern apparently should be considered. The new approach of the Court in taking a stricter formal requirement should be more transparent in order to help applicants better to figure out their prospective chances of success thereby discouraging potential inadmissible applications in the first place.

Second, as stated by President Dean Spielmann in the Annual Report 2014 of ECtHR, another challenge is in relation to find a solution to the handling of repetitive cases. Numerically, in 2014, there are more than 34,000 of such cases. Most of the repetitive cases have been flooded from certain member States with systemic problems. Di Borgo noted that: '[t]hese States Parties, most notably Italy, Ukraine, Turkey, the Russian Federation, Serbia, Romania and the United Kingdom (all of which have more than 1,000 repetitive cases pending before the Court) bear primary responsibility for this unacceptable situation'. It may be argued that the extended competence of three judge committee introduced by Protocol No. 14 could overcome this challenge. But, based on the statistic mentioned, it seems the effectiveness of such committee has not implemented well. However, since the repetitive cases originate in a structural

or systemic problem at the domestic level, it is necessary to take into account the encouragement of domestic mechanisms as the first and foremost part in protecting the rights and freedoms enshrined in the Convention in conformity with the principle of subsidiarity by which the ECHR system is based. In this regard, di Borgo stated that: '[t]he reduction of the number of cases coming before the Strasbourg Court, especially those of a repetitive nature stemming from structural or systemic deficiencies in States Parties, depends in large part on enhancing the notion of subsidiarity by effectively securing the full implementation of the rights enshrined in the Convention at the domestic level. Bearing in mind that Protocol No. 15 whereby providing the amendment to include the principle of subsidiarity in the Preamble of the ECHR has not entered into force yet. Thus, this principle remains not expressly mentioned in the Convention. But, the Court has apparently recognized the applicability of the principle of subsidiarity in its case law and implicitly mentioned in Articles 1, 13, 19 and 35(1) ECHR.

In recent years, during the ongoing reform process of the ECHR after Protocol No. 15 was opened for signature, the principle of subsidiarity has gained 'an increasingly high profile', described as the 'Age of Subsidiarity'. Mowbray examined that: "[t]here was a noticeable increase in the yearly average numbers of references to subsidiarity in reports from both Chambers and the Grand Chamber during the post-Interlaken period compared to throughout the first decade of the full-time Court's work." It can be seen that the importance of sharing responsibility between international and domestic level during the 'third' period of reform has envisaged in order to overcome the conundrum entrenched at the Court. In this respect, Yudkivska concluded that: "the decentralization of the protection of human rights and allocation of the burden of such protection to national courts is the only adequate answer to those challenges that the Court is facing today, and a guarantee of the efficient future of the Court and whole complex mechanism of human rights." She added: "[notwithstanding the role of international mechanisms, an efficient protection of human rights begins and ends on the national level."

To conclude, as mentioned elsewhere in this dissertation, Protocol No. 11 and No. 14 have brought their own achievements during the reform of ECtHR. The complexity of the very first institution in ECHR system had been replaced to the new single Court whereby shortening the process of the individual applications. Furthermore, the conundrum in dealing with the peculiar cases in which notoriously causing the even far-increasing number of applications also has been measured. As a result, after the long period of reform, the statistic in the number of applications lodged to a judicial formation has decreased in 2014 as described beforehand. However, despite that fact, it may not be the end of story of the reform to the ECtHR. One or two protocol could not prompt to overcome the backlog of the Court's workload.

In this respect, the ECtHR could not manage to deal with the problem alone as the Contracting Parties also have a significant role in protecting human rights

particularly in their respective countries. Therefore, the ongoing reform is related to the notion of sharing responsibility between the Court and domestic authorities. Two notable challenges that are likely to be the next issues, apparently are in relation to this matter. It seems that the changes brought by Protocol No. 15 and No. 16 could help to answer the challenges in particular to the provisions whereby emphasizing the measure at the national level. But, for some issues which could give the stricter requirement to the right of individual application, the measures should be discussed further. There are at least two instances of this category such as the shortening of the time limit for submitting an application to the Court and the amendment of the admissibility criteria as discussed. In doing so, it could be envisaged, this is the time for Protocol No. 15 and No. 16 to give their contribution in the following reform to the ECtHR. Nevertheless, it should be admitted that even though at the end those protocols could reach their own achievements in a certain part, the reform of the Court is likely to continue along with the development of human rights protection around the globe. The discussion on the reform of the ECHR system is quite similar to the discussion of the constitution project at European Union level which is difficult to be ended. Again, as stated by Caflisch, 'there will have to be, after the reform of 1998 and 'reform of the reform' of 2004, a reform of the reform of the reform.

Nilai Pembuktian dan Kualifikasi Keterangan Ahli dari BPK dalam Pemeriksaan Perkara Tindak Pidana Korupsi

The Probative Value and Qualification of BPK Testimonial Expert in Corruption Case Examination

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ABSTRACT

The purpose of this study is to determine the probative value of the BPK Testimonial Expert and to determine the qualifications of the BPK Testimonial Expert to be used as a basis for consideration of the Judge in corruption case investigation. The method used is the empirical normative that combine theory and application in the field. This study is a descriptive in illustrate, describe and explain the probative value and qualifications of the BPK Testimonial Expert in corruption cases investigation. The collected data were analyzed qualitatively in order to get the correct data.

The results of this study indicates that the description of BPK Testimonial Expert needed in the investigation, prosecution and trials of corruption crimes which require proof in a complex and complicated state losses. BPK Testimonial Expert should be relevant to the other evidence and the facts revealed in the court. BPK Testimonial Expert is the personification of the institution of BPK as a state agency, not an expert testimony in his capacity as an individuals. Thus the judge will assess the qualifications of BPK Testimonial Expert by letter of assignment as the BPK Testimonial Expert, experience in the field of financial examination, and the Expert Employment Status. If the description of BPK Testimonial Expert associated with the calculation of the values and amounts of state losses, it is presented in court is an examiner who participate in team membership of State Losses Calculations. BPK Testimonial Expert in addition to having special expertise regarding financial management and state losses, the information given must be in the form of information "according to knowledge." Material presented by BPK Testimonial Expert should be consistent with the methods and references used in his opinion, so as to provide an answer filed by the Judge, Defendant's Legal Counselor, General Prosecutor and Justice Seekers convincingly.

Keywords: BPK Testimonial Expert, Proof of State Losses, Corruption Case Investigation

ABSTRAK

Tujuan penelitian ini adalah untuk mengetahui nilai pembuktian Keterangan Ahli dari BPK dan untuk mengetahui kualifikasi Keterangan Ahli dari BPK agar dapat digunakan sebagai dasar pertimbangan Hakim dalam pemeriksaan perkara tindak pidana korupsi. Metode penelitian yang digunakan adalah normatif empiris yaitu memadukan antara teori dan penerapannya di lapangan. Penelitian ini bersifat deskriptif dengan menggambarkan, menguraikan dan menjelaskan nilai pembuktian dan kualifikasi Keterangan Ahli dari BPK dalam pemeriksaan perkara tindak pidana korupsi. Data yang terkumpul dianalisis secara kualitatif agar mendapatkan hasil data yang benar.
Hasil penelitian ini menunjukkan bahwa Keterangan Ahli dari BPK diperlukan dalam penyidikan, penuntutan dan pemeriksaan sidang perkara tindak pidana korupsi yang memerlukan pembuktian kerugian negara yang kompleks dan rumit. Keterangan ahli dari BPK harus relevan dengan alat bukt i yang lain dan fakta- fakta yang terungkap di dalam persidangan. Keterangan Ahli dari BPK adalah personifikasi dari institusi sebuah lembaga negara yaitu BPK, bukan keterangan Ahli dalam kapasitasnya sebagai individu atau perseorangan. Maka dari itu Hakim akan menilai kualifikasi Keterangan Ahli dari BPK berdasarkan Surat Tugas sebagai Ahli dari BPK, Pengalaman dalam bidang pemeriksaan keuangan negara, dan Status Kepegawaian Ahli tersebut. Apabila Keterangan Ahli dari BPK terkait dengan perhitungan nilai dan jumlah kerugian negara, maka yang dihadirkan di dalam persidangan adalah seorang Pemeriksa yang ikut serta dalam keanggotaan Tim Penghitungan Kerugian Negara. Keterangan Ahli dari BPK selain memiliki keahlian khusus mengenai pengelolaan keuangan negara dan kerugian negara, keterangan yang diberikan harus dalam bentuk keterangan "menurut pengetahuannya." Materi yang disampaikan Keterangan Ahli dari BPK harus konsisten dengan metode dan rujukan yang digunakan dalam pendapatnya, sehingga dapat memberikan jawaban yang diajukan oleh Hakim, Penasihat Hukum, Penuntut Umum dan para pencari keadilan dengan meyakinkan.

Kata kunci: Keterangan Ahli dari BPK, Pembuktian Kerugian Negara, Pemeriksaan Perkara Tindak Pidana Korupsi

Keterangan ahli dari BPK dalam tahap penyidikan dan penuntutan sangat diperlukan untuk membantu penyidik dan penuntut umum dalam pembuktian kerugian negara yang memerlukan penghitungan yang rumit atau kompleks. Dalam putusan perkara No.04/Pid.Sus.Tipikor/2012/PN.GTLO tindak pidana korupsi Dana Perhitungan Fihak Ketiga (PFK) Kabupeten Bone Bolango, Majelis Hakim yang diketuai oleh Mustari memasukkan Keterangan Ahli dari BPK yang berupa laporan hasil perhitungan kerugian negara/daerah sebagai dasar pertimbangannya. Majelis Hakim memasukkan laporan hasil perhitungan kerugian negara/daerah No. 02/LHP-PKN/XIX.GOR/II/2011 tanggal 30 Desember 2011 tentang perhitungan kerugian Negara/Daerah atas pengelolaan dana Perhitungan Fihak Ketiga (PFK) pemerintah Kabupaten Bone Bolango tahun anggaran 2007 s/d 2010 sebagai Alat Bukti Surat. Hakim berpendapat bahwa tidak perlu menghadirkan Ahli dari BPK di persidangan karena dengan alat bukti surat tersebut dapat membuktikan unsur kerugian negara/daerah dan nilai kerugian tersebut secara sah dan meyakinkan.

Permasalahan kualifikasi Keterangan Ahli dari BPK terkait dengan seseorang yang dapat memberikan keterangan ahli di persidangan, topik dan materi keterangannya, serta bentuk keterangan yang disampaikan di dalam persidangan. Keterangan Ahli dari BPK diharapkan dapat menjelaskan unsur dan nilai kerugian negara dan Hakim berhak memiliki pertimbangan yang diyakininya, termasuk dalam mengukur relevansi keterangan ahli dengan perkara serta menilai kapasitas ahli tersebut.

Dalam sidang tingkat pertama kasus korupsi dana operasional PT Jogja Tugu Trans misalnya, Hakim mengharuskan penuntut umum untuk menghadirkan Ahli dari BPK sesuai dengan Laporan Hasil Penghitungan Kerugian Negara/Daerah dan Berita Acara Pemeriksaan Ahli pada tahap penyidikan di persidangan untuk menjelaskan nilai kerugian negara/daerah. Dalam putusan pengadilan tindak pidana korupsi tingkat pertama Majelis Hakim mengesampingkan Keterangan Ahli dari BPK terkait nilai kerugian negara/daerah. Berdasarkan pembuktian di persidangan, majelis hakim Pengadilan Tindak Pidana Korupsi Yogyakarta yang dipimpin Hakim Ketua Suwarno memutus dalam perkara Dana Operasional PT JTT tidak ada kerugian keuangan negara seperti dakwaan Jaksa Penuntut Umum. Majelis tetap memvonis Mulyadi dan Poerwanto bersalah melanggar Pasal 3 Undang Undang No. 31 Tahun 1999 jo Undang Undang No. 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi. Majelis berpendapat kedua terdakwa terbukti menyalahgunakan kewenangan dan jabatan dalam proses pencairan Dana Operasional PT JTT pada Februari 2008. Proses pencairannya melalui kasbon dan tidak disertai dokumen resmi sehingga melanggar ketentuan administrasi. Perbuatan kedua terdakwa itu juga berpotensi menimbulkan kerugian keuangan negara.

Keterangan ahli dari BPK dibutuhkan untuk menerangkan dan menjelaskan salah satu unsur tindak pidana korupsi yaitu adanya kerugian negara/daerah. Keterangan Ahli dari BPK dalam persidangan belum tentu dapat digunakan oleh hakim

sebagai salah satu upaya untuk membuat terang suatu perkara pidana karena nilai pembuktiannya yang tidak mengikat. Dari beberapa permasalahan terkait dengan nilai pembuktian dan kualifikasi Keterangan Ahli dari BPK seperti diatas yang menjadi latar belakang penulis melakukan penelitian tesis dengan judul "Nilai Pembuktian dan Kualifikasi Keterangan Ahli dari BPK dalam Pemeriksaan Perkara Tindak Pidana Korupsi."

Berdasarakan latar belakang masalah diatas, maka dapat perumusan masalah penelitian ini adalah bagaimanakah nilai pembuktian keterangan ahli dari BPK dalam pembuktian perkara tindak pidana korupsi? Tujuan penelitian ini adalah untuk mengetahui nilai pembuktian Keterangan Ahli dari BPK dan untuk mengetahui kualifikasi Keterangan Ahli dari BPK agar dapat digunakan sebagai dasar pertimbangan Hakim dalam pemeriksaan perkara tindak pidana korupsi. Metode penelitian yang digunakan adalah normatif empiris yaitu memadukan antara teori dan penerapannya di lapangan. Penelitian ini bersifat deskriptif dengan menggambarkan, menguraikan dan menjelaskan nilai pembuktian dan kualifikasi Keterangan Ahli dari BPK dalam pemeriksaan perkara tindak pidana korupsi. Data yang terkumpul dianalisis secara kualitatif agar mendapatkan hasil data yang benar.

Dalam kasus dugaan korupsi Biaya Operasi Kendaraan PT Jogja Tugu Trans (JTT) Penyidik Kejaksaan Tinggi DIY telah menetapkan mantan Kepala Dinas Perhubungan Komunikasi dan Informatika DIY Mulyadi Hadikusumo dan Mantan Direktur PT JTT Purwanto Johan Riyadi sebagai tersangka. Dalam kasus ini, dua tersangka diduga kuat menyalahgunakan jabatan dan kewenangan dengan melakukan penyimpangan dana biaya operasi kendaraan bagi Bus Trans Jogja pada Tahun Anggaran 2008-2009.

Penyidik Kejaksaan Tinggi DIY bekerjasama dengan BPK RI Perwakilan Provinsi DIY melakukan Penghitungan Kerugian Negara dalam penggunaan anggaran biaya operasional kendaraan PT JTT. Penyidik Kejaksaan Tinggi DIY mengajukan permohonan permintaan Keterangan Ahli kepada BPK melalui Kepala Perwakilan BPK RI DIY. Berdasarkan permohonan tersebut, Kepala Perwakilan BPK kemudian meneruskan permintaan Keterangan Ahli tersebut secara berjenjang kepada Kepala Sub Auditorat BPK DIY untuk mengkaji dan memberikan pendapat mengenai jawaban atas permintaan Ketarangan Ahli oleh Kejaksaan Tinggi DIY.

Berdasarkan Keputusan Sekretaris Jenderal BPK RI No. 208/K/X- XIII.2/4/2013 tentang Pedoman Pemberian Keterangan Ahli dari BPK, dijelaskan bahwa kapasitas BPK dalam suatu proses peradilan mengenai kerugian negara adalah sebagai ahli bukan saksi. BPK sebagai ahli dalam memberikan keterangan berdasarkan keahliannya, bukan sebagai saksi yang memberikan keterangan berdasarkan yang dilihat, didengar, dan dialaminya sendiri.

Penjelasan KUHAP tentang Ahli dari BPK sangat singkat karena hanya mengemukakan Ahli sebagai seseorang yang memiliki keahlian khusus tentang hal yang diperlukan untuk membuat terang suatu perkara pidana. Permasalahan kualifikasi

seorang Ahli dari BPK sering muncul dalam persidangan perkara tindak pidana korupsi terutama mengenai kualifikasi Keterangan Ahli dari BPK yang dapat dijadikan acuan bagi BPK dan aparat penegak hukum agar dapat dijadikan dasar pertimbangan hakim dalam pemeriksaan perkara tindak pidana korupsi. Berdasarkan studi literatur dan lapangan yang dilakukan oleh penulis, permasalahan tersebut adalah terkait dengan Kualifikasi seseorang yang memberikan keterangan ahli di persidangan, Topik dan Materi serta Bentuk Keterangan Ahli dari BPK yang diberikan dalam persidangan. Kamus Besar Bahasa Indonesia menjelaskan istilah 'kualifikasi' sebagai berikut:

1. Pendidikan khusus untuk memperoleh suatu keahlian;
2. Keahlian yang diperlukan untuk melakukan sesuatu (menduduki jabatan dsb);
3. Tingkatan;
4. Pembatasan.

Berdasarkan ketentuan Pasal 120 KUHAP jika dihubungkan dengan Pasal 1 angka 28 KUHAP, semakin jelas bahwa Keterangan Ahli dapat dinilai sebagai alat bukti yang memiliki kekuatan pembuktian ketika:

a. Keterangan ahli yang memiliki keahlian khusus dalam bidangnya sehubungan dengan perkara pidana yang sedang diperiksa;
b. Bentuk keterangan yang diberikan adalah harus sesuai dengan keahlian khusus yang dimilikinya menurut pengetahuannya.

Dengan demikian, agar Keterangan Ahli dapat dinilai sebagai alat bukti, di samping faktor orangnya memiliki keahlian khusus dalam bidangnya, harus pula dipenuhi faktor kedua, yaitu keterangan yang diberikan harus dalam bentuk keterangan "menurut pengetahuannya." Apabila keterangan yang diberikan berbentuk pendengaran, penglihatan atau pengalamannya sehubungan dengan peristiwa pidana yang terjadi, keterangan seperti ini tidak bernilai sebagai alat bukti Keterangan Ahli, tetapi berubah menjadi alat bukti keterangan saksi. Oleh karena itu, dalam menentukan penilaian apakah suatu keterangan dapat dinilai sebagai Keterangan Ahli, bukan semata-mata ditentukan oleh faktor keahliannya atau faktor orangnya. Tetapi ditentukan oleh faktor "bentuk keterangan" yang dinyatakannya, yakni berbentuk keterangan menurut "pengetahuannya" secara murni. Jadi harus berhati-hati menilai bentuk Keterangan Ahli. Harus benar-benar "murni" berbentuk keterangan menurut pengetahuannya. Jika bentuk keterangan itu bercampur aduk dengan bentuk keterangan lain, dengan sendirinya keterangan tersebut tidak lagi bernilai sebagai alat bukti Keterangan Ahli.

Berdasarkan pendapat dari Suwarno, untuk membuktikan unsur kerugian negara Keterangan Ahli dari BPK yang dihadirkan di persidangan dapat dilakukan tanpa pemeriksaan terlebih dahulu. Keterangan Ahli dari BPK untuk membuktikan unsur kerugian negara seperti inilah yang dapat disebut sebagai "Keterangan Ahli Murni." Selanjutnya Suwarno menambahkan, jika Keterangan Ahli dari BPK yang dihadirkan terkait dengan perhitungan nilai dan jumlah kerugian negara berdasarkan pada

Laporan Hasil Penghitungan Kerugian Negara maka hakim harus secara jeli dan hati-hati untuk menilainya. Disamping itu harus dipisahkan secara jelas dengan Keterangan Saksi karena Keterangan Ahli dari BPK berdasarkan pada Laporan Hasil Penghitungan Kerugian Negara istilahnya lebih dekat dengan istilah Saksi Ahli. Hal ini dapat terjadi karena tim yang menghitung kerugian negara tersebut mengetahui fakta yang terjadi bukan hanya menyampaikan keterangan menurut pengetahuan dan keahliannya.

Keterangan Ahli dari BPK diperlukan dalam penyidikan kasus korupsi yang memerlukan penghitungan kerugian negara/daerah yang rumit dan kompleks, sedangkan untuk kasus korupsi yang pembuktian kerugian negaranya sederhana Penyidik dapat melakukan penghitungan sendiri. Dalam tahap Penuntutan Keterangan Ahli dari BPK diperlukan untuk melengkapi berkas apabila Penuntut Umum menilai dalam tahap penyidikan, pemeriksaan terhadap ahli belum lengkap. Keterangan Ahli dari BPK yang dihadirkan di persidangan dapat membuat terang dan memperkuat terkait unsur telah terjadi kerugian negara, tetapi untuk nilai dan jumlah angka kerugian negara ditentukan oleh perkembangan yang terjadi setelah penghitungan kerugian selesai dan disesuaikan dengan fakta fakta yang terkait dalam persidangan. Pemberian Keterangan Ahli dari BPK terkait dengan kasus korupsi Biaya Operasi Kendaraan PT Jogja Tugu Trans (JTT) diberikan berdasarkan Laporan Penghitungan Kerugian Negara/Daerah, sedangkan terkait dengan kasus korupsi dana hibah Tembakau Virginia di Kabupaten Bantul dihadirkan secara lisan di pengadilan berdasarkan LHP atas Kepatuhan terhadap Peraturan Perundang-undangan dalam Kerangka Pemeriksaan Laporan Keuangan Pemerintah Kabupaten Bantul Tahun Anggaran 2010 No.23c/LHP/XVIII.YOG/06/2010 tanggal 4 Juni 2010. Keterangan Ahli dari BPK bernilai sebagai alat bukti jika bersesuaian dengan alat bukti yang lain di dalam persidangan.

Keterangan ahli dari BPK memiliki perbedaan jika dibandingkan dengan keterangan ahli pada umumnya. Keterangan Ahli dari BPK adalah personifikasi dari institusi sebuah lembaga negara yaitu BPK bukan keterangan Ahli dalam kapasitasnya sebagai individu atau perseorangan. Maka dari itu bagi Hakim, Surat Tugas sebagai Ahli dalam persidangan menjadi pertimbangan utama. Selanjutnya Hakim akan mempertimbangkan Pengalaman, Status Kepegawaian, Pelatihan, Kursus dan Sertifikasi Keahlian. Bagi BPK dan Aparat Penegak Hukum, latar belakang pendidikan formal Pemeriksa BPK tidak dijadikan landasan atau dasar pertimbangan dalam menilai kua lifikasi ahli karena dalam praktek, pengalaman pemeriksa dalam melakukan pemeriksaan khusus dapat mendatangkan keahlian. Ahli dari BPK harus menguasai ketentuan pengelolaan keuangan negara/daerah agar dapat menjawab pertanyaan yang diajukan oleh Hakim, Penasihat Hukum dan Penuntut Umum dengan meyakinkan. Kualifikasi terkait dengan seseorang yang dapat memberikan Keterangan Ahli di Persidangan, jika:

a. Keterangan Ahli dari BPK yang terkait dengan perhitungan nilai dan jumlah kerugian negara berdasarkan pada Laporan Hasil Penghitungan Kerugian Negara,

maka yang dihadirkan di dalam persidangan adalah seorang Pemeriksa yang ikut serta dalam keanggotaan Tim Penghitungan Kerugian Negara dan nama seseorang tersebut harus tercantum dalam Surat Tugas Penghitungan Kerugian Negara tersebut.

b. Keterangan Ahli dari BPK menerangkan terkait dengan pembuktian unsur kerugian negara maka dapat dihadirkan seseorang dari BPK yang berada diluar keanggotaan Tim Penghitungan Kerugian Negara.
c. Jika terkait dengan penghitungan nilai dan jumlah kerugian negara yang dihadirkan adalah seseorang yang tidak masuk dalam Keanggotaan Tim Penghitungan Kerugian Negara maka Keterangan Ahli dari BPK tersebut akan dikesampingkan oleh Hakim.

Bunga Rampai Tesis/Disertasi

PENDIDIKAN

Program Beasiswa SPIRIT

Desain Kurikulum Berbasis Kebutuhan pada Diklat Pemeriksaan Infrastruktur Jalan dan Jembatan

Needs-Based Curriculum Design for Education and Training of Road and Bridge Infrastructures Audit

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ABSTRAK

Penelitian ini dilatarbelakangi oleh adanya permasalahan bahwa program diklat pemeriksaan infrastruktur jalan dan jembatan yang dilaksanakan di Pusdiklat BPK kurang sesuai dengan kebutuhan. Tujuan penelitian ini adalah untuk menentukan desain kurikulum berbasis kebutuhan, komponen-komponen kurikulum yang sesuai dengan kebutuhan, serta faktor-faktor penunjang untuk kurikulum diklat pemeriksaan infrastruktur jalan dan jembatan. Penelitian menggunakan pendekatan kualitatif dengan metode studi kasus. Subyek penelitian meliputi pihak lembaga kerja, pengelola diklat, dan calon peserta diklat. Teknik pengumpulan data melalui wawancara, studi dokumentasi, observasi dan studi literatur. Hasil penelitian ini yaitu diperolehnya: (1) model desain kurikulum diklat pemeriksaan infrastruktur jalan dan jembatan mengacu pada model problem centered design, dengan prosedur desain kurikulum adalah: identifikasi kebutuhan belajar, merumuskan kompetensi, mengorganisasi materi, menentukan metode pembelajaran, dan evaluasi; (2) komponen-komponen kurikulum yang sesuai dengan kebutuhan, yang meliputi: rumusan tujuan diklat yang terdiri atas 1 standar kompetensi, 3 kompentensi dasar dan 12 indikator hasil belajar; materi diklat yang sesuai kebutuhan belajar sebanyak 10 materi; metode pembelajaran yaitu ceramah, studi kasus, pemutaran video/film pendek, demonstrasi, sharing, tanya jawab, diskusi kelompok, praktik di kelas dan praktik di lapangan; dan metode evaluasi diklat dengan tiga level evaluasi; serta (3) faktor-faktor penunjang yang meliputi: peserta diklat adalah pemeriksa dengan kualifikasi peran ATS; instruktur adalah kombinasi dari akademisi, praktisi infrastruktur jalan dan jembatan, dan pemeriksa BPK yang berpengalaman; serta sarana-prasarana yang harus tersedia adalah modul, video/film pendek, peralatan pengujian, serta lokasi jalan dan jembatan untuk pelaksanaan praktik di lapangan.

Kata kunci: Desain Kurikulum, Diklat, Pemeriksaan, Infrastruktur Jalan dan Jembatan.

ABSTRACT

The study based on problems that the education and training program of road and bridge infrastructures audit carried out in BPK Training Center had less accordance with the needs. The purpose of the study is to determine the needs-based curriculum design, curriculum components that accordance with the needs, and supporting factors for the curriculum design. The study used a qualitative approach with the case study method. The informants covered institutions, training center, and trainee candidate. The techniques of data collection are interview, documention study, and observation. The results of the study are obtained: (1) the model of curriculum design for education and training of road and bridge infrastructures audit refers to the problem centered design pattern, with the curriculum design procedures are: identificating the learning needs, formulating the objectives, organizing the materials, determining methods, and evaluation, (2) the curriculum components that accordance with the needs, which include: formulation of objectives which consist of 1 standard competency, 3 basic competencies, and 12 indicators of learning outcomes; 10 training materials that accordance with the learning needs; learning methods, i.e: lecture, case study, short video/film, demonstration, sharing, question and answer, group discussion, in class and at the field practice; and the method of training evaluation through three levels of evaluation; and (3) the supporting factors which include: the learners are the auditors who have ATS qualification; the instructors are combination of academics, practitioners of road and bridge infrastructures, and experienced auditors; and the facilities that must be available are a module, short video/film, testing equipments, and the locations of road and bridge for conducting at the field practice.

Keywords: Curriculum Design, Educatioan and Training, Audit, Road and Bridge Infrastructures.

Bagi para perancang dan pembuat kebijakan publik, infrastruktur dipandang sebagai salah satu indikator kesejahteraan suatu negara dan rakyatnya. Maka dari itu upaya pengentasan kemiskinan tidak dapat dipisahkan dari upaya membangun infrastruktur. Pentingnya ketersediaan infrastruktur membuat pihak yang berwenang dalam hal ini Pemerintah membutuhkan dana yang sangat besar untuk membiayai pembangunan infrastruktur yang menyeluruh dan berkesinambungan.

Ironisnya, peningkatan anggaran belanja Pemerintah (baik APBN maupun APBD) untuk pembangunan infrastruktur tidak serta merta dibarengi dengan peningkatan kualitas infrastruktur tersebut. Oleh karena itu, pemeriksaan/audit terhadap infrastruktur jalan dan jembatan tersebut menjadi sangat penting untuk memastikan bahwa pelaksanaan pembangunannya telah taat pada aturan perundangan yang berlaku. Hal ini menjadi tanggung jawab yang berat bagi Badan Pemeriksa Keuangan (BPK).

Besarnya tanggung jawab BPK sebagaimana diamanatkan oleh Undang-Undang menuntut BPK untuk menjadi lembaga pemeriksa yang profesional. Dalam melaksanakan pemeriksaaan atas suatu konstruksi, para pemeriksa/auditor harus memiliki kompetensi yang memadai agar para pemeriksa dapat menganalisis dan menilai hasil pekerjaan dengan tepat dan akurat, sehingga pemeriksaan dapat dilaksanakan secara efektif, efisien dan ekonomis serta dapat memberikan rekomendasi yang tepat.

Profesionalisme pemeriksa BPK diimplementasikan dengan cara bahwa setiap pemeriksa yang akan melaksanakan tugas pemeriksaan harus telah lulus diklat fungsional sesuai dengan peran yang diembannya. Permasalahan yang sering ditemui dalam penyelenggaraan diklat adalah sudah sejauhmana penyelenggaraan diklat tersebut mampu memberikan kontribusi yang signifikan terhadap peningkatan kualitas sumber daya manusia sesuai dengan kebutuhan atau harapan pengguna (user) di tingkat lembaga. Dokumen kurikulum diklat pemeriksaan infrastruktur jalan dan jembatan disusun dalam bentuk sebuah program diklat yang memuat komponen-komponen kurikulum. Kurikulum/program diklat pemeriksaan infrastruktur jalan dan jembatan juga memuat komponen evaluasi. Diklat pemeriksaan infrastruktur jalan dan jembatan dilaksanakan selama lima hari.

Identifikasi kebutuhan belajar diperlukan untuk menentukan kebutuhan mana yang paling potensial dari segi tingkat kemanfaatan dan kemudahan pemenuhannya dalam penyelenggaraan diklat. Oleh karena itu, identifikasi kebutuhan belajar berguna untuk mendesain kurikulum diklat, sehingga tujuan dari kegiatan diklat dapat tercapai secara efektif.

Berdasarkan latar belakang dan identifikasi masalah penelitian di atas, rumusan permasalahan yang ingin diteliti dalam penelitian ini adalah: "Desain kurikulum berbasis kebutuhan yang bagaimanakah yang sesuai untuk diklat pemeriksaan infrastruktur jalan dan jembatan?". Penulis berharap bahwa penelitian ini dapat dapat bermanfaat

untuk menemukan desain kurikulum sesuai dengan teori pengembangan kurikulum, khususnya berkenaan dengan pengembangan kurikulum pendidikan dan pelatihan.

Penelitian ini secara umum bertujuan untuk mengembangkan desain kurikulum berbasis kebutuhan yang cocok untuk diklat pemeriksaan infrastruktur jalan dan jembatan. Ditinjau dari jenis data dan teknik analisis data yang digunakan, penelitian ini menggunakan pendekatan kualitatif. Penelitian kualitatif adalah penelitian yang menghasilkan penemuan-penemuan yang tidak dapat dicapai dengan menggunakan prosedur statistik. Subyek penelitian dalam penelitian ini adalah responden/ narasumber yang menjadi sumber data utama penelitian. Jenis data yang digunakan dalam penelitian ini adalah data kualitatif berupa hasil wawancara dengan subyek penelitian, hasil observasi serta hasil studi dokumentasi dan studi literatur.

Desain Kurikulum Berbasis Kebutuhan yang Sesuai

Desain kurikulum berbasis kebutuhan untuk diklat pemeriksaan infrastruktur jalan dan jembatan mengacu pada model problem centered design, meskipun juga dipengaruhi oleh model desain lainnya. Pengorganisasian komponen-komponen kurikulum diklat mendasarkan perhatiannya pada kehidupan nyata, terutama pada bidang pekerjaan pemeriksaan (auditing) yang dipadukan dengan kondisi dan permasalahan-permasalahan pada bidang infrastruktur jalan dan jembatan yang ada di lapangan, sesuai dengan yang dikemukakan oleh Zais (1976, hlm 413-414), Murray Print (1993, hlm. 101) dan Sukmadinata (2011, hlm. 120). Pengorganisasian kurikulum yang relevan dengan pekerjaan dan permasalahan yang dihadapi oleh para peserta diklat akan memberikan pengalaman belajar yang bermakna dan sesuai dengan kebutuhan peserta diklat.

Desain kurikulum diklat pemeriksaan infrastruktur jalan dan jembatan dimulai dari identifikasi kebutuhan. Identifikasi kebutuhan untuk menjaring informasi mengenai kompetensi yang dibutuhkan pemeriksa agar mampu melaksanakan tugas pemeriksaan infrastruktur jalan dan jembatan dengan baik dan profesional (Sanjaya, 2012, hlm. 85). Pendekatan dalam identifikasi kebutuhan belajar menggunakan model deduktif dengan melibatkan pihak lembaga kerja, pengelola diklat dan calon peserta diklat, sesuai dengan yang dikemukakan Abdulhak (2000, hlm. 34). Berdasarkan identifikasi kebutuhan tersebut kemudian dirumuskan tujuan/kompetensi yang hendak dicapai, yang dijabarkan ke dalam standar kompetensi dan kompetensi dasar.

Langkah selanjutnya setelah kompetensi dirumuskan adalah mengorganisasi materi. Pemilihan materi kurikulum bukan saja didasarkan pada kompetensi yang harus dicapai, akan tetapi harus mempertimbangkan segi signifikansi, validitas, kemudahan dipelajari dan sesuai dengan kebutuhan peserta diklat (Taba, 1962, hlm. 353), terutama dalam melaksanakan tugas pemeriksaan infrastruktur jalan dan

jembatan. Pengorganisasian materi diklat meliputi cakupan/skup dan sekuensnya. Cakupan dan sekuens merupakan permasalahan kritis dalam desain kurikulum (Zais, 1976, hlm. 439), terutama pada problem centered design (hlm. 419; Sukmadinata, 2011, hlm. 121), karena tidak ada buku atau media lain yang dipersiapkan khusus membahas mengenai pemeriksaan infrastruktur jalan dan jembatan.

Setelah materi diorganisasi dengan baik, langkah selanjutnya adalah menentukan metode pembelajaran untuk mengembangkan pengalaman belajar melalui aktivitas pembelajaran. Aktivitas pembelajaran mencakup aktivitas-aktivitas khusus yang ditawarkan kepada peserta diklat untuk memahami materi kurikulum sehingga peserta diklat tersebut dapat mencapai tujuan kurikulum yang telah ditetapkan (Print, 1993, hlm. 186). Efektivitas pembelajaran sangat dipengaruhi oleh strategi dan metode pembelajaran yang digunakan. Peserta diklat adalah orang dewasa yang telah memiliki pengalaman, maka strategi dan metode pembelajaran yang digunakan harus mampu mendorong peserta diklat untuk terlibat secara aktif dalam belajar. Aktivitas pembelajaran harus dikondisikan supaya peserta diklat benar-benar merasa ingin belajar untuk memenuhi tuntutan pekerjaannya (Mujiman, 2011, hlm. 164). Pada diklat pemeriksaan infrastruktur jalan dan jembatan, pesertanya memiliki latar belakang pendidikan yang beragam, materinya banyak, sedangkan waktu pelaksanaannya singkat, oleh karena itu penetapan metode pembelajaran harus memperhatikan permasalahan tersebut (Abdulhak, 2000, hlm. 52-55).

Tahap terakhir adalah pelaksanaan evaluasi. Evaluasi yang dilakukan pada diklat pemeriksaan infrastruktur jalan dan jembatan meliputi evaluasi formatif dan dan evaluasi sumatif. Evaluasi formatif untuk menilai efektivitas program diklat pemeriksaan infrastruktur jalan dan jembatan, sehingga hasil dari evaluasi formatif dapat digunakan untuk perbaikan program di masa yang akan datang. Sedangkan evaluasi sumatif untuk menilai tingkat ketercapaian kompetensi peserta diklat setelah mengikuti seluruh rangkaian diklat (Sanjaya, 2012, hlm. 87). Pelaksanaan evaluasi diklat dapat mengadopsi model evaluasi yang sering digunakan untuk program diklat, yaitu model Kirkpatrick

Komponen Kurikulum yang Sesuai

Komponen-komponen kurikulum disusun berdasarkan pendapat narasumber/subyek penelitian yang dielaborasi dengan studi dokumentasi dan literatur terkait serta telah divalidasi oleh ahli. Komponen-komponen kurikulum diklat pemeriksaan infrastruktur jalan dan jembatan yang telah peneliti susun berusaha untuk menjawab tujuan penelitian yang telah ditetapkan.

Desain Kurikulum yang Berbasis Kebutuhan

Penelitian ini dilakukan bertujuan untuk menentukan desain kurikulum berbasis kebutuhan yang sesuai untuk diklat pemeriksaan infrastruktur jalan dan jembatan. Keseluruhan kajian teoritis, deskripsi, dan pembahasan yang terdapat dalam tesis ini merupakan upaya untuk menjawab pertanyaan penelitian dan mencapai tujuan penelitian yang telah ditetapkan. Berdasarkan hasil penelitian yang telah dilakukan, diperoleh simpulan sebagai berikut:

Desain kurikulum berbasis kebutuhan untuk diklat pemeriksaan infrastruktur jalan dan jembatan mengacu pada model problem centered design. Prodesur desain kurikulum adalah: identifikasi kebutuhan, merumuskan tujaun/kompetensi, mengorganisasi materi, menentukan metode pembelajaran, dan pelaksanaan evaluasi.

Komponen-komponen kurikulum yang sesuai dengan kebutuhan pada diklat pemeriksaan infrastruktur jalan dan jembatan, yaitu:

Rumusan tujuan diklat yang sesuai dengan kompetensi yang harus dimiliki pemeriksa diuraikan menjadi standar kompetensi diklat dan kompetensi dasar diklat. Standar kompetensi diklat yang dirumuskan adalah "Peserta diklat setelah mengikuti diklat dapat menganalisis infrastruktur jalan dan jembatan dan dapat menguji kuantitas, kualitas, dan harganya." Sedangkan rumusan kompetensi dasar diklat adalah peserta diklat setelah mengikuti diklat: (1) memahami aspek teknis infrastruktur jalan dan jembatan; (2) memahami mekanisme pekerjaan infrastruktur jalan dan jembatan; dan (3) memahami cara pengujian pekerjaan infrastruktur jalan dan jembatan. Ketiga kompentensi dasar diklat tersebut dijabarkan lagi menjadi dua belas indikator hasil belajar.

Materi diklat yang sesuai dengan kebutuhan belajar peserta diklat dari berbagai macam latar belakang pendidikan formal ada sepuluh topik, yaitu: (1) konsep dasar infrastruktur jalan dan jembatan; (2) spesifikasi teknis konstruksi jalan dan jembatan; (3) peraturan-peraturan terkait infrastruktur jalan dan jembatan; (4) manajemen konstruksi; (5) dokumen-dokumen terkait pekerjaan infrastruktur jalan dan jembatan; (6) analisis biaya konstruksi; (7) metodologi pengujian kuantitas dan kualitas infrastruktur jalan dan jembatan; (8) titik-titik kritis penyimpangan dalam proses pengadaan infrastruktur jalan dan jembatan; (9) teknik-teknik audit infrastruktur; dan (10) teori dan praktikum pengujian di lapangan dengan core drill, test pit, dan hammer test. BPK seharusnya dapat menyusun petunjuk teknis mengenai pemeriksaan infrastruktur jalan dan jembatan, sehingga dapat dijadikan rujukan dalam penyusunan materi diklat.

Metode pembelajaran yang sesuai dengan tujuan, materi dan peserta diklat adalah ceramah, studi kasus, pemutaran video/film pendek, demonstrasi, sharing, tanya jawab, diskusi kelompok, praktik di kelas dan praktik di lapangan.

Metode evaluasi yang tepat untuk mengukur tingkat efektivitas pelaksanaan diklat yaitu dengan melaksanakan tiga level evaluasi, yaitu: (1) evaluasi level 1, untuk

mengukur tingkat reaksi dan feedback dari peserta pada pelaksanaan diklat yang mencakup materi, instruktur dan fasilitas; (2) evaluasi level 2, untuk mengukur tingkat pemahaman/penyerapan materi diklat oleh peserta pada pelaksanaan diklat; dan (3) evaluasi level 3, untuk mengukur perubahan perilaku atau kinerja peserta diklat.

Faktor-faktor penunjang dalam desain kurikulum berbasis kebutuhan untuk diklat pemeriksaan infrastruktur jalan dan jembatan, yaitu:

Peserta diklat adalah pemeriksa dengan kualifikasi peran anggota tim senior (ATS), yaitu pemeriksa dengan tanggung jawab melaksanakan pemeriksaan dengan kompleksitas tinggi dan disandang oleh Pemeriksa Pertama atau Pemeriksa Muda.

Instruktur diklat berasal dari akademisi, Kementerian Pekerjaan Umum (PU) atau dinas terkait, dan Pemeriksa BPK yang memenuhi persyaratan: (1) mempunyai pengetahuan dan pengalaman sesuai dengan materi diklat yang akan diberikan; (2) mempunyai kemampuan untuk mentransfer pengetahuan kepada peserta diklat; (3) mempunyai dedikasi yang tinggi sebagai instruktur; serta (4) diutamakan yang telah mengikuti pelatihan widyaiswara atau training of trainer (TOT).

Sarana yang belum terdapat di Pusdiklat dan harus tersedia antara lain: modul, video/film pendek, serta peralatan pengujian kuantitas dan kualitas jalan hotmix dan beton, yaitu core drill, test pit, dan hammer test. Sedangkan prasarana yang harus ada adalah lokasi jalan dan jembatan yang komprehensif untuk pelaksanaan praktik di lapangan.

Appreciative Inquiry for Changing Mindset and Culture of the Indonesian Public Servants Due to the Indonesian Bureaucracy Reform

Pertanyaan Apresiatif untuk Mengubah Pola Pikir dan Budaya Pegawai Negeri Sipil dalam Reformasi Birokrasi Indonesia

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The development of government organizations in Asia, the Middle East, Africa, and Latin America has exclusively used the concept of bureaucracy reform (Henderson, 1999). Stone (1966, as cited in Henderson, 1999) explains that bureaucracy reform is a united effort that consists of a continuous cycle of formulating, evaluating, and implementing interconnected plans, policies, programs, projects, and activities of government organisations for developing human and physical resources for achieving government organisation goals. Moreover, bureaucracy reform is a modernisation process by the diffusion of western values and technology that is emphasised on harmony development as stable and orderly changes by doing adaptation and sustainable system (Henderson, 1999).

In Indonesia, bureaucracy reform is a big issue that has been implemented because of some factors such as (Indonesia Presidential, 2010):

- corruption, collusion, and nepotism have been happening in Indonesia,
- the quality of public services is still bad,
- ineffective and inefficient of working productivity in government organisations,
- the transparency and accountability level of government organisations is still low,
- Indiscipline and bad working habits of public servants (Ministry of Administrative and Bureaucracy Reform, 2008).

Indonesia bureaucracy reform consists of organisational structure reform, business processes reform, and human resource management reform (Ministry of Administrative and Bureaucracy Reform, 2008). Due to Indonesia bureaucracy reform, the National Civil Service Agency (NCSA) has been reforming its organisational structure, business processes, and human resource management. The NCSA is one of the critical public sector organisation that has a role in reforming human resource management. The vision of the NCSA is establishing and supervising human resource management of Indonesian public servants (Badan Kepegawaian Negara, 2014c).

As a unit in the NCSA that has role in developing regulations of managing public servants, the Directorate of Competency and Job Standardisation (DCJS) had an additional workload to revise old regulations, develop new regulations, and inform all government organisations in Indonesia about them. However, some of public servants (especially public servants from older generation) refused to obey those regulations. They thought that latest regulations are complicated and will not change public servants management processes.

Johnson (1996) said that changing of organisational structure, systems of control, and power structure will certainly not cause paradigm (belief and assumptions) shift of organisational members (as cited in Senior, 2002). Belief and assumptions (aspects of paradigm) are part of culture (Schein, 2010). Therefore, for changing working mindset, culture of public servants, and to overcome resistance from some public servants, the NCSA should develop an additional program.

Appreciative Inquiry (AI) is an approach that is going to be explored in this study for changing working mindset, culture of Indonesia public servants, and to overcome resistance from some public servants. The author will attempt to apply AI in the Directorate of Planning of Public Servants Recruitment (DPPSR) as the workplace that the writer is going to work in after finishing her study at Flinders University. The author used to work in the DCJS - which was merged into other departments. Following the merger, all employees in the DCJS joined the DPPSR. Nowadays, the DPPSR has an additional role as a regulation maker of public servants management due to organisational structure reform and informs all government organisations in Indonesia of the latest regulations for managing public servants.

This study will use an unobtrusive method which is non-reactive research methods to learn human society by examining material items that are produced in their culture (Liamputtong, 2009) such as books, government regulations, literature, and websites. Moreover, the author also did personal communication to get detail information.

This project is developed based on the author's working experiences in the DCJS which was merged into other unit; and the author is going to work in the DPPSR when she returns to work. Therefore, the limitation of this project that the author does not know the conditions of new unit that is going to be her work place after the writer finishes her study of the master program. It might need modification for applying AI in new unit that the writer is going to work in. Moreover, due to limited length of this project, the writer cannot fully explain and provide deep detail information.

There are many approaches to change mindset and culture in an organisation. However, in this study the author delimits the study to the AI approach by using 5D cycle: define, discovery, dream, design, and destiny to change mindset and culture of the NCSA public servants.

The Impact

The Indonesian bureaucracy reform that has effected change in organisational structure, business process, and human resource management in the NCSA, has significant influence on the NCSA organisational members, especially organisational members in the DCJS. The DCJS was a unit in the NCSA that had role in developing regulations of the Indonesian public servants management, got additional work for revising old regulations and developing new regulations of public servant management that were more appropriate and applicable with current situations.

After that, the DCJS employees had to inform all Indonesian government organisations of those regulations. The Indonesian bureaucracy reform had meant that the DCJS got additional workload and it needed to adapt and respond quickly to that situation. All those activities had been done in a short time because the Indonesian

government wanted to do bureaucracy reform as soon as possible and wanted to change the pattern of government organisational change from planned change into emergent change (Coram & Burnes, 2001).

The author could feel the negative feelings of the Indonesian public servants when the author and other the DCJS employees had informed the government organisations of the latest regulations, the public servants in those organisations were not only shocked and confuse, but also some of them (especially public servants who are from the older generation) refused to obey those regulations. They were resistant to change because the regulations can create an insecure working environment; change can require them to learn a new job or work harder and that makes them fearful of their personal conditions such as: lack of knowledge, skills, and stamina needed for change. Furthermore, they may have perceived that the new regulations also could take away current good working conditions, freedom, responsibility and authority (Kets de Vries & Balazs, 1999).

Another factor that makes the Indonesian public servants feel shocked, confused, insecure and resistant to obey the latest regulations is because they are not involved in regulations development processes. As the regulation users, they have an important voice in regulations development processes, but the DCJS missed their voice. It shows that the DCJS spent most of their time to think about revising and developing regulations without explaining the reasons for revising and developing regulations (Deetz, et al., 2000) and did not allow other government organisational members to share their information, knowledge, and skills with the DCJS (Coram & Burnes, 2001). Therefore, other government organisational members felt surprised to receive the new regulations, did not understand the purpose of revising and developing the new regulations, and did not want to obey those regulations (Deetz, et al., 2000).

Furthermore, there are several areas of mindset and culture of Indonesian public servants that have to be changed because they do not support the Indonesian bureaucracy reform such as lack of discipline and bad working habits (Ministry of Administrative and Bureaucracy Reform Regulation, 2008). Chrisnandi (2015) as a Minister of Administrative and Bureaucracy Reform, explains mindset and culture that have to be developed to support the Indonesia bureaucracy reform are: having the ability to provide good public service to Indonesian civilisation, thriftiness, modesty, and competence.

Appreciative Inquiry (AI) as an Approach

The resistance experienced within other government organisational members is interfering with the necessary change that needs to occur. Involving government

organisational members by using the processes of AI can reduce the resistance from them (Fernandez & Rainey, 2006; Cooperrider & Whitney, 2005, as cited in Watkins et. al., 2011). Very importantly, Pancasila as the basis of life for society, nation, and state of Indonesia (Soeprapto, 2007) also states that Indonesian civilisation have to be involved in governance activities. On point number four of Pancasila, it states that "the people led by wisdom in musyawarah (deliberation)/ representation".

Based on those values, the concept of musyawarah (deliberation) in Pancasila is similar to the basic concepts of AI that focuses on collaboration and high participation of organisational members (Watkins et al., 2011). Additionally, musyawarah (deliberation) which is based on the spirit of togetherness to create decision making (Soeprapto, 2007) is connected to the constructionist principle of AI. This principle emphasises conversation to create meaning, communication to create reality, and social interaction to create knowledge (Whitney & Trosten-Bloom, 2010). Within point four of Pancasila it is evident, Indonesians have already have a basic knowledge appreciation of the thinking that underpins AI. Moreover, the relationship between Pancasila and AI shows that AI is suitable to apply in the Indonesian government organisations as tool for changing mindset and culture of the Indonesian public servants. In this study, AI can be applied in the Directorate of Planning of Public Servants Recruitment (DPPSR) as the workplace that the author is going to work in after finishing studying at Flinders University.

By involving the Indonesian public servants in a musyawarah (deliberation), it can avoid resistance to change in process of bureaucracy reform (Fernandez & Rainey, 2006). Furthermore, the Indonesian public servants will have intrinsic motivation to support the Indonesian bureaucracy reform because they can learn and assimilate the process of bureaucracy reform (Ryan & Deci, 2000), and understand the reason for doing bureaucracy reform (Deetz et al., 2000); share their critical information and feedback that are related to bureaucracy reform (Fernandez & Rainey, 2006); improving new skills and knowledge by combining their own knowledge with others' (Coram & Burnes, 2001).

From the first phase of AI process, defining phase, the process facilitates the participants to learn the process that focuses on positive aspects in an organisation (Lewis et al., 2011). During the defining phase, the facilitators have to explain the purpose of AI process in the DPPSR is to develop a positive mindset and culture of the Indonesian public servants such as having ability to provide good service to Indonesian civilisation, thriftiness, modesty, and competence (Chrisnandi, 2015). It shows that the defining phase leads the DPPSR members as AI participants to start developing new positive framework as a basis to build new positive mindsets to make sense and evaluate their organisation. Moreover, within the next phases, discovery, dream, design, and destiny, the DPPSR members fill their new positive framework with their infomation, working experiences, and knowledge about having the ability to provide

good service to Indonesian civilisation, thriftiness, modesty, and competence, that they have got in the NCSA in the past and the present (Cooperrider et al., 2008; Chrisnandi, 2015). Those processes have the potential to make the DPPSR develop new a positive mindset.

As AI participants, the DPPSR members have to discuss the answer to the questions that are asked by the facilitators (see appendix 3), with other participants in a group. Positive questions in the AI process can activate positive mindset components such as: cognitive (positive ideas, innovation, and invention), affect, and behaviour (energy, effort, and intrinsically related to action) (Rosenberg & Hovland, 1960; Whitney & Trosten-Bloom, 2010; Goldberg, 1998). Discussion among the AI participants can create meaning, reality, and social interaction (Whitney & Trosten-Bloom, 2010) that encourage development of positive culture in the DPSSR (Seel, 2000). For example, as group participants discuss the question in design phase "as a public servant, what plans do you have to provide excellent public services?" they will share their ideas on how they plan to provide excellent public services. The culture of having ability to provide good services to Indonesian civilisations emerges automatically in this discussion process. Therefore, simultaneity principle is being practised in the AI process because mindset and culture changing simultaneously appear in the DPPSR members (Whitney & Trosten-Bloom, 2010).

With reference to Johnson's (2012) cultural web (Figure 3), the AI process can be used to develop new positive stories and myths that can create new rituals and routines in the DPPSR (Johnson, 1992). Some symbols, power structures, organisational structures, and control systems are within the Indonesian government's control. Changing in organisational structure, business processes, and human resource management in the NCSA that has been mandated by the Indonesian government due to the Indonesian bureaucracy reform, are part of the symbols, power structures, organisation structures, and control systems. It shows that the Indonesian government has controlled the NCSA as a government organisation in Indonesia (Ministry of Administrative and Bureaucracy Reform, 2008; Johnson, 1992).

However, there is a simple effort by using AI that can be done in the DPPSR to change the symbols, power structures, organisation structures, and control systems as part of the DPPSR's culture (see the pink spots in symbols, power structures, and organisational structure part in cultural web, Figure 3). For example, in the annual meeting in the DPPSR as a media for communication among the DPPSR members that also shows organisational structure, hierarchy power flow, and control system, a question for developing positive mindset and culture can be inserted to meeting agenda such as "what positive things have done to make your jobs have better quality?" Every DPPSR members has the same chance to share their answer with other the DPPSR members in that meeting without being restricted by their position in the DPPSR. This activity reduces indirectly rigid hierarchy power flow, control system, and organisation

structure in the DPPSR. Someone can records the answers from the DPPSR members, make a summary of the answers, print it and give it to all the DPPSR members. The summary of the answers that are given to all the DPPSR members is a symbol that all of them are involved in the meeting, the answers from them are respected because they are recorded, and all the DPPSR members get a same chance to access the information in the DPPSR.

The AI focuses on positive stories and myths in the past, at the present, and in the future. The past and the present stories and myths are activated in defining phase. The future stories and myths are activated in dream, design, and destiny phases. In the defining phase, the stories and myths about having ability to provide good services to Indonesian civilisation, thriftiness, modesty, and competence are recalled by the DPPSR members based on their working experiences in the NCSA (Johnson, 1992; Chrisnandi, 2015; Reed 2007). For helping the DPPSR members to recall those stories and myths, the facilitators can ask, "what has been your most successful experience since you have been working as a public servants?" "what is your feeling when you can provide good services to Indonesian civilisation?" The positive principle of AI states that positive questions that are asked by the facilitators help the DPPSR members to activate positive stories and myths that lead to positive change in the DPPSR (Whitney & Trosten-Bloom, 2010).

In the dream phase, the DPPSR members have to imagine what is going to happened if they have ability to provide good service to Indonesian civilisation, thriftiness, modesty, and competence. For example, in this phase, the facilitators can ask "what are the kind of competencies that should be demonstrated by Indonesian public servants in the future?" to know the ideas of competencies that should be owned by the Indonesia public servants. Some competencies such as competency of analytical thinking, innovation, and empathy can be the examples of positive images that encourage the DPPSR members to do some actions to achieve those competences. Images of positive mindset and culture could guide and inspire the DPPSR members to activate other positive nodes in memory that could emerge inspirations of their present performance (anticipatory principle).

In the design phase, the DPPSR members activate stories in the future by creating plan of actions to have ability to provide good services to Indonesian civilisation, thriftiness, modesty, and competence. The question that can encourage the DPPSR members to think about the plan of actions to develop culture of thriftiness is "what is your plans to develop thrifty condition in the NCSA?. Annual meetings to share information, knowledge, and skills, attending some training, courseworks, workshops, and getting higher education can be new rituals and routines that can emerge in the design phases (Cooperrider et al., 2008).

Finally, in the last phase, destiny, the DPPSR commit to do new rituals and routines that had been planned in the design phase (Whitney & Trosten-Bloom, 2010).

The question that can be asked by the facilitator in this phase is "what are your actions and strategy based on your roles and responsibilities in the NCSA for developing modesty life style as a public servant?"

Involving the Indonesian public servants is the key word for reducing their feeling shocked, confuse, insecure due to the Indonesian bureaucracy reform, and resistance to support the Indonesia bureaucracy reform. AI can be an approach for solving those problems. Furthermore, concept of AI which is similar with Pancasila concept make AI is suitable to apply in changing working mindset and culture of the Indonesian public servants. As consequence, AI can help the Indonesian public servants to develop positive mindset and culture such as having ability to provide good services to Indonesian civilisation, thriftiness, modesty, and competence.

The NPM (Bevir, 2009) and principles of good governance and clean government (Indonesia Presidential, 2010) have influenced the Indonesian government for doing reform in aspects of structure organisation, business processes, and human resource management. It shows that reform at the supra-national level has influenced reform at the national level (Gornitzka et al., 2005). All of reform processes in the Indonesia government organisations should be done based on Pancasila as the foundation of ideology, policies, economy, socio-culture, security, and defence of the Indonesian government (Soeprapto, 2007). Pancasila shows that good governance in Indonesian context is focused on social-politic development rather than economic liberalism (Bevir, 2009).

As one of the critical public sector organisation that has a role in reforming human resource management, the NCSA also has been reforming its internal organisational structure, business processes, and human resource management (reform at the institutional level) (Gornitzka et al., 2005) due to the Indonesian bureaucracy reform. As consequence, the DCJS as a unit in the NCSA had additional workload to revise the old regulations of human resource management, develop the latest regulations, and inform them to all government organisations in Indonesia as soon as possible. It shows that the Indonesian government organisations must change their pattern of organisational change processes from the planned change into the emergent change. The Indonesia government organisations have to adapt and respond quickly to the Indonesia bureaucracy reform's pressure and change their rigid top-down and autocratic culture into dynamic open-ended and bottom-up culture (Coram & Burnes, 2001).

However, the bureaucracy reform makes the Indonesian public servants feel shocked and confused because the Indonesian government do not tell them how to change their rigid top-down and autocratic culture into dynamic open-ended and bottom-up culture (Coram & Burnes, 2001). Moreover, some of them has negative response to the Indonesian bureaucracy reform by refusing to obey the latest regulations that had been developed by the DCJS. Not involving in the process of

revising the old regulations and develop new regulations and do not understand the reasons for doing the Indonesian bureaucracy reform made them reject the regulations and do not support the Indonesian bureaucracy reform (Deetz et al., 2000). In fact, there are also mindset and culture characteristics that should be changed such as lack of discipline, bad working habits (Ministry of Administrative and Bureaucracy Reform Regulation, 2008), extravagant and luxurious habits, and incompetent (Chrisnandi, 2015).

An approach that attempts to develop constructive union of organisational members to discuss the present and the past of an organisation's capacities in order to involve the Indonesian public servants in reform processes and changing their working mindset and culture. Furthermore, on point number four of Pancasila, it states that "the people led by wisdom in musyawarah (deliberation)/ representation" (Soeprapto, 2007, p. 30). It shows that the concept of musyawarah (deliberation) in Pancasila is similar to the basic concept of AI that focus on collaboration and high participation of organisational members (Watkins et al., 2011). Therefore, the Indonesians already have a basic knowledge of the thinking that underpins AI, and shows that AI is suitable to apply in the Indonesian government organisations as tool for changing mindset and culture of the Indonesian public servants.

Leadership, Voice, and Participation: Voice of Teachers to Participate in and Lead Improvement

Kepemimpinan, Suara, dan Partisipasi: Suara Guru untuk Berpartisipasi dalam dan Memimpin Perbaikan

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ABSTRACT

The development of the teacher has been recognised as an important issue in current educational leadership. Regarding teacher leadership, this research has aimed to investigate the extent to which teachers in Indonesia are able to have a say in decision making as well as participating in and leading school improvement and change. For the purpose of this research, a qualitative interview research was selected. The semi structured interview was used to collect data from 8 participants.

The result showed that teachers had an influence on decision making at various degrees. The data showed that the position of teachers within school hierarchy affected whether they could influence the decision and policy making. Similarly, school hierarchy also influenced teacher participation in school improvement and change. Furthermore, teacher voice has also had an implication for school leadership at various degrees. However, since the findings were only based on the perceptions of 8 participants, generalisations about the subject cannot be made.

The results of this research suggested that further attention is required in terms of teachers participating in decision making and school improvement. As not much research has been carried out in this field, further research on teacher leadership might be needed in order to give a more in depth study relating to this field.

ABSTRAK

Perkembangan guru telah diakui sebagai isu penting dalam kepemimpinan pendidikan saat ini. Mengenai kepemimpinan guru, penelitian ini bertujuan untuk mengetahui sejauh mana guru di Indonesia dapat memiliki suara dalam pengambilan keputusan serta berpartisipasi dalam dan memimpin perbaikan dan perubahan sekolah. Untuk tujuan penelitian ini, dilakukan penelitian wawancara kualitatif. Wawancara semi terstruktur digunakan untuk mengumpulkan data dari 8 peserta.

Hasil penelitian menunjukkan bahwa guru memiliki pengaruh terhadap pengambilan keputusan pada berbagai tingkatan. Data menunjukkan bahwa posisi guru dalam hirarki sekolah mempengaruhi apakah mereka dapat mempengaruhi keputusan dan pembuatan kebijakan. Demikian pula, hirarki sekolah juga mempengaruhi partisipasi guru dalam perbaikan dan perubahan sekolah. Selanjutnya, suara guru juga memiliki implikasi bagi kepemimpinan sekolah pada berbagai tingkatan. Namun, karena temuan hanya berdasarkan persepsi 8 peserta, generalisasi tentang subjek tidak dapat dilakukan.

Hasil penelitian ini menyarankan agar perhatian lebih lanjut diperlukan dalam hal guru yang berpartisipasi dalam pengambilan keputusan dan peningkatan sekolah. Karena belum banyak penelitian yang dilakukan di bidang ini, penelitian lebih lanjut tentang kepemimpinan guru mungkin diperlukan untuk memberikan studi mendalam mengenai bidang ini.

This dissertation aims to understand teacher leadership in Indonesia, in terms of decision making and school improvement and changes. Firstly, teachers are one of the most important factors in students' achievement and school improvement (Katzenmeyer and Moller, 2011; Danielson, 2006; and Frost et al., 2000). By realizing this fact, in any improvement programmes within schools, head teachers should embrace their teachers in their practise of participatory leadership (Evans, 1996). By being involved in the programmes, teachers are able to shape these programmes in ways which suit them.

In schools, there are also good reasons to give teachers freedom of speech to articulate their voice in order to take part as an active agency and to be involved in school decision-making and policy. Their voice is worth listening to, because teachers are those who know students and classes better than any others within schools. Listening to the teachers' voice might enable head teachers to plan programmes of school improvement more effectively and efficiently. This is because, as Durrant and Holden (2006) suggest, current discourses embrace shared leadership and place the emphasis on an inclusive leadership model, which takes into account the increasing teachers' voice, teacher leadership and individual agency.

Teacher leadership might be understood as participation. According to Durrant and Holden (2006) agency and active participation are crucial in leadership, and schools should take these into account. They suggest that to enhance this, a school's characteristics should include openness, which enables people to develop understanding of one another, to be able to criticize and be criticized, as well as to deliver ideas, opinion, or comments. Any individual agency within a school may have a right to deliver his/her opinion regarding school improvement.

In the matter of leading change and school improvement, the nature of teacher leadership might be either formal or informal (Leithwood et al., 2000). The examples of formal leadership include head teacher, master teacher and union representative. Whereas, examples of informal leadership are sharing expertise, bringing new ideas for school improvement, etc. Furthermore, the nature of teacher leadership and teachers' voice might have implications for school leadership. Again, a wide range of literature states that to be successful, a school leader should take into account the teachers' voice.

The brief introduction above outlines the reasons that drew me to investigate teachers' participation in school decision-making and policy, as well as in school improvement, in several Indonesian schools. Briefly, Indonesia consists of 34 provinces and each province is autonomous and has its own local government. Before 1999, education in Indonesia was heavily centralized. After the Suharto regime, education became more decentralized and in 2001, school-based management was introduced in Indonesia nationally (Hariri et al., 2012).

The purpose of this study is to investigate to what extent teachers in Indonesia are able to have a say in decision-making and school improvement. I wish also to examine how teachers in Indonesia participate in school leadership. To this purpose, I will obtain data from teachers' perspectives, feelings and experiences. In addition, I will also discuss the implications of teachers' voice and participation for school leadership.

To collect or generate data, I decided that a qualitative semi-structured interview would be the best method. In this kind of interview, the researcher has a specific topic to learn about, prepares a limited number of questions in advance, and plans to ask follow-up questions (Rubin and Rubin, 2012). From among the many teachers and schools in Indonesia, I interviewed teachers from two Indonesian provinces: Yogyakarta and Bali.

What Teachers Feel on School's Decision-Making and Policies

The findings from the first category generally reveal that teachers feel they have a very limited influence. Teacher D has been working for almost for ten years. He has experienced several school leadership changes. In the current leadership, he felt that the teachers at his school are not given much opportunity to be involved in school decision-making. The excerpt above shows that teachers only receive the decision made by the school management, without being able to influence the decision-making process. It might be said that they are passive recipients.

The decision-making process resides especially within the level of school management. Teachers who are not in a position of management might have limited power to influence the decision-making. In practice the school management does ask their opinion about the matter discussed, but they are not really heard. So far, it is free, meaning whatever we discuss and deliver is accepted. However, the decision-making is not always based on what is suggested. Sometimes, even what happens is that what is discussed, what teachers propose as A, can be decided B (Teacher D).

In the excerpt above, the participant gave an example that even sometimes; the decision can be quite different from what is proposed by teachers. This implies that teachers are not listened to. Even though teacher participation in decision-making is important (Emira, 2010), in this school it seems that participative management has not been implemented yet. From the excerpt above, it might be implied that teacher voice is not fully empowered through shared decision-making.

This vertical structure is a traditional managerialist structure (Bush and Middlewood, 2013). Such an organizational structure reflects hierarchy and is associated with power (Gunter, 2001) and formal roles (Harris and Muijs, 2005). Thus, at the school of this participant, we might say that the head teacher is in the top position and has power over the subordinated people in the school management. As Lefstein

and Perath (2014) suggest, a teacher's official role in the school will also determine whether their voice will be listened to or not. Therefore, teachers who do not have formal roles within the school management do not have a voice strong enough to influence the decision-making. From the interview, the participant said that teachers are indeed free to articulate their opinions, perspectives and ideas to the school management; however, it seems that their voice is not really listened to or taken into account.

The conditions above should not be occurring, in the sense that teachers should be involved more in the school's decision-making process. The school leader should consider more teacher participation and collaboration in decision-making, both for those teachers assigned formal roles and those who are teaching in the classes. This might not require whole school restructuring. Muijs and Harris (2007) suggest that teacher participation might still be able to exist within a traditional structure. The school should find a system that enables teachers to participate more, while allowing the head teachers to keep their lead position.

Teachers May Influence Decision-Making

The second category is that teachers have influence in decision-making. Teacher E, who has been working for more than 12 years, said that teachers may influence the decision-making within the working group. He explained that each working group has a different job description or area. The teachers have more say in the working group in which they are especially involved; however, teachers may also be involved in some decisions that require all the other teachers' involvement.

These working groups in the school may indicate that the organizational leadership is not highly vertical but more flattened and horizontal (Bush and Middlewood, 2013). The power in the school is distributed among working groups, which deal with different areas. To some degree, the school leaders have engaged teacher participation and collegiality. This implies teacher leadership, in terms of the teachers exercising formal and informal influences (Poekert, 2012). This reflects the view that all teachers are involved in the school decision-making at a certain level.

What is interesting from this statement is that the school leadership is democratic, which is at the heart of teacher leadership. Even though teachers' voice might be influenced by their official roles in the school (Leftstein and Perath, 2014), it seems that the head teacher will help teachers to raise their voice regardless of their positions in the school. This implies that the leadership in the school is participative, meaning that all teachers are involved in the decision-making process. This is an important element in teacher leadership.

The notion exists that the school organization consists of different working groups, while also democratic; this reflects a kind of relation between teacher leadership and the head teacher. As proposed by Anderson (2004), this might suit the

interactive model. The head teacher distributes decision-making to the working groups in an interactive and extensive involvement with all teachers.

Teachers are given opportunities to provide their inputs, ideas or views on the issues being discussed. As Wadesango (2010) suggests, this democratic participation also enables the school to reduce the imposed decisions, because teachers are involved in those decisions. Another reason for this is that teachers are the executors of the decisions and policies made, especially if those decisions and policies are related to student achievement.

This is a relatively similar notion to the second category. The department holds a meeting and all teachers within this department are involved in the departmental decision-making. For the school, when it comes to decision-making, every department is represented by the head of department. Furthermore, Teacher A explained that this system is followed because there are more than 200 teachers and if all teachers are involved in every decision-making process, it would not be efficient.

This hierarchy may not accommodate all teachers' involvement in the school's decision-making process; however, this does still accommodate opportunities for teacher leadership to be fostered, especially at the departmental level. As proposed by Anderson (2004), there is a mutual and reciprocal influence between teacher leaders and the head teacher. Apparently, in the school where the participant (Teacher A) works, this kind of relationship follows the buffered model. In this kind of relationship, the head teacher is mostly surrounded by teacher leaders–in this case the heads of departments and is relatively isolated from other teachers in the school. The other teachers are represented by their heads of departments in the school decision-making process.

However, in terms of teacher voice, when the participant was asked whether the teachers are free to have a say in the school, he answered that teachers are free; but he once again pointed out that all teachers should still deliver the ideas, opinions or views to their respective head of department.

Teachers G and H felt that even though teachers have the same opportunities to influence the decision-making and policies in the school, some elite teachers seem to be "stronger and louder" than other teachers. This is, as Anderson (2004) suggests, the negative side of teacher participation in decision-making, in that it may create hierarchy among teachers. In this case, it creates elite teachers who are closer to the school management than other teachers. They may not have official roles, but they might be able to exert more influence on the decision-making process.

As previously mentioned, the situation above might best reflect the buffered model as proposed by Anderson (2004). In this model, the head teacher is surrounded by elite teachers, and is isolated from the rest of the teachers. The elite teachers have more power to influence the head teacher in making decisions while the other teachers, who are not close to the locus of leadership, are relatively unheard.

To overcome this kind of elitism, there should be a system which accommodates other teacher voices, so all the teachers have the same right to have a say, regardless of their formal position in the schools. As Angelle (2011) suggests, to be successful the organization should embrace all levels and elements of the school.

From this research, we might be able to say that the structure of the schools is not highly vertical; it is more "collegial" (Bush and Middlewood, 2013). The shared decision-making also reflects the nature of teacher leadership in the schools where decision-making is taken collectively. As Harris and Muijs (2005) and O'Donoghue and Clarke (2010) note, collegiality is exercised in this form of decision-making.

The organizational structure is not vertical but is mainly concerned with the relations and connections between teachers in the school. It also shows that it reflects the concept of teacher leadership, which is trying to replace traditional values of power and hierarchy. It places more emphasis on cooperation and collegiality (Taylor et al., 2011).

This shared decision-making is also able to reduce the imposed decision-making. By being involved in their schools' decision-making, teachers feel respected and listened to. In most decisions made, teachers are the implementer of those decisions; therefore, they will follow up and carry out the decisions and policy more sincerely. Partly, this is because in the shared decision-making process, teachers might be able to shape programmes in ways that suit them.

This paper has discussed the issues related to the extent to which teachers in Indonesia can influence decision-making and how they can participate in school improvement and school leadership. Descriptive analyses of participants' answers were used.

This research identifies that teachers' participation in the decision and policymaking process seems depend much on the leadership style of the schools. The hierarchy of the school leadership affects whether teachers may be able to influence decision-making and participate in school improvement and leadership.

School hierarchy and distribution of power may also influence whether teachers are able to actively participate in school improvement. The participants felt that the highly hierarchical structure prevented them from being active participants in school improvement. They felt that they are just implementers of the school's policies. On the other hand, the more democratic the school leadership is, the more teachers feel they are able to participate in school improvement programmes. Besides this factor, from the research it is revealed that whether teachers can participate more or not depends on the teachers themselves. There are teachers who just teach. They just do their jobs, and they do not want to be more involved in the school improvement programmes or other activities.

Similarly, whether the teachers have a chance to lead change and improvement depends on the school's leadership, the situation in the schools and their own interests.

Lastly, from the research, large or small implications for the school's leadership may come from teachers' voice, the formal roles of the teachers, and the closeness to the centre of leadership and the teachers themselves.

I understand that the concept of teacher leadership is relatively new in Indonesia; at a guess, this concept may not even have been heard of by some teachers. Before conducting the research I perceived that teachers were always involved in the decision-making process. I assumed that whether their voice was heard or not depended on the logic of their opinions, meaning that if the opinion made sense, then it would be accepted. However, in advance, it suggests something different. There are many factors influencing whether teacher voice is listened to or not.

Through this research I understand how school hierarchy affects whether teachers influence decision-making and policies, or are able to have a say or participate in and lead school improvement programmes. However, I also understand that the notion of teacher leadership is not fully implemented in all Indonesian schools. In this research, it was illustrated in the data presented in the discussion.

The findings also suggest that to foster teacher leadership, schools should give more space for teachers to become active participants and change agents and create such conditions to make this happen. In my opinion, Indonesia school should create supportive condition where teachers feel that they really belong to the school. All elements of school must be embraced by the school management. This might be done by involving teachers in both formal and informal leading roles.

The findings also suggest that despite being given opportunity to participate and take leading roles, teachers do not take the opportunity. Teachers also should realise this and take that. This might be caused by the limited view of leadership. Many teachers might assume leadership as formal roles in the school management. As Taylor et (2011) suggest, teachers and school leaders should consider that leadership may emerge from many individuals within schools rather than centralised in small number of formal leaders.

Investigating Success Factors for Implementing E-Learning, Virtual Communities of Practice, and Knowledge Management and the Likeliness of Aligning Factors at the Audit Board of the Republic of Indonesia to Fit the Success Factors

Menyelidiki Faktor Keberhasilan Penerapan *E-Learning, Virtual Communities of Practice,* dan *Knowledge Management* dan Kemungkinan Faktor Penyelarasan di Badan Pemeriksa Keuangan agar sesuai dengan Faktor Keberhasilan

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ABSTRACT

This study is grounded on the understanding that facilitating various forms of learning and removing barriers to learning is significant for enhancing organisational learning and in turn organisational competitiveness. Given this understanding, this study identifies the need for the Audit Board of the Republic of Indonesia (TABRI) to implement e-learning, virtual communities of practice (VCoPs), and knowledge management (KM) as to facilitate various forms of learning and remove barriers to learning. Given the significance of implementing e-learning, VCoPs, and KM in the organisation, this study is aimed at investigating the success factors and the likeliness of aligning factors at TABRI to fit the success factors. In doing so, this study reviews literature on e-learning, the integration of ICT in educational contexts, CoPs, VCoPs, and KM. This, in turn, results in the so many success factors. A categorisation of the success factors is then made on the basis to provide more manageable success factors. In doing so, these success factors are categorised into ten factors, i.e. leadership, strategy and strategic planning, organisational culture, organisational structure, processes, ICT, resources, human resource management, rewards, and measurement. A discussion on TABRI context is done using the framework of success factors to see the likeliness of aligning factors at TABRI to fit the success factors. This discussion results in organisational culture as the only factor at TABRI difficult to be aligned to fit the success factors.

Keywords: organisational learning, learning organisation, e-learning, the integration of ICT in educational contexts, communities of practice, virtual communities of practice, and knowledge management.

ABSTRAK

Penelitian ini didasarkan pada pemahaman bahwa memfasilitasi berbagai bentuk pembelajaran dan menghilangkan hambatan belajar sangat penting untuk meningkatkan pembelajaran organisasi dan pada gilirannya meningkatkan daya saing organisasi. Dengan pemahaman ini, penelitian ini mengidentifikasi kebutuhan Badan Pemeriksa Keuangan Republik Indonesia (TABRI) untuk menerapkan e-learning, virtual community of practice (VCoPs), dan knowledge management (KM) untuk memfasilitasi berbagai bentuk pembelajaran dan penghapusan. Hambatan untuk belajar Mengingat pentingnya menerapkan e-learning, VCoPs, dan KM dalam organisasi, penelitian ini bertujuan untuk menyelidiki faktor keberhasilan dan kemungkinan faktor penyelarasan di TABRI agar sesuai dengan faktor keberhasilan. Dengan demikian, studi ini mengulas literatur tentang e-learning, integrasi TIK dalam konteks pendidikan, CoPs, VCoPs, dan KM. Hal ini, pada gilirannya, menghasilkan begitu banyak faktor keberhasilan. Kategorisasi faktor keberhasilan kemudian dibuat berdasarkan pada faktor keberhasilan yang dapat dikelola lebih terkelola. Dengan demikian, faktor keberhasilan ini dikategorikan menjadi sepuluh faktor, yaitu kepemimpinan, strategi dan perencanaan strategis, budaya organisasi, struktur organisasi, proses, TIK, sumber daya, manajemen sumber daya manusia, penghargaan, dan pengukuran. Diskusi tentang konteks TABRI dilakukan dengan menggunakan kerangka faktor keberhasilan untuk melihat kemungkinan faktor penyelarasan di TABRI agar sesuai dengan faktor keberhasilan. Diskusi ini menghasilkan budaya organisasi sebagai satu-satunya faktor di TABRI yang sulit disesuaikan agar sesuai dengan faktor keberhasilan.

Kata kunci: pembelajaran organisasi, organisasi belajar, e-learning, integrasi TIK dalam konteks pendidikan, komunitas praktik, komunitas praktik virtual, dan manajemen pengetahuan.

The Importance of Organisational Learning

The concept of organisational learning as discussed in the private sector literature is also relevant for the public sector. Public sector organisations, for example, are also faced with the changing environment. The implementation of organisational learning in the public sector has also been argued as important for improving policy-making capacity and public policy implementation. In addition to the importance of organisational learning in the public sector, there are also difficulties in implementing it as acknowledged by various public sector literatures. The reasons for the difficulties include the political environment, legislative constraints, and the not-for-profit motive.

The importance of organisational learning has stimulated interests in developing a learning organisation. Many scholars and practitioners have offered prescriptive models to help organisations to become learning organisations. In spite of these models, the terms between organisational learning and learning organisation are still subject to extensive.

Organisational learning occurs through individuals. It can be independent of any specific individual but not of all individuals. Conversely, individuals can learn without organisations. Their learning, however, does not necessarily imply that organisational learning has occurred. In order for individual learning to be organisational, the results of learning by individuals must be stored in the organisation's memory.

Given that implementing e-learning, VCoPs, and KM in TABRI (the Supreme Audit Institution (SAI) of the Republic of Indonesia). Its main duty is to audit public finance management and accountability can facilitate various forms of learning and remove barriers to learning, this study is aimed at investigating success factors for implementing e-learning,

In achieving the aims of the study, this study will answer the following research questions are what are success factors for implementing e-learning, VCoPs, and KM? and How is the likeliness of aligning factors at TABRI to fit the success factors?

This study is a qualitative research. It uses thematic analysis in addressing the research questions. In this regard, this study examines literature on e- learning, the integration of ICT in educational contexts, CoPs, VCoPs, and KM. The literature or data is collected through Flinders University's Library, Google Scholar, Social Science Research Network (SSRN), and Indonesian National Library. Data regarding TABRI context is as obtained in official documents and anecdotal evidences of the author.

The Framework of Success Factors

The success factors for implementing e-learning, VCoPs, and KM can be categorised into ten factors, i.e. leadership, strategy and strategic planning, organisational culture,

organisational structure, processes, ICT, resources, human resource management, rewards, and measurement.

Leadership

As with other organisational initiatives that involve change in processes and employee behaviour, leadership plays a key role in ensuring the success of e-learning, VCoPs, and KM initiative. Leadership as exercised by a facilitator is also a key factor in VCoPs success. This leadership helps build and maintain the communities, encourages participation, helps direct attention to important issues, and brings in new ideas to energise the communities. It also urges leaders to exemplify the desired behaviour for KM, steer the change effort, convey the importance of KM to employees, maintaining employees' morale, and create an organisational culture supportive for knowledge sharing and use.

Strategy and Strategic Planning

A clear and well-planned strategy is a means for driving the success of e-learning, VCoPs, and KM implementation. It is important because it focuses team effort, brings integration, enables delegation, and requires leaders' proactivity. Rosenberg argues that a strategy should address the following three issues: motivation, competence, and resources. Wong argues that it should be well adjusted to the situation and context of the organisation in hand. In other words, it should be flexible enough to cope with future uncertainty. A strategy should also support an imperative business issue of an organisation.

Organisational Culture

Introduction of e-learning, VCoPs, and KM in the organisation is likely to change the existing organisational culture. Organisational culture has been argued as one of the most difficult factors to achieve and barriers to KM success. In relation to e-learning, Rosenberg suggests building a learning culture that dismisses the perceptions that learning and work are different. A flexible school culture that values and encourages risk-taking is argued by Moyle in relation to the integration of ICT in educational contexts. Newhouse, in the meantime, argues a school culture that promotes inquiry, innovation, excellence, and participation. As for KM, a supportive culture for KM is the one that highly values knowledge and encourages its creation, sharing, and application. In the meantime, an innovative culture is deemed necessary and needs to be fostered as to encourage individuals to generate new ideas, knowledge, and

solution. Individuals, at the same time, need to be empowered so that they have more freedom and opportunities to explore new possibilities and approaches. As for risk-taking, reasonable mistakes and failures are openly shared without the fear of punishment and viewed as a key source of learning.

Organisational Structure

In addition to organisational culture, another thing likely to be affected by the implementation of e-learning, VCoPs, and KM is organisational structure. An organisation's structure determines the placement of power and authority in the organisation. It provides guidance as to whom should people interact with to accomplish organisational tasks. III argues that the organisational structure should support the strategy. If it does not support the strategy, employees would find themselves working in isolation. Baker said that the organisational structure needs to be evaluated on regular basis and then reorganised or redesigned when and where necessary to ensure that the structure is the most appropriate for the given circumstances, context, and environment.

Processes

Processes are another key factor that affects the success of e-learning, VCoPs, and KM initiative. A process is a series of connected activities that move information up and down and across the organisation. Given the boundaries that the organisational structure creates, organisations that have processes across the organisational boundaries force their units to work together. Systematic processes in e-learning is evident in ADDIE model. This model consists of five processes, i.e. analysis, design, development, implementation, and evaluation. Ghirardini argues that some of the steps in the processes can be skipped or simplified according to project's objectives and requirements, e.g. budget, expertise, or organisational constraints. Moyle (2006) suggested using ICT not only in teaching and learning but also in the full range of a school's operations, including education management.

ICT

ICT is one of the key enablers for implementing e-learning, VCoPs, and KM system. Its capability has evolved from merely being a static archive of information to being a

connector of a human to information and of one human to another. ICT infrastructure usually includes hardware, software, Internet services, networking, and connectivity. Newhouse (2010) argues that the provision and budget allocation over these resources should be grounded in pedagogical understanding not technological requirements. Nowadays, organisations are moving their focus on ICT infrastructure from the collection and codification of knowledge to enabling personal connection between employees. Consequently, the collaborative and communicative capabilities of an organisation's ICT infrastructure have become much more critical to the success of KM initiative.

A number of success factors for implementing e-learning, VCoPs, and KM that have been revealed in the literature can inform the development of e- learning, VCoPs, and KM system. These include system quality (e.g., system reliability, user interface consistency, ease of use, documentation quality, and quality and maintainability of program code), information quality (e.g., timeliness, scope, relevance, and accuracy of information), service quality, flexibility of access to instructional and assessment media, interactivity, response time, and security.

Resources

A successful implementation of e-learning, VCoPs, and KM is affected by the availability of resources and HR management. Financial support, humans, and time are significant resources for the successful implementation of e-learning, VCoPs, and KM. Wong (2005) argues that financial support is significant if a technological system investment is to be made. Given that a technological system investment involves a significant amount of money, an investment in these systems should be based on a sound consideration rather than 'a nice to have.'

Human Resource Management

Human resource management can have implications on e-learning, VCoP, and KM success. This is consistent with Davenport and Volpel who argue "managing knowledge is managing people; managing people is managing knowledge." Effective recruitment of employees, for example, can bring the required knowledge and competences into the organisation to fill knowledge gaps. Employee training and development, in the meantime, can be considered as a way for individuals to acquire the required knowledge and competences.

Rewards

Rewards are also part of human resource policies and practices. They are used to align employee behaviours with the organisational goals and provide motivation and incentives for employees to complete the strategic direction. Both monetary and non-monetary rewards are often suggested as means of encouraging employees to participate in KM efforts. Beer, Spector, Lawrence, Mill, and Watson argue that reward systems are not only concerned with extrinsic rewards but also intrinsic rewards.

Measurement

Organisational initiatives such as e-learning, VCoPs, and KM will suffer the risk of becoming just another management fad if they are left unmeasured. Measuring e-learning, VCoPs, and KM is necessary to check whether the envisioned objectives are achieved or not. Measurement also enables organisations to track the progress of e-learning, VCoPs, and KM and to look for their benefits and effectiveness. In essence, it provides a basis for organisations to evaluate, compare, control, and improve the performance of e-learning, VCoPs, and KM. Measurement might also be needed to demonstrate the value and worthiness of e-learning, VCoPs, and KM initiative to top management and stakeholders. Without such evidences, support and confidence from top management might be hard to get. Given the difficulties in quantifying the benefits of e-learning, VCoPs, and KM, reflecting the success of these initiatives can also be done through providing narrative indicators.

The Likeliness of Aligning Factors at TABRI

Like many other public sector organisations, TABRI has been characterised with bureaucracy. Bureaucracy affects leadership, organisational structure, and organisational culture. A type of leadership common in bureaucratic organisations is managerial leadership. Managerial leadership has its focus on functions, tasks, and behaviours. Given that functions, tasks, and behaviours are working properly, one's work will facilitate the work of others. Consequently, managerial leaders are focused on supervision and controls. Rather than visioning a better future for the organisation, they are focused on managing the existing activities successfully. This description of managerial leadership is describing well the role of leaders at TABRI.

Given that TABRI is a bureaucratic organisation, an organisational structure at TABRI is built on the assumption that a stable relationship between members behaviour and the organisational goals is present. A hierarchical structure as well as formal rules and procedures are among the artefacts of organisational culture at TABRI. Other

artefacts of organisational culture at TABRI include formality. Formality within TABRI is evident in the formal dress that people wear at work and the way people talk to their superiors. Using rules and procedures to create formality is not limited to their capability in creating social rituals. Applying rules and procedures impersonally, for instance, can also create this formality. While formality is obvious, one should dig deeper to find out what drives the overt behaviour. In doing so, the author of this study recognises that formality within TABRI is present to enforce compliance. Compliance is common in bureaucracy because of its emphasis on formal rules and procedures. At TABRI, compliance is necessary because it is used to maintain the confidentiality of audit works as required by laws and audit quality as set out in audit manuals and procedures. Rules and procedures have been used by leaders to control its members. When members believe that following rules and procedures are the best means to achieve a particular end, exercising control through rules and procedures can result in compliance.

Given the influence of bureaucracy at TABRI, the kind of leadership, organisational structure, and organisational culture argued by the above success factors are likely to be in contrast with the existing leadership, organisational structure, and organisational culture at TABRI. Managerial leadership that focuses on supervision and controls, for example, is in contrast with a type of leadership that allows for more freedom and opportunities to individuals. Lastly, assuming a stable environment in today's environment is in contrast with the reality that today's environment is rapidly changing.

In spite of the fact that TABRI is largely characterised with bureaucracy, attempts have been made in relation to creating a professional bureaucracy that has the following characteristics: adaptive, integrity, high performance, clean and corruption-free, able to serve the public, neutral, prosperous, dedicated, and uphold the basic values and code of ethics.

These attempts are also known as bureaucracy reform programmes and initiated by the Government of the Republic of Indonesia since 2004. Since their inception, these reform programmes have introduced many private sector management techniques and tools at TABRI. The influence of the reform programmes on factors at TABRI are evident in the organisational structure, strategy and strategic planning, measurement, human resource management, rewards, processes, ICT, and resources and the use of private sector management techniques and tools in these success factors.

The influence of the reform programmes is evident in the use of credit point system. Even though this credit point system does not offer monetary incentives directly, the achievement of credit points can lead to the advancement of career and status and in turn can result in take-home pay increases. In relation to processes and ICT, the influence of reform programmes on processes and ICT is evident in the redesign of business processes.

The influence of the reform programmes on factors at TABRI implies that some of the factors at TABRI can easily be aligned to fit the success factors. Given the above description of TABRI, this study argues that some of the factors at TABRI (i.e., leadership, strategy and strategic planning, organisational structure, processes, ICT, resources, human resource management, rewards, and measurement) are relatively easy to be aligned to fit the success factors. While these factors are relatively easy to be aligned to fit the success factors, a factor such as organisational culture is likely to be more difficult to be aligned to fit the success factors. The features of organisation culture at TABRI are clearly in stark contrast with features of organisational culture argued by the success factors that encourage freedom, flexibility, creativity, innovation, openness, participation, and risk-taking.

Given the stickiness in organisational culture at TABRI to depart from the bureaucratic organisational culture, this study argues that organisational culture in TABRI is likely to be difficult to be aligned to fit the success factors. This is consistent with Parker and Bradley (2000) who found that organisational culture in Australian public sector organisations is still largely characterised with traditional bureaucratic values given that they have been encouraged to depart from these traditional bureaucratic values to adopt a greater emphasis on change, flexibility, entrepreneurialism, outcomes, efficiency, and productivity.

Bunga Rampai Tesis/Disertasi

PENGETAHUAN BUDAYA

Program Beasiswa SPIRIT

Translation Techniques and Equivalence in the Indonesian Translation of ASEAN Charter

Teknik Penerjemahan dan Kesepadanan dalam Terjemahan Piagam ASEAN

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ABSTRACT

This research discusses the translation techniques and equivalence in legal text translation. The object of this research is the ASEAN Charter, both the English and Indonesian texts. A descriptive-functional approach is employed in the comparison between the ST and TT's legal features.The analysis is limited on the textual contents of the object of research comprising all words, phrases, clauses, sentences and the whole text using referential, translational, distributional and ideational methods. The identification of translation techniques follows Molina and Albir's (2002) classification, and the equivalences measured are classified into Šarčević's (2000) functional equivalence groups. In addition, a closed questionnaire is distributed and filled by experts to rate the translated text for its quality. The research found that the applied translation techniques produced different degree of the translated text's functional equivalences. Appropriate application of translation techniques resulted and supported the achievement of near equivalence for the target text, and show real attempt to up-level the non-equivalence expressions into partial equivalence. Meanwhile, the false applications of these techniques could result in down-level of the near-equivalence and partial equivalence expressions into non-equivalence ones, and also risk the target text's parts for having legal effect loss.

Keywords: ASEAN Charter, legal translation, translation technique, functional equivalence

ABSTRAK

Penelitian ini mengulas teknik penerjemahan dan kesepadanan dalam penerjemahan teks hukum. Objek penelitian ini adalah Piagam ASEAN dalam bahasa Inggris dan Indonesia. Ancangan deskriptif-fungsional digunakan dalam membandingkan aspek bahasa hukum teks sumber dan sasaran. Analisa dibatasi pada isi tekstual objek penelitian yaitu semua kata, frasa, klausa, kalimat dan teks secara keseluruhan yang mencirikan kekhasan teks hukum menggunakan metode referential, translational, distributional dan ideational (Sudaryanto, 1993). Pengidentifikasian teknik penerjemahan mengacu pada klasifikasi yang dikemukakan oleh Molina dan Albir (2002), dan kesepadanannya ditinjau dari pengelompokan kesepadanan fungsional (Šarčević, 2000). Sebuah kuesioner tertutup dilakukan dan diisi oleh para ahli untuk menilai kualitas teks terjemahan Dari penelitian ini terungkap bahwa teknik penerjemahan yang digunakan menghasilkan tingkat kesepadanan berbeda-beda. Penggunaan teknik penerjemahan yang akurat akan menghasilkan dan mendukung pencapaian hasil terjemahan yang berupa near-equivalence, dan menunjukan usaha menungkatkan terjemahan yang non-equivalence menjadi partial-equivalence. Namun, penggunaan teknik terjemahan yang kurang sesuai dapat mengurangi kesetaraan teks dari near-equivalence dan partialequivalence menjadi non-equivalence serta beresiko terhadap hilangnya dampak hukum teks terjemahan.

Kata kunci: Piagam ASEAN, penerjemahan hukum, teknik penerjemahan, kesepadanan fungsional

The influence of legal language on people's lives places legal translation studies in greater research efforts aimed at both social development and linguistic analysis. Such effect also applies for the peoples of The Members of Association of Southeast Asian Nations (ASEAN) since the institutional framework, namely the ASEAN Charter, is entry into force in 2008. The ASEAN Charter crucially provides a legal basis for more concrete works to achieve shared goals for its ten Member States. The source language (SL) of the Charter is English, as well as the working language of ASEAN itself since the people of ASEAN are speakers of numerous language and dialect.

The ASEAN Charter has been translated to the national languages of its Member States for the purpose that the stakeholders, especially the policy makers, can understand the content of this charter, regardless of one's English competence. One of the target languages (TL) is Bahasa Indonesia.However, there are limits to what extent the translation can be considered effective, particularly when one completely relies on the translation. Up to now, to the best of my knowledge, none of the existing academic works has discussed the Bahasa Indonesia translation seriously. In fact, there is no guarantee that one will comprehend the content of the Indonesian translation of ASEAN Charter without referring to the English as the original piece.

Furthermore, the ASEAN Charter was co-drafted in multilingual setting, similarly as the legal documents of European Union (EU). EU translation has challenged some major concepts of Translation Studies with its fluid and non-final source texts, concurrent drafting and translation, collective translation processes, and the replacement of ST and TT by authentic language versions (Biel & Engberg, 2013:6).

In 2015, Southeast Asia will become a single economic market, and there will be increased regulation at a regional level. This in turn will require greater socialization and awareness among the 600 million people of ASEAN. The translation of regional regulations to all Member States' national languages will be extremely important for this effort to succeed. Translating official documents is not only an obligation of the ASEAN Secretariat. It is also the responsibility of every Member State to enhancing its citizens' awareness and understanding of ASEAN.

Based on the statements above, two questions were addressed, what translation techniques are applied in the Indonesian translation of the ASEAN Charter? And what functional legal equivalence are there in the Indonesian translation of the ASEAN Charter. The purposes of this research are to describe translation techniques applied and to the functional legal equivalence in the Indonesian translation of the ASEAN Charter.

This research uses descriptive method in analyzing the data. This research is designed as a descriptive study using qualitative and quantitative methods. The quantitative method supports this research on data collection through the closed-questionnaire instrument, but the interpretation of such quantitative material collected

is described in qualitative nature. The qualitative method is further employed in the whole analysis description and conclusion.

The objects of this research are the original (in English) and Indonesian translation of ASEAN Charter as legal texts and their whole contents. Their roles within this research are that the main analysis is focused on the Indonesian translation, and the original Charter is used to refer, compare and confirm the techniques, shifts and equivalence analysed. To this end, the data for analysis are the ASEAN Charter in English and Indonesian texts, and the data populationfor analysis are both texts'whole content, comprising sentences, phrases, or words in legal document formulation or pattern.

Translation Techniques in the Indonesian Translation o

The found translation techniques are identified by analyzing the translated text ofthe Indonesian translation of ASEAN Charter throughreferential, translational, distributional and inferential methods. The samples are then quoted and discussed in the following sections, to illustrate the applied translation techniques identified and to explore the potential pros and cons ofeach translation techniques. This research findings, particularly the percentage application of literal translation and transposition techniques, show that the target text is arranged in the most similar structure as the source text, since there are minimal attempt to transpose the source text sentence structure into Indonesian. The high percentage of established equivalent and borrowing techniques applied also support that, since the source text contains specialized terms especially in legal terminologies.

Established Equivalence

Applied in 26% of the target text, the 108 items of established equivalent techniques found consist of translations of performative modal markers and specialized terminologies for international legal text. The performative modal markers 'shall' and 'may' are translated into '*wajib*' (must) and '*dapat*' (can).

Borrowing

One technique used to translate the words that have no similar or exact expression in the target language is through borrowing. A great increase in lexical borrowings from English, as well as syntactic changes under English influence over the 30 years, is evolving Indonesian language (Sneddon, 2003:78). There are 91 items from borrowing techiques applied in the target text. The followings are descriptions

of the applied borrowing techniques, including the pure borrowing and naturalized borrowing analysed from the Indonesian translated text of ASEAN Charter.

Naturalized Borrowing

There are 77 items of the naturalized borrowing technique occupied in translation, that can be seen from previous samples such as the underlined words *Komite-Komite* (Committees) and *organisasi internasional* (international organization) in sample (2), *konsiliasi* (conciliation) and *mediasi* (mediation) in sample (4), and *prosedur internal* (internal procedures) in sample (5). It can be analyzed that the borrowed words are adjusted to the target language phonological and grammatical structures, for instance the use of repetition *komite-komite* (committees) as the plural form of *komite* (committee).

Literal Translation

As many as 83 items found to be translated through literal translation technique in the target text containing language of specific purpose or legal language. It uses ordinary language and gives it a legal function that results in certain legal effect. One feature of English legal language is the use of modals 'shall' and 'may' as performative markers reflecting certain degree of obligation in the legal context. In everyday English language usage, such modals serve as future marker.

Calque

A great number of Indonesian phrases employ native words based on English models. Calques translations sometimes consist merely of an extension of an existing meaning of a word, andmany are phrases that are direct translations of the English(Sneddon, 2003:191). There are 50 items of calqe applied in the target text.

Reduction

There are 45 reductions found in the target text. This reduction technique runs as a repression of an ST information item in the TT (Molina & Albir, 2002:510). It is in line with the 'omission' term stated by Baker (1992:40-41) that it does no harm to omittranslating a word or expression in some contexts as long as the meaning ofreduced fragment is not vital enough to the development of the text. The reductions found in this research comprise not only reduction of words or parts of sentence, but also of indefinite and definite markers as well as specified terminologies thus affect the meaning of the text.

Transposition

In 9% parts of the Charter, there are 37 items oftransposition technique applied. Some of them are applied inappropriately causing shifts of sentence form and meaning.

Equivalences in the Indonesian Translation of ASEAN Charter

The following functional equivalences are determined after careful comparison of the referents' function in the TL with the referent in SL culture (Harvey, 2000:2) using the translational and distributional methods (Sudaryanto, 1993). By these methods, the degree of equivalences can be measured through checking both denotation and connotation, and double check the congruity between SL and TL concepts with back translation.

It is found from the research target text and referred source text that most of the functional equivalent of the translation is partial, i.e. 49%, and only thirty nine percent are in near-equivalence. Meanwhile the twelve percent of the non-equivalence of legal terminologies and/or expressions are potential for adaptation using certain translation techniques, thus produce partial equivalences. The followings are the elaborations of these findings.

Near-Equivalence

There are four translation techniques contributed in producing near-equivalence target text, i.e. 39% of established equivalence, 25% of literal translation, 20% of calque, and 16% From 161 near-equivalent, there are 63 items produced by established equivalent translation technique, comprising the translations of performative modal 'shall' and 'may' illustrated by samples (1), (2), (3), institutional title and acronym in sample (7), as well as other specialized terminologies and expressions such as in sample (4), (5), (6). Further, there are 40 items of literal translation technique adding the near-equivalence of the target text in the word level, phrase, up to complex sentence level.

Partial Equivalence

As the largest functional equivalence of the target text, 203 items of partial equivalence comprised with the resulted applications of six translation techniques, i.e. 77 items of borrowings, 41 items of established equivalence, 35 items of transposition, 18 items of calque, 17 items of literal translation, and 15 items of reduction.

Non-Equivalence

The non-equivalence in the target text occurs for the target language has no pairing words or expressions with equivalent meaning with the source language although the translation techniques are applied as attempt to bridge such gap between the two languages. Such non-equivalence is caused by distinctions of culture-specific concept, semantically complex SL, the use of loan words in ST, differences in physical and in interpersonal perspectives, expressive meaning, form, as well as in frequency and purpose of using specific form, when the SL concepts are not lexicalized in the TL, and also when SL and TL make different distinctions in meaning; the TL lacks of superordinate, specific term (hyponym).

From the close reading, it is found that the non-equivalence is resulted from inappropriate application of some translation techniques. Therefore, it will be elaborated the contributing translation techniques for non-equivalence such as 26 items of literal translation, 14 items of borrowing, 4 items of established equivalent, 4 items of reduction, and 2 items of transposition.

The Rates on Equivalence of Indonesian Translation

There are two percent of the translated text are difficult to understand, not only for they included elements/structure from the source text but also the inconsistent use of terminologies. It can be seen from previous samples (10) and (11) that use both 'ketua' (chairman) and 'kepemimpinan' (leadership) to translate 'Chairmanship' for provisions with similar context. The translated text in sample (11), in particular, shows high complexion for its source text adoption structure and frequent use of future marker 'akan' (will). The expert readers suggest that such literal translation product could cause uncertainty in determining and implementing it appropriately since the future marker in legal text allows readers or related parties, although they read it in twenty or fifty years after the Charter is in effect, to assume that the provision could be enforced later, not in present time. The source text clearly implies obligation with performative marker 'shall' while the translated text eliminate the obligation and implies prediction with future marker 'akan' (will). Therefore, such provisions are considered unequal, both in meaning and in legal effect.

The Translation Techniques Used Resulted in Varying Degrees of Correspondence

It is found that the established equivalent is the mostly used translation technique in the target text, i.e. 26%, followed by the borrowing technique with 22% including

both pure and naturalized borrowings. Another largely used translation technique is the literal at 20% of the whole target text. Meanwhile there are 12% of calque technique, another 11% of reduction technique, and 9% of transposition technique applied to translate the ASEAN Charter. Most parts of the translated text occupy literal translation aimed at precision and identical form and meaning, but in some parts loose it accuracy, especially in translating performative markers and definite words. Reduction technique also contributed in the loss of accuracy and readability in translating those two features. Calque, established equivalent and borrowing techniques are found effective to establish equivalent translated text. But sometimes the synonymous words produced from these techniques overlap one another in translating a word or term, creating inconsistencies. Transposition is unavoidable technique in translating a legal writing style in one language to another. Several long and complex sentences are still transposed inaccurately with the interference of SL writing style, unnecessary additions of phrase and clause found in the translated text.

These translation techniques produced different functional equivalences. The near-equivalence is found 161 items or 39% of the translated text and is shown by four translation techniques, i.e. 63 items of established equivalent, 40 items of literal, 32 items of calque, and 26 items of reduction. The translated text is 49% partial equivalence that is shown by 203 items comprised with the resulted applications of six translation techniques, i.e. 77 items of borrowings, 41 items of established equivalent, 35 items of transposition, 18 items of calque, 17 items of literal, and 15 items of reduction. Finally, there are only 50 items or 12% of the target text is in non-equivalence, shown by 26 items of literal, 14 items of borrowing, 4 items of established equivalent, 4 items of reduction, and 2 items of transposition. However, the application of reduction technique for nominalizations and definite articles makes the translated text lost its equivalence and message clearness, thus highly recommended to be avoided in translating legal documents. Some shifted and/or lost legal effects resulted from the misusage of some translation techniques are subject to revision.

From the questionnaire on translation quality assessment of the Indonesian translation of ASEAN Charter, the experts rate the TL as generally readable but with awkward expression. Although there are minor alterations in meaning, additions or omissions, and although the translated text has a few terminological errors, the specialized content is not seriously affected. The TFA accurately accomplishes the goals, purpose and function of the original. The NCS slight nuances and shades of meaning have been rendered adequately, and the SC is accurate and appropriate.

Recommendations

Besides illustrating the success of translation techniques applications, the findings also reveal many inconsistencies in word choice and sentence arrangements since there are no available guidelines on when and where to use appropriate expressions and/or translation technique for legal translation. For this matter, this study gives consideration on further establishing legal terminologies near as well as partial equivalences.

Additionally, the expert readers rated the translation also provide some notes on comparison of English and Indonesian legal writing customs together with both languages' distinct dictions in common words and legal context as main reasons for shifts found in the translated text. Shifts with risk of losing legal effects and giving error translation are therefore recommended for immediate revision.

Bunga Rampai Tesis/Disertasi

PSIKOLOGI

Program Beasiswa SPIRIT

Internet Use during Non-work Hours: An Examination of Its Mediating Role between Various Individual Characteristics and Psychological Outcomes among Indonesian Employees

Penggunaan Internet diluar Jam Kerja: Pemeriksaan Peran Mediasi Antara Berbagai Karakteristik Individu dan Hasil Psikologis diantara Pegawai Indonesia

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ABSTRACT

Internet brought an impact for employees by enabling them to work with more flexibility. However, 24/7 connectivity also caused a blurring line between work and home domain, resulting in various dynamics. This study explored several predictors and outcomes of the use of internet during non-work hours for work-related matters. A set of questionnaire as a result of items adaptation from English to Indonesian language had been published through an online link and paper format. The questionnaire was completed by 137 employees in Indonesia. Segmentation preference, segmentation supplies, and conscientiousness were examined as predictors. On the other hand, work-home interference, psychological detachment, and need for recovery were evaluated as consequences. This study also checked whether internet use during non-work hours mediated the relationship between predictors and outcomes. Segmentation preference and conscientiousness were found to significantly predict the use of internet during non-work hours, and internet use was also significantly associated to all the studied outcomes. However, it appeared that the use of internet only partially mediated the relationship between segmentation preference and psychological detachment.

ABSTRAK

Internet membawa dampak bagi karyawan dengan memungkinkan mereka bekerja dengan lebih fleksibel. Namun, konektivitas 24/7 juga menyebabkan garis kabur antara domain kerja dan rumah, menghasilkan berbagai dinamika. Studi ini mengeksplorasi beberapa prediktor dan hasil penggunaan internet selama jam kerja non-kerja untuk masalah yang berkaitan dengan pekerjaan. Satu set kuesioner sebagai hasil adaptasi item dari bahasa Inggris ke bahasa Indonesia telah dipublikasikan melalui link online dan format kertas. Kuesioner tersebut diselesaikan oleh 137 karyawan di Indonesia. Pilihan segmentasi, persediaan segmentasi, dan ketelitian diperiksa sebagai prediktor. Di sisi lain, gangguan kerja-rumah, detasemen psikologis, dan kebutuhan akan pemulihan dievaluasi sebagai konsekuensi. Penelitian ini juga mengecek apakah penggunaan internet selama jam kerja non-dimediasi hubungan antara prediktor dan hasil. Preferensi segmentasi dan kesadaran diketahui secara signifikan memprediksi penggunaan internet selama jam kerja tidak bekerja, dan penggunaan internet juga terkait secara signifikan dengan semua hasil yang dipelajari. Namun, tampak bahwa penggunaan internet hanya sebagian memediasi hubungan antara preferensi segmentasi dan detasemen psikologis.

Internet Impact in Indonesia

Indonesia has been known as a country who continued to develop its economy. The World Bank (n.d.) recorded a steady rising in gross national income per capita from US$ 2.200 in the year 2000 to US$ 3.563 in 2012. Indonesia Investment Coordinating Board (2013) also documented significant increase in foreign capital investment value from US$ 16.214,8 million in 2010 to US$ 21.202,7 million in the third quarter of 2013. This surge of economic investment has its own impact in the growth of communication technology. There is a steady increase on the percentage of households who use the computer, internet, and mobile cellular from 2006 to 2012, according to Statistics Indonesia (2012). In 2012, 14,86% households in Indonesia owned a set of computer, compared to 2006 when only 4,36% of families had computer in their home. Between the same period, there has also been 58,92% increase of mobile cellular users throughout urban and rural areas. These expansion of gadget use is altogether followed by the raise of internet subscription as well. In 2012, 30,66% of Indonesian households enjoyed internet connection while in 2006, there was only 4,22% families could access internet from their home.

What Makes an Individual Willing to Work during Non-Work Hours?

Individuals vary so much in everything, including their willingness to finish their job during personal times. While two persons may receive the same work e-mails at night, there are certain characteristics that make one answer it right away and one leave it for tomorrow. They may keep separate agenda for work and personal matters, refuse to discuss the events at work with family, or try not to think about work issues during their own times. On the contrary, integrator, or people who prefer to integrate both domains, are happy to bring co-workers at home, talk about family while at work and the other way around. Thus segmentation preference is conceptualized as a continuum, with one side representing segmentation and the other representing integration (Kreiner, 2006). In regard to the focus of this study, it shall be stated that people who have high preference on segmentation would be less likely to use internet during non-work hours.

Hypothesis A1 : Segmentation preference is negatively associated to the use of internet during non-work hours.

Hypothesis A2 : Perceived segmentation supplies is negatively associated to the use of internet during non-work hours.

Hypothesis A3 : Conscientiousness is positively associated to the use of internet during non-work hours.

The Consequences of Using Internet to Work during Non-Work Hours

As stated earlier, anywhere anytime accessibility through the internet has created a condition in which life at home and work become more collided into each other. In particular, employees may have to face complications in performing personal role at home due to interference related to work matters. In other words, work-home interference is a direct outcome of the use of internet during non-work hours.

Hypothesis B1 : Internet use during non-work hours is positively associated to work-home interference.

Hypothesis B2 : Internet use during non-work hours is negatively associated to psychological detachment.

Hypothesis B3 : Internet use during non-work hours is positively associated to need for recovery.

Testing Internet Use during Non-Work Hours as a Mediator

Previous set of hypotheses aimed to explore the use of internet during non-work hours from the perspective of cause and consequence. This model of hypotheses created an expectation that the use of internet would bridge the relationship between various individual characteristics and psychological outcomes.

Hypothesis C1 : Internet use during non-work hours partially mediates the relationship between segmentation preference and work-homeinterference.

Hypothesis C2 : Internet use during non-work hours partially mediates the relationship between perceived segmentation supplies and work-home interference.

Hypothesis C3 : Internet use during non-work hours partially mediates the relationship between conscientiousness and work-home interference.

Hypothesis C4 : Internet use during non-work hours partially mediates the relationship between segmentation preference and psychological detachment.

Hypothesis C5 : Internet use during non-work hours partially mediates the relationship between perceived segmentation supplies and psychological detachment.

Hypothesis C6 : Internet use during non-work hours partially mediates the relationship between conscientiousness and psychological detachment.

Hypothesis C7 : Internet use during non-work hours partially mediates the relationship between segmentation preference and need for recovery.

Hypothesis C8 : Internet use during non-work hours partially mediates the relationship between perceived segmentation supplies and need for recovery.

Hypothesis C9 : Internet use during non-work hours partially mediates the relationship between conscientiousness and need for recovery

For this study, a questionnaire was developed in order to recruit the participants needed. The characteristics of the participants were Indonesian employees who use internet and computer in their daily worklife. Initially, there were 177 participants who started the online questionnaire.

Relationship between Internet Use during Non-work Hours and Psychological Outcomes

The second set of hypotheses aiming to explore the relationship between internet use during non-work hours and various psychological outcomes related to work; namely work-home interference, psychological detachment, and need for recovery. The internet use positively associated with work-home interference, as settled in Hypothesis B1. Hypothesis B2 asserted that the use of internet would be negatively related to psychological detachment. Lastly, in Hypothesis B3, need for recovery would positively associated as well with the use of internet.

Another series of hierarchical multiple regression analysis were conducted to check these hypotheses. Demographic variables were entered in the first step, followed by psychological job demand and job autonomy in the second step, and variables related to individual characteristics afterwards. The internet use during non-work hours was included in the final step.

After controlling demographics, job-related and individual-related variables, apparently the use of internet was positively associated to work-home interference ($\beta = .162$, $p < .05$). It had 2,1% role of the total variance in predicting work-home interference ($\Delta F (1,127) = 4,141$, $p < .05$). Thus Hypothesis B1 testing the role of internet use during non-work hours to the occurrence of interference at home by work matters is supported. Internet use during non-work hours seemed to have significant role in predicting psychological detachment as well, particularly explaining 5,8% of the total variance ($\Delta F (1,127) = 14,047$, $p < .001$). The value of beta also showed that internet use during non-work hours was negatively related to psychological detachment ($\beta = -.271$, $p < .01$). This means that the more an individual used internet to work, the less detached the person was from thoughts about work, confirming Hypothesis B2. Model 3 illustrated that the use of internet also had its own part in explaining 5,9% of the total variance of need for recovery ($\Delta F (1,127) = 10,253$, $p < .01$). It was also positively

associated to the need for recovery (β = .275, p < .01). Thus the habit to use internet for work during private times predicted higher need for recovery among the participants, supporting Hypothesis B3.

Hours, and Psychological Outcomes

This last part of hypotheses was directed to test the mediation relationship between individual characteristics, internet use during non-work hours, and psychological outcomes. To give a clear explanation, this structure of the analysis will be framed based on the psychological outcomes.

Hypotheses Predicting the Mediation Relationship

It was pointed out in Hypothesis C1 that internet use during non-work hours partially mediates the relationship between segmentation preference and work-home intereference. Hypothesis C2 stated that the use of internet partially mediates the relationship between perceived segmentation supplies and work-home interference. Furthermore, Hypothesis C3 suggested that the use of internet during non-work hours would partially mediate the relationship between conscientiousness and work-home interference.

In conclusion, the use of internet during non-work hours did not partially mediate the relationship between segmentation preference, perceived segmentation supplies and conscientiousness on one hand and work-home interference on the other hand.

Hypotheses Predicting the Mediation Relationship

Hypothesis C4 proposed that the use of internet during non-work hours would partially mediate the relationship between segmentation preference and psychological detachment. Hypothesis C5 then addressed to check the partial mediation role of internet use during non-work hours to the relationship between perception of segmentation supplies and psychological detachment. Lastly, Hypothesis C6 would see if the use of internet partially mediate conscientiousness and psychological detachment.

Thus, segmentation preference fulfilled all the criteria based on Baron & Kenny (1986) for partial mediation, implicating that Hypothesis C4 is supported. Furthermore, Sobel test was conducted to check the significance of the partial mediation effect. The result confirmed that there was a significant mediation relationship between segmentation preference and psychological detachment through the use of internet

during non-work hours ($z = 2.45$, $p < .05$). Therefore, it can be concluded that internet use during non-work hours only partially mediated segmentation preference and psychological detachment.

Hypotheses Predicting the Mediation Relationship

Hypothesis C7 asserted that the use of internet would partially mediate the relationship between segmentation preference and need for recovery. Hypothesis C8 stated that the internet use partially mediates the relationship between perceived segmentation supplies and need for recovery. Last but not least, Hypothesis C9 pronounced that the relationship between conscientiousness and need for recovery would be mediated by the use of internet during non-work hours.

Thus, internet use during non-work hours did not partially mediate the relationship between segmentation preference, perceived segmentation supplies, and conscientiousness on one side and need for recovery on the other side.

Internet Only Partially Mediated the Relationship

The habit of using internet during non-work hours to accomplish work-matters had its own antecedents and consequences. People who do not have strong indication to separate their work from home domain will have less objection to handle their work duties for a while in their personal time. The same goes with people who have higher trait of conscientiousness. However, the tendency to use internet for work matters during non-work hours was proven to be associated to negative outcomes related to their well-being. They will be more likely to experience more conflict in performing their domestic role, have more difficulties in getting a break from work problems, and feel higher need for recovery after work. On the account of whether the use of internet during non-work hours linked the antecedents and consequences, it was apparent that internet use only mediated the relationship between segmentation preference and ability to be psychologically detached from work.

Pelatihan Developing Self in Work Through Psychological Empowerment untuk Meningkatkan Pemberdayaan Psikologis dan Perilaku Kerja Inovatif pada Karyawan Divisi Produksi PT X

Training of Developing Self in Work Through Psychological Empowerment to Improve Psychological Empowerment and Innovative Work Behavior to the Production Division Employees at PT X

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ABSTRAK

Penelitian ini bertujuan untuk mengetahui hubungan antara pemberdayaan psikologis dengan perilaku kerja inovatif pada karyawan divisi Produksi di PT X. Berdasarkan hasil identifikasi masalah organisasi, para karyawan menampilkan pemberdayaan psikologis yang rendah dan dianggap menjadi salah satu faktor yang menghambat munculnya perilaku kerja inovatif. Alat pengumpul data yang digunakan adalah kuesioner pemberdayaan psikologis (Spreitzer, 1995) dan kuesioner perilaku kerja inovatif (Janssen, 2000) yang telah diadaptasi oleh Etikariena & Muluk (2014). Partisipan penelitian berjumlah 144 orang karyawan level staf di divisi Produksi PT X. Hasil analisis korelasional menunjukkan koefisien korelasi r = .536 ($p<0.05$) yang berarti pemberdayaan psikologis memiliki hubungan positif yang signifikan dengan perilaku kerja inovatif. Peneliti merancang program pelatihan sebagai intervensi untuk meningkatkan pemberdayaan psikologis. Dengan meningkatnya pemberdayaan psikologis, maka diharapkan dapat meningkatkan perilaku kerja inovatif. Uji perbedaan sebelum dan sesudah pelatihan menunjukkan peningkatan yang signifikan pada pengetahuan pemberdayaan psikologis, persepsi pemberdayaan psikologis, dan persepsi perilaku kerja inovatif. Dengan demikian, program pelatihan disarankan sebagai intervensi untuk meningkatkan pemberdayaan psikologis dan perilaku kerja inovatif pada karyawan divisi Produksi PT X.

Kata kunci: pemberdayaan psikologis, perilaku kerja inovatif, pelatihan

ABSTRACT

This study aimed to determine the relationship between psychological empowerment and innovative work behavior in the Production division's employees at PT X. Based on identification of organizational problems, employees indicate lower level of psychological empowerment and it is considered to be the one of the factors that inhibit innovative work behavior. Data collection instrument used was a questionnaire of psychological empowerment (Spreitzer, 1995) and innovative work behavior (Janssen, 2000) which has been adapted by Etikariena & Muluk (2014). There were 144 staff level employees that had participated in the Production division of PT X. Correlational analysis result showed the correlation coefficient of $r = .536$ ($p<0.05$) which means that psychological empowerment has a significant positive relationship with innovative work behavior. Researcher designed a training program as an intervention to improve the psychological empowerment. An improving psychological empowerment is expected to improve innovative work behavior. The difference between pre-test and post-test result of training showed a significant increase in knowledge of psychological empowerment, perception of psychological empowerment, and perception of innovative work behavior. Hence, the training program is recommended as an intervention to improve the psychological empowerment and innovative work behavior in the Production division employees of PT X.

Keywords: psychological empowerment, innovative work behavior, training

Pemberdayaan psikologis memiliki peran penting terhadap perilaku kerja inovatif karyawan di dalam organisasi. Dengan memiliki pemberdayaan psikologis, karyawan yakin bahwa mereka mampu melakukan tugas-tugas sesuai peran dan konteks kerjanya guna menghasilkan inovasi. Hal tersebut sangat diperlukan di bisnis media televisi sebagai bagian dari industri kreatif. Persaingan antarmedia televisi yang kian ketat memerlukan ide-ide inovatif dari karyawan untuk memproduksi program-program acara yang dapat memenangkan pasar dan memeroleh pendapatan iklan yang besar. Dengan demikian, hubungan antara pemberdayaan psikologis dan perilaku kerja inovatif pada media televisi perlu dilihat karena memiliki arti penting bagi keunggulan kompetitif dan pertumbuhan berkelanjutan media televisi itu sendiri. Peneliti akan melakukan penelitian lebih lanjut mengenai hubungan pemberdayaan psikologis dengan perilaku kerja inovatif dalam konteks industri kreatif, yaitu di PT X yang merupakan salah satu stasiun televisi swasta nasional di Indonesia.

Dalam peneltian kali ini, karyawan di PT X menjadi sampel penelitiannya. PT X sendiri adalah stasiun televisi swasta milik ABC CORP. Dengan mengandalkan tampilan, gaya, serta program yang inovatif, PT. X berupaya untuk menjadi trendsetter di industri pertelevisian (Company Profile PT X 2016). Sebanyak 80% program acara yang berupa in-house production merupakan keunggulan kompetitif PT. X bila dibandingkan dengan stasiun televisi lainnya. Sebuah stasiun televisi dapat dilihat kesuksesannya dari faktor penjualan (sales), rating, dan share (Harnoko dalam Rahayu, 2015).

Untuk memperdalam pemahaman mengenai isu organisasi lainnya, peneliti melakukan studi dokumen terhadap laporan diagnosis organisasi PT X tahun 2016 yang disusun oleh pihak konsultan eksternal ("Organizational Diagnosis: PT X OAQ," 2016). Dari laporan diagnosis organisasi tersebut ditemukan isu yang terkait dengan sumber daya manusia adalah kemampuan karyawan baru yang belum sesuai dengan tuntutan pekerjaan serta pengembangan karir, pengembangan karyawan, penilaian kinerja, dan intangible rewards yang kurang memadai. Sementara, isu terkait proses manusia adalah masalah komunikasi, koordinasi, pengambilan keputusan, dan motivasi karyawan di PT X. Isu-isu yang berada pada level individu kemudian digali lebih dalam oleh peneliti melalui wawancara. Pemilihan isu pada level individu karena peneliti fokus pada orang-orang di dalam organisasi dan proses yang perlu dilalui agar mereka dapat mencapai tujuan organisasi (Cummings & Worley, 2009). Wawancara dilakukan terhadap 15 karyawan di divisi Produksi yang merupakan core business PT X. Responden wawancara mewakili beberapa jabatan dari setiap divisi Produksi, yaitu tiga orang kepala divisi (Production 1, Production 2, dan FDS), satu orang kepala departemen (Production 2), dua orang executive producer (Production 1 dan Production 2), dua orang associate producer (Production 1 dan Production 2), tiga orang senior creative (Production 2), dua orang creative (Production 1 dan Production 2), dan dua orang production assisstant (Production 2).

Berdasarkan uraian di atas terdapat tiga permasalahan yang akan diangkat dalam penelitian ini, yaitu apakah terdapat hubungan antara pemberdayaan psikologis dengan perilaku kerja inovatif pada karyawan divisi Produksi PT X? kedua, tentang dimensi pemberdayaan psikologis apakah yang memiliki hubungan paling kuat dengan perilaku kerja inovatif pada karyawan divisi Produksi PT X? dan pertanyaan ketiga adalah program intervensi apakah yang dapat diberikan untuk meningkatkan perilaku kerja inovatif pada karyawan divisi Produksi PT X?

Hal tersebut berdasarkan dengan tujuan penelitian ini, yaitu untuk mengetahui hubungan antara pemberdayaan psikologis dengan perilaku kerja inovatif, mengetahui dimensi pemberdayaan psikologis yang memiliki hubungan paling kuat dengan perilaku kerja inovatif, mengetahui program intervensi yang dapat diberikan guna meningkatkan perilaku kerja inovatif pada karyawan divisi Produksi PT X.

Action Research Dipilih sebagai Pendekatan Penelitian

Pendekatan penelitian yang digunakan dalam penelitian ini adalah action research. Shani dan Pasmore (dalam Coghlan & Brannick, 2005) mendefinisikan action research sebagai proses untuk menggali informasi dengan menerapkan ilmu pengetahuan tentang perilaku yang diintegrasikan dengan pengetahuan organisasi dan digunakan untuk mengatasi masalah organisasi.

Untuk mendapatkan data-data yang diperlukan dalam action research, penelitian ini menggunakan pendekatan kuantitatif. Pendekatan ini digunakan untuk mengetahui gambaran variabel penelitian melalui analisis statistik. Hasil analisis tersebut kemudian menjadi dasar bagi peneliti untuk melakukan tindakan atau intervensi bersama-sama dengan anggota organisasi sebagai upaya untuk memecahkan masalah. Hal ini terkait dengan upaya untuk membawa perubahan dalam organisasi, mengembangkan kompetensi self-help bagi anggota organisasi dan menambah pengetahuan ilmiah (Shani & Pasmore dalam Coghlan & Brannick, 2005).

Penelitian ini terdiri dari dua studi dengan desain penelitian yang berbeda, yaitu studi 1 menggunakan cross-sectional design untuk melihat hubungan antar variabel dan studi 2 menggunakan before-and-after study untuk melihat efektivitas pemberian intervensi.

Metode pengambilan sampel yang digunakan pada studi 1 untuk mengetahui hubungan antara pemberdayaan psikologis dengan perilaku kerja inovatif adalah non-probability sampling design. Teknik pengambilan sampel yang digunakan adalah convenience atau accidental sampling. Metode pengambilan sampel pada studi 2 adalah non-probability sampling design. Teknik pengambilan sampel yang digunakan adalah purposive atau judgemental sampling. Pada studi 1 dan studi 2, metode pengumpulan

data yang digunakan adalah kuesioner. Kuesioner yang digunakan adalah kuesioner yang mengukur perilaku kerja inovatif dan mengukur pemberdayaan psikologis

Pemberdayaan Psikologis Memiliki Hubungan Positif yang Signifikan

Inovasi penting bagi pertumbuhan organisasi dalam era bisnis yang kompetitif dan kemampuan individu dalam memberikan ide atau solusi yang inovatif menjadi sumber daya yang sangat berharga (Knol & Linge, 2008; Kotter & Schlesinger dalam Lari et al., 2012). Salah satu faktor yang berhubungan dengan perilaku kerja inovatif adalah pemberdayaan psikologis (Spreitzer, 1995). Oleh karena itu, pemberdayaan psikologis dan perilaku kerja inovatif diperlukan untuk praktik-praktik kerja guna mencapai keberhasilan organisasi. Meski demikian, berdasarkan studi awal ditemukan indikasi rendahnya pemberdayaan psikologis dan perilaku kerja inovatif pada karyawan dengan level jabatan staf, yaitu creative, senior creative, dan production assistant di divisi Produksi PT X. PT X adalah perusahaan swasta nasional yang bergerak di industri media televisi di Indonesia.

Penelitian ini sendiri terdiri dari dua studi, yaitu studi 1 untuk melihat hubungan antara pemberdayaan psikologis dengan perilaku kerja inovatif dan studi 2 untuk melihat efektivitas pemberian pelatihan. Berdasarkan hasil studi 1 ditemukan bahwa pemberdayaan psikologis memiliki hubungan positif yang signifikan dengan perilaku kerja inovatif pada karyawan dengan jabatan creative, senior creative, dan production assistant divisi Produksi PT X. Hasil penelitian ini sejalan dengan penelitian-penelitian lain yang dilakukan pada konteks yang berbeda, antara lain perusahaan manufaktur, farmasi, dan layanan teknologi informasi di Italia (Odoardi, Montani, & Battiselli, 2015); perusahaan jasa teknologi, transportasi, finansial dan toko ritel di Taiwan (Tsai et al., 2015); dan hotel di Taiwan (Luoh et al., 2014). Selain itu, penelitian serupa juga telah dilakukan terhadap karyawan pemerintah daerah di Amerika Serikat (Polston-Murdoch, 2015); bank pemerintah di Pakistan (Mariam, Shoaib, & Shoaib, 2014); guru sekolah dasar di India (Singh & Sarkar, 2012); dan instansi pemerintah di Belanda (Pieterse, Van Kinippenber, Schippers, & Stam, 2010).

Dimensi Pemberdayaan Psikologis

Dari hasil analisis korelasional ditemukan bahwa masing-masing dimensi pemberdayaan psikologis memiliki hubungan positif yang signifikan dengan perilaku kerja inovatif. Dimensi yang memiliki hubungan paling kuat adalah dimensi competence, disusul dengan dimensi meaning, impact, dan self-determination. Hal tersebut menunjukkan bahwa dimensi competence pada pemberdayaan psikologis

adalah dimensi yang paling berperan dalam meramalkan perilaku kerja inovatif. Karyawan yang memiliki competence akan merasa yakin dengan kemampuannya untuk melakukan pekerjaan dan untuk menangani isu-isu yang terkait dengan pekerjaan, serta akan menunjukkan perilaku yang lebih inovatif (Bandura dalam Singh & Sarkar, 2012). Dalam studi yang dilakukan oleh Spreitzer (1995), competence juga memiliki korelasi yang lebih tinggi dengan perilaku inovatif jika dibandingkan dengan tiga dimensi lainnya dalam pemberdayaan psikologis. Karyawan yang memiliki competence tinggi akan cenderung untuk lebih menyarankan cara-cara baru dalam melakukan sesuatu pekerjaan (Singh & Sarkar, 2012).

Dimensi meaning ditemukan memiliki hubungan positif yang signifikan dengan perilaku kerja inovatif. Meaning mengacu pada kebutuhan peran kerja dan kesesuaian dengan nilai-nilai pribadi, keyakinan dan perilaku karyawan (Thomas & Velthouse, 1990). Menurut Singh dan Sarkar (2012), persepsi karyawan tentang kebermaknaan tugas akan memengaruhi perilaku inovatifnya. Upaya ekstra yang dilakukan karyawan untuk menjadi inovatif akan berhasil jika ada kesesuaian antara nilai terhadap tujuan pekerjaan dengan nilai-nilai pribadinya. Hal ini sejalan dengan hasil studi yang dilakukan oleh Bass (dalam Singh & Sarkar, 2012) bahwa karyawan yang memiliki kebermaknaan tinggi dalam tugas-tugasnya adalah karyawan yang inovatif.

Program Intervensi yang dapat Diberikan

Berdasarkan hasil analisis korelasional, dimensi impact memiliki hubungan positif yang signifikan dengan perilaku kerja inovatif. Impact adalah sejauh mana individu dapat memengaruhi hal strategis, administratif, atau hasil kerja di tempat kerja (Ashforth dalam Spreitzer, 1995). Knol dan Linge (2009) menemukan bahwa dimensi impact memiliki pengaruh yang kuat pada perilaku inovatif di jenis pekerjaan yang outputnya berdampak pada orang lain. Jika karyawan merasa bahwa pekerjaannya dapat membuat perbedaan dalam kehidupan orang lain maka karyawan akan menunjukkan perilaku yang lebih inovatif (Knol & Linge, 2009).

Hasil analisis korelasional antara dimensi self-determination dengan perilaku kerja inovatif menunjukkan adanya hubungan positif yang signifikan. Bila dibandingkan dengan dimensi pemberdayaan psikologis lainnya, yaitu competence, meaning, dan impact, dimensi self-determination memiliki hubungan yang paling lemah dengan perilaku kerja inovatif. Self-determination terkait dengan otonomi dalam mengelola pekerjaan (Deci, Conell, & Ryan dalam Spreitzer, 1995). Karyawan akan menemukan cara baru dalam melakukan pekerjaannya jika mereka tidak terlalu dikontrol mengenai cara untuk melaksanakan tugas-tugas tersebut (Ramamoorthy, Banjir, Slattery, & Sardessai dalam Singh & Sarkar, 2012). Hal ini yang tidak banyak dimiliki oleh karyawan di level creative, senior creative, dan production assistant karena adanya kontrol dan

intervensi dari berbagai level pimpinan dalam pembuatan program televisi. Kondisi tersebut dinilai memrediksikan hubungan antara self-determination dengan perilaku kerja inovatif pada karyawan divisi Produksi PT X

Pelatihan pemberdayaan psikologis berjudul Developing Self in Work through Psychological Empowerment didesain sebagai pilot program rangkaian program intervensi. Pelatihan ini dilaksanakan selama dua jam dan direspon dengan baik oleh para peserta. Hal ini tampak dari hasil evaluasi reaksi yang diberikan peserta terhadap keseluruhan aspek pelatihan, yaitu (1) pelaksanaan pelatihan, (2) alat bantu pelatihan, (3) materi pelatihan, (4) fasilitator pelatihan, dan (5) pelatihan secara keseluruhan.

Hasil penelitian dalam studi 2 menemukan bahwa terdapat peningkatan yang signifikan terhadap skor pengetahuan mengenai pemberdayaan psikologis, persepsi terhadap pemberdayaan psikologis, dan persepsi terhadap perilaku kerja inovatif setelah dilakukan pelatihan pemberdayaan psikologis. Hal ini menunjukkan bahwa pelatihan pemberdayaan psikologis efektif untuk meningkatkan pengetahuan mengenai pemberdayaan psikologis, persepsi terhadap pemberdayaan psikologis, dan persepsi terhadap perilaku kerja inovatif. Hosseinpour et al. (2015) menyatakan bahwa dengan pemberian pelatihan diharapkan muncul perubahan atas sikap, keyakinan dan pikiran karyawan mengenai pekerjaan dan lingkungan kerjanya sehingga meningkatkan pemberdayaan psikologis. Dengan meningkatnya pemberdayaan psikologis, maka diharapkan perilaku kerja inovatif karyawan juga akan meningkat. Hosseinpour et al. (2015) merekomendasikan pelatihan untuk meningkatkan pemberdayaan psikologis bagi semua karyawan, termasuk manajer senior sekalipun pada tiap perusahaan atau organisasi. Selain itu, pelatihan dapat menjadi mekanisme kunci untuk mendukung karyawan dalam meningkatkan keyakinan diri untuk menjadi mampu dalam menyelesaikan pekerjaannya, termasuk menghasilkan ide-ide baru di tempat kerja (Greasley et al., 2005).

Dalam penelitian ini, peningkatan persepsi terhadap pemberdayaan psikologis dan perilaku kerja inovatif pada kelompok intervensi dibandingkan dengan kelompok kontrol. Kelompok kontrol disetarakan dengan kelompok intervensi dengan cara menyamakan jumlah subjek dan melakukan teknik konstansi dengan blocking terhadap karyawan yang memiliki kategori skor sama (Seniati, Yulianto & Setiadi, 2011). Pada kelompok kontrol, skor pemberdayaan psikologis dan perilaku kerja inovatif terjadi peningkatan skor mean, namun tidak memiliki perbedaan mean yang signifikan pada saat dilakukan pengukuran pertama dan kedua. Sementara, berdasarkan hasil perbandingan kelompok intervensi dengan kelompok kontrol ditemukan bahwa peningkatan persepsi terhadap pemberdayaan psikologis dan persepsi terhadap perilaku kerja inovatif hanya terjadi pada peserta pelatihan atau kelompok intervensi. Dengan demikian, program pelatihan pemberdayaan psikologis, yaitu Developing Self in Work through Psychological Empowerment dinilai efektif meningkatkan pemberdayaan psikologis

yang pada nantinya akan meningkatkan perilaku kerja inovatif pada karyawan dengan jabatan creative, senior creative, dan production assistant divisi Produksi PT X.

Program Pelatihan Disarankan sebagai Intervensi

Perusahaan disarankan untuk mengimplementasikan rangkaian program intervensi secara keseluruhan, meliputi coaching dan pemberian penugasan dari atasan langsung, serta pelaksanaan evaluasi untuk melihat adanya perubahan perilaku karyawan dalam periode waktu 6 bulan pasca pelatihan. Selain itu, perusahaan membekali para atasan langsung yang memiliki jabatan Produser dengan kemampuan coaching yang efektif terhadap bawahan melalui pemberian program pelatihan coaching.

Penugasan terhadap karyawan dapat diberikan melalui jaringan (online assignment) sebagai media untuk mempermudah pengerjaan tugas oleh karyawan dan pelaksanaan reviu oleh atasan. Perusahaan melalui unit Training pada departemen Human Capital & Organizational Development (HC & OD) melakukan monitoring pelaksanaan program intervensi pasca pelatihan agar dapat berjalan sesuai dengan rencana. Perusahaan memberikan program pelatihan Training of Trainers (TOT) bagi karyawan di unit Training departemen HC & OD agar dapat menjadi fasilitator dalam pelatihan pemberdayaan psikologis pada batch-batch berikutnya. Perusahaan dapat memodifikasi materi pelatihan pemberdayaan psikologis untuk dapat disisipkan dalam kurikulum pendidikan Broadcast Development Program (BDP) yang diselenggarakan pada semester dua di tahun 2016. Pelatihan pemberdayaan psikologis yang diberikan berikutnya dapat lebih memperbanyak aktivitas kelompok yang bertujuan untuk membentuk dukungan kelompok dalam meningkatkan pemberdayaan psikologis bagi individu.

Career Management: Case Study of Assessment Centre in Ministry of Home Affairs, Indonesia

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ABSTRACT

Assessment centre (AC) is needed to prevent the issues of political intervention, corruption, collusion and nepotism in leadership selection and personnel development. Therefore, it is necessary to carry out research to investigate the extent AC has been implemented in Ministry of Home Affairs (MoHa) in Indonesia. This is the aim of this research. The methodologies used are data collection with mixed methods research which are secondary data and primary data. The secondary data is collected by analysing several research papers that focused on the implementation of AC and primary data collection was conducted by structured survey research methods. This finding revealed that AC in MoHa has been used for selection of leadership and personnel development with various exercises and dimensions. However, the problems in selecting leadership candidates and development is still possible to occur. In conclusion, the present study found that AC in MoHA has not been fully implemented yet.

ABSTRAK

Assessment center (AC) diperlukan untuk mencegah isu intervensi politik, korupsi, kolusi dan nepotisme dalam pemilihan kepemimpinan dan pengembangan personil. Oleh karena itu, perlu dilakukan penelitian untuk mengetahui sejauh mana AC telah dilaksanakan di Kementerian Dalam Negeri (MoHa) di Indonesia. Inilah tujuan dari penelitian ini. Metodologi yang digunakan adalah pengumpulan data dengan metode penelitian campuran yaitu data sekunder dan data primer. Data sekunder dikumpulkan dengan menganalisis beberapa makalah penelitian yang difokuskan pada pelaksanaan AC dan pengumpulan data primer dilakukan dengan metode penelitian survei terstruktur. Temuan ini mengungkapkan bahwa AC di MoHa telah digunakan untuk pemilihan kepemimpinan dan pengembangan personil dengan berbagai latihan dan dimensi. Namun, masalah dalam pemilihan calon dan pengembangan kepemimpinan masih dimungkinkan terjadi. Kesimpulannya, penelitian ini menemukan bahwa AC dalam Kemendagri belum sepenuhnya dilaksanakan.

Career management (CM) is generally used by most organisations. The aim of CM is developing and planning employees to improve performance in the organisation. CIPD emphasized that CM is important to meet with present and future challenges in sustainable performance. CM is needed to formulate succession planning so as to ensure career development of employees by assessment. Therefore, assessment centre (AC) is used for effective selecting and evaluating development of the career of employees. AC is a tool to measure competencies by the training program that was designed to develop it.

AC practice is not only frequently used in private sectors, but also in the public sector. In the case of the Ministry of Home Affairs (MoHa), CM is important for the performance of the organisation. As a large public sector organisation, MoHa has a total of 6077 employees among which, are 790 echelon IV (supervisor), 323 echelon III (low manager), 60 echelon II (middle manager) and 13 echelon I (high manager). It is, therefore, a requirement to efficiently and effectively plan career management in MoHa. Regarding the policy of the Minister of Home Affairs (MoHa) Indonesia, policy number 43 in 2015 is about organization and working procedure. It states that the role and function of the Ministry of Home Affairs Indonesia is to help the President in organizing home affairs in government. One of its functions is developing and providing administration for government employees in personnel planning, career management, personnel transfer and discipline and rewards that is delivered by the personnel bureau. CM is subdivided into division analysis and capacity development, competency appraisal and structuring positions, and performance appraisal. Furthermore, division of competency appraisal and structuring positions has the responsibility to manage and develop AC, talent management, planning and coordinating for selection structuring position.

The Implementation of CM in MoHa

The implementation of CM in MoHa have concern on the issues of transparency and accountability. Regarding the constitution of the President Republic Indonesia, number 5 in 2014 about civil servants, the problem of political intervention, corruption, collusion and nepotism are the central focus for employee government Indonesia. Likewise, it influences career management in terms of intervention to promotion, transfer and dismissal. Despite that it has been regulated in government regulation number 100 in 2000 about promotion, transfer and dismissal for structural position, the possibility of problems still occurs. The selection candidate leadership is potentially get political intervention when the leadership position is important and crucial to make money.

The CM tends to nominate candidate leadership not based on competency, but depending on relativity or connection between candidate and the highest management.

Consequently, the possibility of corruption would increase because employees who desire to have higher positions or promotions would more likely engage in bribery to get the position in CM. Thus, this impacts on sustainable performance in government in Indonesia in achieving good corporate governance and clean governance. In addition, the worst effect also for employees of government tend to be less motivation, lack of job satisfaction and less commitment because the opportunities are not given for employees in career development. It surely would also influence the quality of public service in government Indonesia. Moreover, according to constitution of President Republic Indonesia, number 5 in 2014, about civil servants also emphasizes that human resource management in MoHa, Indonesia are not yet based on competency and qualification that the candidates have in recruitment, promotion and mapping for managerial position. The requirement for promotion and mapping only has a general statement that is regulated in government regulation number 100 in 2000 about promotion, transfer and dismissal for structural position. It only explains that the requirement to be nominated as managerial position is a related competency but the employees are not assessed the measure of competency that they have. Therefore, AC is needed for operation and implementation in MoHa to promote objectivity, transparency and accountability in leadership selection and personnel competency development.

AC in MoHa Indonesia was established in 2014 with compliant regulation of MoHa number 43 in 2015 about organization and working procedure, policy of MoHa number 800-5147 in 2016 about assessor associate and policy of MoHa number 800-5148 in 2016 about assessor. Policy of MoHa number 800-5148 states that a list of 21 names of assessors in internal MoHa are responsible to validate competency relevant to job standard competency, arrange tools assessment, make a schedule, data collection, give feedback, report and evaluation. MoHa number 800-5147 states that 42 external assessors are responsible to validate competency, set tool assessment, collect data, analyse data, report result assessment, feedback and collaboration with assessor. Therefore, referring to the importance of function and problem of career management in MoHa, it is necessary to carry out research to investigate the extent AC has been implemented in MoHa. It is important so that central government MoHa presents better management that could be emulated for local government as central government have the responsibility of local government, that consist of 35 provinces in Indonesia. The effectivity of management of human resources in AC can be imitated by local government. Furthermore, the research is important due to the lack of recent study that investigates implemented AC in MoHa. The aim of this research is to determine whether AC is used for career advancement or not.

Research Methodologies

The methodologies used are data collection with secondary and primary data. The secondary data is collected by analysing several research papers that focus on implementation of ACs and primary data collection is conducted by structured survey research questions methods. Kiessling & Harvey explain that mixed methods research is the most appropriate method to examine strategic global human resource management issues. The research design methods integrated quantitative and qualitative data that was gathered concurrently and sequentially. Molina explain that the advantages of mixed-methods research provide better inferences, a variety of perspectives and greater focuses on the research question. The survey questions were developed based on the regulation of Minister of Home Affairs number 43 in 2015 about organization and working procedure, policy of MoHa number 800-5147 in 2016 about assessor associate and policy of MoHa number 800-5148 in 2016 about assessor. The correspondents are 21 of internal assessors in MoHa who are at various levels; staff, supervisor and middle managerial. The correspondent is anonym without concern from and not assure information age or gender correspondent. It is important to find accurate information on the operation and AC procedures in MoHa. The survey consisted of 20 questions that was conducted by email.

The final survey question presented as a checklist that was translated into Bahasa Indonesia because most of Indonesians cannot speak, write and read English fluently. It made it easier for the correspondents to understand the questions and choose the relevant answer. The survey has been conducted on July 2016 with the collaboration of several co-workers in MoHa to distribute it directly to correspondents and the survey results back via email. The final surveys were completed by the 15 internal assessors who filled out the survey questions while the remaining 6 did not respond. Since more than 70 % of correspondents has responded to the research survey, it made it possible to carry out analysis and evaluation of development and procedure AC used in MoHa. The survey results were then combined with regulation and policies in MoHa, and literature reviews on the development of AC.

AC in Moha is Categorized in Four Group

Result for the present study of AC implemented in MoHa Indonesia are represented. The result is categorized in the following four group that are AC design, assessee, assessor, and AC procedure.

As researchers explain that the purpose of AC is used for many objectives and the AC design should differentiate the purpose of AC development in detail, it is also demonstrated in AC MoHa. It is evident that the purpose of AC design is more often used for personnel development/training rather than promotion / job placement. It can

be seen from the number of correspondent responses, that is 13 of 15 respondents have answered development as the goal of the AC. While, less than that stated AC objective were used for promotion/ job placement and identifying competency. Therefore, it can be argued that the purpose of AC in MoHa is more focused on recommendation of employees who need further development based on their competency.

This finding correlates with the purpose of AC use for personnel development. It is also supported by other research that explain LGD exercise can predict career success. Exercise using focus groups have shown evidence of leadership contribution in predicting promotion opportunities and career success in leadership. However, all correspondents also responded that in-basket and role play are not conducted yet to achieve the goal in AC. This finding illustrates that in-basket and role play are not given priority in implemented AC MoHa to assess managerial capability. In previous research, it was found that in-basket has proven to correlate to competency development and job-relevant behaviour, but in-basket exercises are not fully applicable to measure the performance of leadership competencies in AC.

In addition, the selection dimension of AC MoHa show that all correspondents agree the dimension of analytical thinking can be predicted by exercises that AC used. 14 correspondents answered that the dimensions they use mostly are problem solving, communication and decision making. However, only 1 and 4 people have argued that the AC contributes to organisation or planning and consideration or awareness respectively. This finding shows the disconnection between the purpose of the organisation and the aspect of dimension to be assessed while organising or planning and consideration or awareness is a dimension related to leadership competency. The result of this analysis supports previous research that explain that AC design needs to consider target dimension designs that are needed to correlate with the needs of the organisation (Krause et al., 2011). It means the current system implementation of AC MoHa is partly use to construct validity which AC should be used related needs organisation and target dimensions.

AC has been Used More for Assessing

In this research, it can be seen that all the correspondents are convinced that AC has been used more for assessing echelon IV (supervisor) and echelon III (low manager) rather than echelon I (high manager) and staff. This finding demonstrates that the target of personnel development or selection of leadership competency in the early development of AC is for supervisor and low manager. The focused candidate that AC is relevant with, for the purpose of AC design in MoHa shows that AC is used for personnel development and promotion/job placement.

The leadership selection is used for candidates from echelon IV (supervisor) to echelon III (low manager) or echelon III (low manager) to echelon II (middle manager), and it also predicts the level of competency for personnel development opportunity by training recommendation. In addition, it is not only for promotion, the AC is used also for job placement employees who are more effective in another job that is related with their competency. This can be within the same echelon. This finding is related with previous research that found out that AC in the public sector is mostly used for executives, middle managers and supervisors (Lowry, 1996). Another finding of this current study provides the variety in the number of assessees who have been assessed in each assessment. It shows that most of the correspondents stated that the number of assessees in each assessment is approximately 21 to 30 candidates, while only one person's answer is 41 to 50. It can be demonstrated that every assessment has a different number of assessees. The reason for this is not clearly explained.

Every AC that is implemented is based on the requirements of the organisation. For instance, to find a candidate for leadership selection in echelon II (middle manager), AC management needs to assess the total number of echelon III (low manager), while, if the organisation needs to find information on competency for personnel development in echelon IV (supervisor), AC management would assess the total number of echelon IV (supervisor). Every assessment has a different number of assessees. As a result, correspondents have different points of views on the total number of employees who have been assessed in AC from 2014 to 2016. Most of the correspondents demonstrate that more than 1000 assessees had been assessed while others believe that it ranges approximately from 101 to 1000. This finding means that AC was used more than 20 % of the total number employees in MoHa (4891) that it imply the process of AC is still on progress to achieve target selection leadership and personnel development.

The assessors in MoHa have shown a lack of capability in operating AC perfectly (see in table 3) whereas, the ability of assessor is important in predicting and judging performance (Krause et al. 2006). Most of the correspondents stated that every assessor in MoHa has the qualifications but they do not have the experience in operating AC. Many correspondents answered that the ratio between assessor and assessees at the same time is 1 is to more than 20. Otherwise only one correspondent believes the ratio of assessor to assessee is between 1:10 and 1:25 respectively. The majority of correspondents also stated that the result of observation and judgement from the assessor in AC process takes more than three weeks after having spent eight hours in one assessment session. In addition, the large number of correspondents are convinced that AC in MoHa did not provide feedback for assessees after assessment rating. They also argued that, if feedback was given, it was verbal instead of written. This finding shows that the role of assessor in the operation of AC MoHa is still in the learning process because they have not gained enough experience yet since the implementation of AC. In the initial implementation of AC, MoHa has more trained

assessors, however, they are not experienced in conducting AC. It can be concluded that the quality of assessment of employees need more time and learning to be able to handle it. Moreover, AC MoHa are no provide feedback of results for assessees, there is a big gap in the assessor to assessee ratio, and more time is needed to analyse and conduct an assessment. This is in line with Melchers et al, 2010 that suggests an assessor should observe a few candidates during group discussion exercises in AC for quality rating and that assessors with expertise in observation, evaluation and rating affect the validation of AC dimensions (Jones & Born, 2008). On the other hand, considering this problem, management needs to hire an external assessor as stakeholder in a short contract to guide and lead procedure implementation of AC in MoHa. According to policy of MoHa number 800-5147 in 2016 about assessor associate, the direct external assessor or assessor associate are hired to help set tool assessment, collect data, analyse data, report result assessment, give feedback and work in collaboration with the internal assessor. Referring to this, management of AC in MoHa is well prepared to deal with the poor quality of observation and evaluation of inexperienced assessors. Despite the assessor in MoHa does not have more ability and more experience in operating AC, the role of the assessor associate is enough to cover the weakness of the assessor in MoHa. Moreover, in the phase of expert direction and learning from the external assessor, assessors in MoHa can learn and increase their experience in conducting AC.

AC in MoHa has been Used to Select Leadership and Personnel Development

Considering issues transparency and accountability in career management. It is believed that operating AC could prevent the problems associated with political intervention, corruption, collusion and nepotism in leadership selection and personnel development based on competency for sustainable performance and quality of public service in the government of Indonesia. Thus, this research is necessary to investigated the extent AC has been implemented in MoHa refers to the importance of function and problem of career management in MoHa. This finding reveals that the extent of AC in MoHa Indonesia has been not fully implemented yet. AC in MoHa has been implemented with similarities and support from the theory of previous research and the AC design has been used in line with the purpose of the organisation. It distinguishes between selection and personnel development for career management that is used mostly for echelon IV (supervisor) and echelon III (low manager) and training recommendation. The selection of exercises and dimensions in AC is also related to the purpose of AC and it has achieved almost all of the objectives of AC. This research result is exciting due to it shown in the two years of establishing AC, it has been implemented four times

with assessors who have been trained by certified training assessor and supported by assessor associates. The possibility of being influenced by political intervention still occurs in decision making while selecting candidates in leadership positions and personnel development. It because some of assessor is integrate in line manager.

This research result that did not inform before is some of the correspondents tend to manipulate the performance of AC to give a positive impression of what they have done. Moreover, the AC process in MoHa does not provide feedback for assessees after assessment, has no reassessment periodically and six of the assessors are also integrated as line managers. It creates opportunities for high managers to make political intervention, corruption, collusion and nepotism in selection of leadership and personnel development. Therefore, this finding demonstrate agree with some literature review that explain feedback for assesses, evaluation periodically, feedback and bias effects of assessors who are integrated as line managers im are important to AC validity. In conclusion, the present study found that AC in MoHA has been only partially implemented.

The Work-Family Conflict Experiences of Breastfeeding Workers in Indonesia

Pengalaman Konflik Keluarga-Pekerjaan yang dialami Pekerja Menyusui di Indonesia

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ABSTRACT

Indonesian law imposes all mothers to provide exclusive breastfeeding for babies. However, the period of maternity leave in Indonesia is only three months. It means, the breastfeeding workers—the workers who provide breast milk for their babies—should return working in the middle of exclusive breastfeeding process. The previous literatures showed that both working and breastfeeding had several advantages for women, however when women did not receive sufficient support, the combination of those activities had negative impact for women. What are the experiences of the breastfeeding workers in Indonesia when they return to work after maternity leave and what can be done to improve their condition? Using snowball sampling, Skype and telephone interview, together with thematic analysis, four themes from 13 of breastfeeding workers in Indonesia emerge in this study: conflict of breastfeeding workers, impact of breastfeeding workers' conflict, supporting figures, and improvement condition of breastfeeding workers.

Keywords: work-family conflict, breastfeeding workers, telephone interview, thematic analysis, snowball sampling

ABSTRAK

Hukum Indonesia mengharuskan semua ibu memberikan ASI eksklusif untuk bayi. Namun, masa cuti bersalin di Indonesia hanya tiga bulan. Artinya, para pekerja menyusui—pekerja yang memberikan ASI untuk bayi mereka—harus kembali bekerja di tengah proses pemberian ASI secara eksklusif. Literatur sebelumnya menunjukkan bahwa baik bekerja dan menyusui memiliki beberapa keuntungan bagi perempuan, namun ketika wanita tidak mendapatkan dukungan yang memadai, kombinasi dari kegiatan tersebut berdampak negatif bagi wanita. Bagaimana pengalaman para pekerja menyusui di Indonesia ketika mereka kembali bekerja setelah cuti melahirkan dan apa yang bisa dilakukan untuk memperbaiki kondisi mereka? Dengan menggunakan sampling bola salju, wawancara Skype dan telepon, bersama dengan analisis tematik, empat tema dari 13 pekerja menyusui di Indonesia muncul dalam penelitian ini: konflik pekerja menyusui, dampak konflik pekerja menyusui, tokoh pendukung, dan kondisi perbaikan pekerja menyusui.

Kata kunci: konflik keluarga-kerja, pekerja menyusui, wawancara telepon, analisis tematik, sampling bola salju

The 1945 Constitution of Republic of Indonesia, article 28, paragraph (2) states that "Every citizen shall have the right to work and to earn a humane livelihood." This means that every citizen in Indonesia, both men and women above 18 years of age, have equal opportunities to work. The assumption that man is the only breadwinner in the family is slowly changing. In 2012, the percentage of female workers became 47.91%, which has increased 1.23% from 2009 (Indonesian Central Bureau of Statistic, 2014). Nevertheless, the paradigm that Indonesian women's role as the only caregiver in the family continues ceaselessly. Female workers often had "second shift" at home doing chores and nurture the children (Karunia et al.,2013); therefore, they have to exist both in the office and in the home.

In order to increase health status of infants in Indonesia, the Ministry of Health created the policy which imposes exclusive breastfeeding for infants such as PP No.33/ 2012. In this policy, every mother must provide breastfeeding for their babies, with several exceptions such as medical problems or the separation between the baby and the mother (Ministry of Health, 2014). Infants must obtain breast milk because optimal breastfeeding helps in preventing approximately 19% of all under-5 deaths, better than any other prevention (Save the Children, 2012). Hence, it is strongly suggested that the mother breastfeeds for the first 6 months.

However, on PP No.24/1976 maternity leave policy in Indonesia is only three months for female workers, either in the public or private sector. Paternity leave is even worse; it is only two days in the private sector (United Nation, 2010) and partially implemented in the public sector depending on policy of local authorities. These conditions do not completely support women's rights to work and provide breast milk for their infants. Consequently, the breastfeeding workers—the working women who provide breast milk for their children—have to return to their jobs in the middle of exclusive breastfeeding periods.

Literatures show that both breastfeeding and working are associated with advantages for women. Breastfeeding is related with fewer negative mood and lower perceived stress on women, while depressed mother stops breastfeeding earlier in infancy (Field, Reif, & Feijo, 2002; Mezzacappa, 2004). The similar result is also shown in the study by Brooks-Gunn, Han, and Waldfogel (2010) with working women. They found that female workers who return to work earlier have less depressive symptoms than workers who work after six months and did not get employed in the first year. However, when women did not receive fully support from the environment, the combination of the two useful activities (breastfeeding and working) could have negative effect. This situation can be described in the qualitative study from Wu, Kuo and Lin (2008) on nurse who expressed breast milk at workplace in Taiwan. This study found that breastfeeding workers felt uncomfortable and exhausted.

Actually, the breastfeeding itself could be more difficult than what the woman had thought since the process was not simple and sometimes it can be painful

(Afoakwah, Smyth, & Lavender, 2013; Schmied & Lupton, 2001). If women combine breastfeeding and working without sufficient support, their situation might be more intricate.

Breastfeeding workers might experience conflict between their role as a worker or as a mother in which each role is energy and time consuming as well as demanding dedication. If a woman could not fulfil the expectations on both roles, they would surrender one of them. For example, women might cease breastfeeding when they return to work due to the tight schedules and short breaks and insufficient privacy at work, so that the rate of breastfeeding cessation was higher on working women than unemployed mother (Cooklin, Donath, & Amir, 2008); or another option, women might be resigning if the incompatible demands as employee and mother leads to emotional exhaustion and reduction of job satisfaction whereas low job satisfaction is related to intention to leave (Hoonaker, Carayon, & Schoepke, 2005). It can be assumed that breastfeeding workers experience chaotic condition.

Breastfeeding at Work

Cardenas and Major (2005) suggested two possible options for breastfeeding workers on how to pump milk for eight times in 24 hours (American Academy of Pediatrics, 2014). First, they can pump the breast milk in advance and put it on the bottles so that the baby can be fed when the mother is absence. Second, women can bring their children to the on-site child care and feed the children during breaks.

Work Family Conflict

Work–family Conflict (WFC) has been defined as a conflict that occurs between work roles and family roles, as a result from the demand of dedication of each role which can reduce performance in the both roles (Greenhaus & Beutell, 1985). Later, Carlson, Kacmar, & Williams (2000) divided WFC into two directions, Work Interferes Family (WIF) and Family Interferes Work (FIW).

Although women enter workforce, Craig (2006) found that mother tended to spend more time with children even though they work full time. Perhaps, as a result, meta-analysis from Byron (2005) found that mothers would experience more conflict than fathers. Moreover, for working mothers the presence of small children is highly associated with FIW (Stevens et al., 2007). However, WIF could occur when workers spend more time at work (Byron, 2005).

Why Women Continue Working after Maternity Leave

Pustolka (2014) stated that several reasons why women return to work after childbirth are high education, economy, loving the job, self-needs, and support from significant others. Several studies confirmed these reasons. Arun, Arun, and Borooah (2004) found that women with higher education qualifications were more likely to return to work. They might desire to implement their knowledge to their jobs. Besides, study from Barrow (1999) and Buzzanell (2005) found that women continue working due to self-needs, loving the job, and economy reasons. Lastly, study from Huffman, Casper, and Payne (2014) found that spouse support decreased the actual turnover behaviour. The family support is very important for women to obtain strength in this life transition because they cannot withstand the difficulties alone and act as super women who play roles as both perfect mother and worker (Ericksen et al., 2008).

Impact of Breastfeeding Workers' Conflict

All of the 13 participants experienced dilemma between family and work although the reasons of dilemma are slightly different. The majority of participants desired to resign from office mainly because of the children. The participants had expressed their feelings that their children needed their existence and this was a duty of the participants as mothers to take care of the children. The children did not want to sleep unless the mother was on their side, the babies did not want to drink milk from a bottle, and when the babies were ill, they needed their mothers more than in the normal situation.

The WFC of participants also had positive and negative side for the jobs. 9 of the participants expressed that although they had mother-worker conflict; they still had experienced positive impact from the job. Some participants thought that they were more productive at work and utilized their time effectively to avoid overtime. Some others felt that they still enjoyed their job because it was their passion or their "me time."

Nevertheless, 10 of the participants also expressed the negative impact of conflict on the job. The participants thought that their ambition to achieve higher position was not same as before due to their realisation that they had additional responsibility after having babies. Besides, they tended to be less focused in doing tasks at office because sometimes they had to break for pumping or they thought about the baby in the office.

7 of the participants expressed their guilty feeling to babies. The participants felt that they should be with their children, caring them, and always beside them whenever they need. The participants also question themselves why they must give their children to other, why they could not take care of the children by themselves. These feelings

mostly occurred for the participants who just had their first child. Some participants who already has several children explained that the guilty feeling disappeared slowly while having the second child.

9 out of 13 participants had informal breastfeeding workers group. This group could be a virtual group such as Blackberry Massager (BBM) and WhatsApp Group or real group in the lactation room. The participants felt free to express their feelings to other breastfeeding workers because they might experienced same feelings as well. Talking with their fellow released the tension of the breastfeeding workers. On top of that, they provided support to each other in order to ensure that every breastfeeding program would be successful.

Discussion

This study attempts to find out the experiences of breastfeeding workers in Indonesia who return to work after maternity leave. The focus of this study is to apprehend the daily conflict between roles as a mother and a worker, the impact of the conflict on the breastfeeding workers, the support they are received, and how to improve the breastfeeding workers condition.

This research found that the breastfeeding workers experience conflict between role as a mother and role as a worker. It can be described when women leave their job to pump the milk and they experienced guilty feeling. Furthermore, to keep the balance between work and breastfeeding, sometimes the participants must encounter inconvenient situations in order to pump the milk regularly. They must express the milk in a vehicle or brought many types of equipment to pump the milk during business trips. These data support several studies (Gatrell, 2007; Payne & Nicholls, 2010; Wu et al., 2008) whilst the breastfeeding workers had difficult time to pump the milk when they play role as a worker. From time to time, they had to pump the milk at toilet, car, or plane. And sometimes the breastfeeding workers must face negative comment from their unsupportive superordinates and colleagues. Those conditions may lead to another result of this study which is: the milk production of breastfeeding workers would be reduced. In this condition, the participants might experience strain based conflict (Cardenas et al., 2005) whereas the absenteeism of lactation friendly atmosphere could be a stressor for the participants and as a result, their breast milk could be decreased.

Besides, the WFC of participants also give impact, the participants felt guilty to the babies because they must leave them when working. This condition might lead to the dilemma between continue working or resign from the job. From the "home" side, children was the major reason they desired to quit and from the "work" side, they desired to continue working due to self-needs, significant others's suggestion,

and economy. These data support findings from Barrow (1999) and Buzzanell et al. (2005) whilst some women continue working due to economy reasons and self-needs. Furthermore, this study also supports the paper from Arun et al. (2004) whereas the majority of participants hold high education, so they have chosen to continue working rather than resign. The study from Huffman et al. (2014) is also confirmed by this research; support from spouse could prevent the actual turnover.

Another point is that the WFC of participants had negative impact to the job such as the participants became unfocused and had less ambition to achieve higher position. However, unsurprisingly, the participants had also enjoyed the job. The pressure from dual roles might not erase the enjoyment on work. This is a similar result with study from Buzzanell (2005).

Nevertheless, in facing the WFC, the participants received support both at home and at work. The husbands, mothers, and maids provided emotional and or practical support at home. At work, some of the superordinates and colleagues also gave support for the participants although the other might show unsupportive behaviour. These different responses happened due to the prior knowledge of the colleagues about breastfeeding workers. This result confirms the study by Johnston et al. (2010) who found that breastfeeding workers might be easier to be accepted when the surrounding also had prior experience about breastfeeding.

Those results have contribution for the enrichment literatures of WFC in the eastern culture. Besides, practically, this study may help the breastfeeding workers to minimise their WFC. Based on results of this study, to achieve the ideal condition both at work and at home, the organisations have responsibilities to improve their facilities and policies for the breastfeeding workers. They could make the better areas for mother and children facilities at work such as lactation room and onsite day care. For the improvement in the policies, the organisations could minimise overtime or business trip because both of these activities could create more WFC for the participants. Futhermore, the organisation could provide special break time to pump the milk at office. Then, the organisation could minimise the participants conflict when they had to leave the tasks to pump the milk.

Moreover, government might participate in reducing WFC of breastfeeding workers through the longer maternity leave because the current maternity leave could not support working women to breastfeed the baby. They had to juggle in order to satisfy both roles at home and at work.

The Mediating Role of Employee Engagement in the Relationship between Psychological Contract Fulfillment and Readiness for Change

Peran Mediasi pada Keterlibatan Karyawan dalam Hubungan antara Pemenuhan Kontrak Psikologis dan Kesiapan untuk Perubahan

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ABSTRACT

Organizations value employees who are willing and able to respond positively to change. It is important for an organization to know how the fulfillment of a psychological contract influences the employee-employer relationship and how an engaged employee contributes to the employee- employer exchange relationship. This study investigates the mediating role of employee engagement in the relationship between psychological contract fulfillment and readiness for change. In a sample of 104 part and full-time workers recruited from Amazon's Mechanical Turk, data were gathered using questionnaires. A mediation analysis with bootstrapping was carried out to assess each component of the proposed mediation model. The result showed that the psychological contract fulfillment was not directly related to readiness for change. Yet, employee engagement was found to mediate the relationship between psychological contract fulfillment and readiness for change. Implications of the study are discussed, together with limitations and suggestions for future research.

Keywords: readiness for change, psychological contract fulfillment, employee engagement

ABSTRAK

Organisasi menghargai karyawan yang mau dan mampu merespon secara positif terhadap perubahan. Penting bagi sebuah organisasi untuk mengetahui bagaimana pemenuhan kontrak psikologis mempengaruhi hubungan pekerja-majikan dan bagaimana karyawan yang terlibat berkontribusi terhadap hubungan pertukaran karyawan-majikan. Penelitian ini menyelidiki peran mediasi keterlibatan karyawan dalam hubungan antara pemenuhan kontrak psikologis dan kesiapan untuk perubahan. Dalam sampel 104 pekerja paruh waktu dan penuh waktu yang direkrut dari Amazon's Mechanical Turk, data dikumpulkan dengan menggunakan kuesioner. Analisis mediasi dengan bootstrap dilakukan untuk menilai setiap komponen model mediasi yang diusulkan. Hasil penelitian menunjukkan bahwa pemenuhan kontrak psikologis tidak terkait langsung dengan kesiapan untuk perubahan. Namun, keterlibatan karyawan ditemukan untuk menengahi hubungan antara pemenuhan kontrak psikologis dan kesiapan untuk perubahan. Implikasi penelitian ini dibahas, bersama dengan keterbatasan dan saran untuk penelitian selanjutnya.

Kata kunci: kesiapan untuk perubahan, pemenuhan kontrak psikologis, keterlibatan karyawan

In order to adapt to a dynamic environment, organizations are constantly confronted with the need to implement changes in strategy, structure, process and culture. Therefore, to respond to a dynamic situation and increased competition, organizations are implementing change programs such as downsizing and mergers, in order to stay competitive. In addition, planned organizational changes also take place to improve the effectiveness, capability and performance of the organization (Cummings & Worley, 2009). However, even though change will give an advantage to the organization, any change can cause certain reactions in employees and these reactions will determine the success of change. Thus, an individual must be open and prepared for change in order to make the organizational change successful (Eby, Adams, Russell, & Gaby, 2000).

In the sense of being ready to change, employees must believe that they are in an equal exchange relationship with their employers. The psychological contract, a pre-change antecedent, is a fundamental concept in employment relations. Psychological contract is an exchange relationship between the employee and the employer. The party that contributes to the relationship expects a return from the other party (Rousseau, 1990). It is important for an organization to know how the fulfillment of the psychological contract influences the employee - employer relationship, as well as the benefits of that relationship.

Besides the fulfillment of the psychological contract, an employee needs to commit and engage to continue contributing to the exchange relationship with his or her employer. An employee contribution is a positive response to a successful organizational change implementation. However, an employee does not automatically perceive a positive response to a change as an obligation. Consequently, substantial levels of engagement are required to stimulate extra-role behavior. High employee engagement has been linked to improve in-role performance (Salanova, Agut & Peiro, 2005) and increased extra-role behavior (Bakker, Demerouti & Verbeke, 2004). Therefore, this study will explore the psychological contract fulfillment and how it relates to readiness for change. Employee engagement will be examined as a possible mediator in this relationship.

Readiness for Change

Armenakis, Harris, and Mossholder (1993) define readiness for change as an individual's beliefs, attitudes, and intentions regarding the extent to which changes are needed, and the organization's capacity to successfully make those changes. In other words, what the members think about the organization's need for change influences how they will respond to change. Readiness for change is defined as a comprehensive attitude, which is influenced by four components at the same time (Holt, Armenakis, Field, & Harris, 2007). These components are: (1) the content of change (i.e. what is

being changed), (2) the process of change (i.e. how the change is being implemented), (3) the context of change (i.e. the circumstances in which the change is occurring) and (4) the individual who is involved in the change (i.e. the characteristics of those being asked to change).

The change process refers to the several steps and then followed by implementation. The first step of the change process can be the extent to which employee participation is allowed. The second step is the organizational change content, which refers to the introduction of a specific initiative, as well as its characteristics. The third step is an organizational context that consists of the conditions and environment within which employees function. The last dimension is the individual attributes of employees that refer to the responses characteristics of the employee toward change (Holt et al., 2007; Piderit, 2000).

Because of the importance of the employees' role in the change process, they need to be mentally, physically, and psychologically ready to change, and to believe that the change will bring positive progress to the organization. If the employees are not ready for change, they will not be able to follow, and find it difficult to adjust (Hanpachern, Morgan & Griego, 1998). Backer (1995) found that if the level of readiness for change is low, then the possibility of successful organizational change will decrease. This is in line with research conducted by Armenakis et. al, (1993) showing that employees' readiness is the baseline for the effectiveness of organizational change. If employees do not believe that the change is needed, or they believe that the organization does not have the capacity to change, then the change process will fail.

Psychological Contract Fulfillment

The fulfillment of the psychological contract can be a strong predictor of how employees respond to change (Van den Heuvel & Schalk, 2009), and it can also have major implications for employees' performance and behavior (Morrison & Robinson, 1997). Van den Heuvel and Schalk (2009) found a negative relationship between the psychological contract and resistance to change, i.e. the fulfillment of the psychological contract led to positive outcomes and to readiness to change. Rousseau (1989) defined the psychological contract as an individual's perception of mutual obligations between the employer and the employee. These obligations, at least in the employee's perception, are the result of promises the employer and the employee have made to each other during the employment relationship.

According to Morrison and Robinson (1997), these promises are essential. This is because although the employer might have never made a promise explicitly, it is very possible that the employee mis-interpreted the discussion, policies, or non-verbal communication, and thought a promise was made. Every employee perceives a

psychological contract differently even within the same organization, and the contents of a psychological contract are specific to a time, a person, the job characteristics and skill level of the job (Suazo, 2009). Therefore, the nature of the psychological contract is dynamic, and it depends on the individual's perception of the employee-organization exchange relationship.

Research into the psychological contract proposes several assumptions (Lambert, Edward & Cable, 2003). The first is that the deficiency of a psychological contract leads to a decrease in organizational commitment and, therefore, to negative outcomes for the employee and the organization; the second is that the fulfillment of the psychological contract leads to positive outcomes for both the employee and the organization. Consequently, Lambert et al. (2003) state that the breach of the psychological contract occurs when the employees perceive a discrepancy between what they were promised and what they received. It is possible that employees receive more or less than what was promised or agreed. If an employee receives more than what was promised, there is fulfillment of the psychological contract. The fulfillment of the psychological contract, in this case, positively relates to job satisfaction (Turnley & Feldman, 2000), positive outcomes (Van den Heuvel & Schalk, 2009) and organizational citizenship behavior (Hui, Lee & Rousseau, 2004). On the other hand, if the employee receives less than what was promised, there is under-fulfillment of the psychological contract.

In terms of change, an employee needs to experience sufficient levels of commitment and engagement to the organization and to continue contributing to the exchange relationship with his employer. Schaufeli and Bakker (2004) found that employee engagement has a positive correlation with commitment, and a negative correlation with intentions to quit. They believed that employee engagement also has a correlation with employee performance and extra-role behaviors.

Employee Engagement

Employee engagement was defined as the degree to which an employee feels a sense of attachment to the organization he or she works for, believes in its goals and supports its values (Baumruk, 2004). Engaged employees are described as being independent, persistent, pervasive, positive, and as having a fulfilling work-related affective-cognitive and motivational- psychological state (Yalabik, Popaitoon, Chowne & Rayton, 2013).

Research conducted by Vidal (2007) found that employee engagement positively correlates with and influences the success of change implementation, especially when employees and all stakeholders of the organization were involved in the change processes. Mangundjaya (2012) found that organizational commitment

and employee engagement were positively related and had contributed to individual readiness for change.

According to Kahn (1990) engagement may lead to intrinsic motivation, creativity, authenticity, ethical behavior, increased effort and involvement, and overall more productive and happy employees. Bal, De Cooman and Mol (2013) recently found that engaged workers and those who are attached to their organization put more effort into their job and, therefore, perceive higher employer obligations compared to those who are low in engagement and high in turnover intentions. People who are engaged in their work and do not plan on leaving their organization are more focused on their positive experience at work, and continually looking for new resources to do their jobs well.

Method

For the purpose of this study, a random sample of part-time and full-time employee was surveyed. Data was gathered via Amazon Mturk in February 2014. Participants received a standard informed consent form at the beginning of the questionnaire, with an accompanying summary that explained the purpose of the study, emphasized voluntary participation and guaranteed confidentiality. A total of 164 participants opened the survey link, but only 104 participants completed personal information questionnaires including demographics, work experience and job level. The participants were 47.1% male (M=31.98 years, SD=8.70 years), 51% female (M=33.75 years, SD=11.20 years) and 1.9% did not want to specify their gender (M=26.50 years, SD=2.12 years). The mean working years was 5.22 years (SD = 4.70 years). The online questionnaire was spread via Amazon Mturk, email and social networks.

Employee Engagement

The Utrecht Work Engagement Scale by Schaufeli and Bakker (2004) consisted of 17 items and measured responses on a 7-point scale ranging from 0 (never) to 6 (always/every day). The respondents were asked to specify statements such as "I find the work that I do full of meaning and purpose" or "I am proud of the work that I do." It measured the degree to which employees have a sense of energetic and effective connection with their work activities, and they see themselves as able to deal well with the demands of their job. The mean and standard deviation were 4.17 and 1.35 respectively. Cronbach's alpha for this scale was .95.

Readiness for Change

The original Readiness for Change Scale by Holt et al. (2007), consisted of four factors measuring the readiness for change at the individual level. The "appropriateness" factor contained 10 items that assessed the extent of the individual's view of the discrepancy and organization valence, for example, "It does not make much sense for us to initiate this change." The "management support" factor consisted of 6 items that measured the extent to which an organizational member felt senior leaders supported the change, for example, "It does not make much sense for us to initiate this change." The "change efficacy" factor consisted of six items to measure the extent of which organization members felt confident that they would perform well and be successful, for instance, "I do not anticipate any problems adjusting to the work I will have when this change is adopted." The last factor, labeled "personal valence," consisted of three items to measure whether the change was perceived to be personally beneficial, for instance.

Employee Involvement was Found to Mediate the Relationship

Organizations value employees who are willing and able to respond positively to change. This study examined if the relationship between psychological contract fulfillment and readiness for change is mediated by employee engagement. Psychological contract fulfillment was captured by six dimensions: job content, career development, social atmosphere, organization policies, work-life balance and reward, which all positively correlated with each other. These separate dimensions seem to all be necessary prerequisites of a strong sense of fulfillment of the psychological contract by employees. Therefore, the separate dimensions were averaged to create an overall measure of fulfillment.

Firstly, we expected that psychological contract fulfillment would have a positive relationship with readiness for change. Our results did not show any evidence that psychological contract fulfillment is directly related to employees' readiness for change. This result contradicts the study by Van den Heuvel and Schalk (2009), who found psychological contract fulfillment to be a strong predictor of how employees respond to change. Another study conducted by Van den Heuvel (2012) also found that psychological contract fulfillment related to the attitudes toward change. However, it should be noted that these studies did not specifically measure readiness for change in the same way that it was operationalized in our study. Van den Heuvel and Schalk (2009) operationalized readiness for change as the response of an over-fulfilled of psychological contract. They addressed it by measuring the effect of psychological contract fulfillment on resistance to change. In addition, Van den Heuvel (2012) conceptualized the attitude toward change as a multidimensional

response to organizational change in either positive or negative terms. In our study, we operationalized readiness for change as a comprehensive attitude that is influenced simultaneously by the content of change, the process of change, the context of change and the individuals who are involved in the organizational change (Holt, et al., 2007). An idea for future research would be to investigate these different conceptualizations and operationalizations of readiness for change and how they relate to both positive (e.g., cohesion, motivation) and negative outcomes (e.g., turnover intensions, word stress).

Although psychological contract fulfillment has been found to be related to employees' affective, behavioral and cognitive responses to change (Zhao, Wayne, Glibkowoski, & Bravo, 2007), no prior research has explored the direct relationship between the psychological contract and readiness for change. The present findings also indicate that the fulfillment of the psychological contract was not directly influenced employee's psychological condition to be ready for change. The psychological contract fulfillment is one of pre-change and change antecedents that influence an employees' attitude toward change. As mentioned by Oreg et al. (2011), there are five main antecedents that influence how the employee responds to the change. Consequently, it is possible that other antecedents influence the employee's perception of his or her psychological contract fulfillment. How the employees respond to the change is influenced by how change recipients feel, what they think or what they intend to do (Oreg et al., 2011). For example, change process implementation as an antecedent may affect how the employee reacts to change. Even though the psychological contract was fulfilled, if the way in which organizations implement change makes the employees feel that it will threaten their future careers, employees may resist promoting the change.

Hypothesis 2 predicted that employee engagement would mediate the relationship between the psychological contract and readiness for change. The bootstrapping analysis results indicated that psychological contract fulfillment indeed had an effect on readiness for change through employee engagement. This result confirms employee engagement as predictor of successful change implementation (Saks, 2006). The present results are also in line with research conducted by Piderit (2000) about employees' attitudes toward change as an important determinant of the success or failure of organizational change. As mentioned by Turnley and Feldman (2000), the over fulfillment of the psychological contract was found to be positively related to employee's loyalty, contribution and other positive outcomes. The fulfillment of the psychological contract will affect the employee's commitment to the organization; thus, the employee will feel more engaged with organization.

Engaged employees have a sense of personal attachment to their work, and their values seem to match well with the organization they work with. An engaged employee is aware of the business context, and works with colleagues to improve performance within the job for the benefit of the organization (Robinson, Perryman & Hayday, 2004), for example, being involved in implementing organizational change.

Furthermore, engaged employees are motivated and able to give their best to ensure the successful implementation of change. Therefore, a tangible benefit for the organization and individual can be achieved.

The findings of our study imply that the organization must pay attention to the exchange relationship between employee and employer to bring the employee's commitment to the highest possible level and encourage people to become more engaged with the organization. This could be done in several ways. For example, when it comes to work situation, the organizations need to provide psychologically healthy and engaging jobs for employees. Probably, the biggest influence on employees' day to day experience of work is his or her line manager. At an operational level, the leader or manager is in a powerful position to influence employees' psychological well-being and engagement with others. Research shows that psychological well- being enhances the relationship between employee engagement and beneficial outcomes (Robertson & Cooper, 2010)

Consequently, the engaged employee will participate in a successful change. This is in line with Rafferty and Restubog's theory that allowing employee participation in change is positively associated with attitudinal responses to change. This study indicates that when employees participate in decisions related to change, feelings of empowerment are created, which provides employees with a sense of agency and control (Rafferty & Restubog, 2010).

Why Civil Servant with Higher Education Stays: A Case Study in the Ministry of Home Affairs Republic of Indonesia

Mengapa Pegawai Negeri dengan Tingkat Pendidikan Tinggi Tetap Bekerja: Studi Kasus di Kementerian Dalam Negeri Republik Indonesia

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ABSTRACT

Turnover is a complex concept which researchers and employers attempted to explain through the proposal of theories and models. This qualitative research was designed to investigate the factors that contribute to the decision making of employees with higher education to stay in the Ministry of Home Affairs. A purposive sampling was utilised to determine the potential respondents. Semi-structured interviews were conducted with ten employees who has a doctoral degree and ten who obtained a master degree to answer the question. Template analysis was used to identify the main categories of issues that emerged from the data collection, then utilised to draw the conclusions.

The findings of the research showed that the reasons for staying did not stand alone and related to one another. These reasons are job satisfaction, such as job security, work satisfaction, job advancement and supervisor. The organisational commitment and the additional income were also the primary consideration. It also revealed some other insignificant reason yet important such as family responsibilities, hope and age. The results indicated that civil service sector succeeds to provide the higher education employees with the high work satisfaction by involved in public policy formulation for national development and politics as well as contributed to the organisation improvement.

ABSTRAK

Perputaran adalah konsep kompleks yang peneliti dan atasan mencoba menjelaskan melalui usulan teori dan model. Penelitian kualitatif ini dirancang untuk mengetahui faktor-faktor yang berkontribusi terhadap pengambilan keputusan pegawai dengan pendidikan tinggi untuk tetap tinggal di Kementerian Dalam Negeri. Pengambilan sampel purposive digunakan untuk mengetahui calon responden. Wawancara semi terstruktur dilakukan dengan sepuluh karyawan yang memiliki gelar doktor dan sepuluh yang memperoleh gelar magister untuk menjawab pertanyaan tersebut. Analisis template digunakan untuk mengidentifikasi kategori utama isu yang muncul dari pengumpulan data, kemudian dimanfaatkan untuk menarik kesimpulan.

Temuan penelitian menunjukkan bahwa alasan menginap tidak berdiri sendiri dan saling terkait satu sama lain. Alasan ini adalah kepuasan kerja, seperti keamanan kerja, kepuasan kerja, kemajuan pekerjaan dan atasan. Komitmen organisasi dan pendapatan tambahan juga menjadi pertimbangan utama. Hal itu juga mengungkapkan beberapa alasan penting lainnya namun penting seperti tanggung jawab keluarga, harapan dan usia. Hasil penelitian menunjukkan bahwa sektor layanan sipil berhasil memberikan kepuasan kerja yang tinggi kepada pegawai pendidikan tinggi dengan terlibat dalam perumusan kebijakan publik untuk pembangunan dan politik nasional serta berkontribusi terhadap peningkatan organisasi.

Many studies reported that job satisfaction has a direct effect on the turnover decision (Fishbein, 1980). Klein and Maher (1966) found that employees with a higher education have less pay satisfaction, an indicator of job satisfaction (Herzberg, 1974), than workers with lower education. Even though Singh and Loncar (2010) found the negative relationship between pay satisfaction and turnover, Rogers discovered that employees with higher education have less satisfaction than who graduated from high school.

The amount of the salary of a civil servant is defined by the education level, position and the length of service, although every province has a different minimum living standard. In 2013, a freshman civil servant with bachelor degree obtained 2,100,000 IDR (Government Act 22/2013) or 105 GBP, meanwhile the minimum wage in DKI Jakarta, the capital city of Indonesia, was 2,200,000 IDR or 110 GBP per month.

Moreover, in the same year, the average minimum wage in 10 provinces in Sumatera was 1,300,000 IDR or 65 GBP per month, and in Papua was 1,700,000 IDR or 85 GBP per month (BPS, 2016). Comparing the amount of salary obtained by a freshman civil servant with a bachelor degree and the minimum living wage in different provinces in Indonesia, it can be seen clearly that the impact of the salary is significantly different for employees who was assigned to the government agencies in Jakarta.

Nevertheless, after fulfilling particular requirements, the unfortunate circumstances the Ministry of Home Affairs has started to change since 11 December 2013 when President Act 177/2013 legalised the performance pay to the employees of the Ministry of Home Affairs for the first time. As the result, currently, take home pay of the employees of the Ministry of Home Affairs is higher than the minimum wage of DKI Jakarta Province.

However, there are also significant income differences among government agencies. For instance, the performance pay for staffs with grade 7, The Ministry of Home Affairs employees obtained maximum 2,928,000 million IDR (Presiden Act 150/2015) or 150 GBP per month. Meanwhile, civil servants who worked in the Directorate General of Taxation received minimum performance pay is 8,211,000 IDR or 410 GBP (President Act 37/2015) per month, and public servant of DKI Jakarta province earned maximum 19 million IDR (Governor of DKI Jakarta Act 193/2015) or 950 GBP per month.

It is undeniable that the life of the employees of the Ministry of Home Affairs was considerably difficult prior to the pay performance established. The 1850 employees who obtained master and 186 employees with the doctoral degree in the Ministry of Home Affairs (MoHA, 2016) are 0.1% of 8% citizens who have higher education qualification (BPS, 2016). That figure shows that the higher education citizens are benefited in the job market competition as Weiss (1984) suggest that higher education qualification increases the employment opportunities. Therefore, the focus of the study

is to investigate the influence of graduate level background on employee's decision to stay in the Ministry of Home Affairs.

A considerable amount of research has been conducted in the area of employee turnover within the workplace. However, fewer researchers tried to find the relationship between turnover and level of education. Furthermore, as far as the researcher is concerned, none of this research has taken place in the context of the Indonesian civil service. A country's culture represents a primary influence on the beliefs, ideas, and values of the employee as individual on organisational culture (Schein, 1992). Therefore, this study will add value to the research in the civil service area, particularly in Indonesia. On a practical level, this study provides the stakeholders with information for the improvement.

This research question of this study is "Why does a civil servant with higher education stay in the organisation?" aim to identify the factors that contribute to the decision of civil service to remain in The Ministry of Home Affairs.

The research was conducted within a case study organisation, since "it is difficult to imagine a human activity that is context-free" (Lincoln and Guba, 1985, p. 114). A case study aims to explore the uniqueness of a single case (Simons, 2009). It is allowed to utilise as a research method when the study proposes a descriptive or exploratory question and emphasises on a real-life context phenomenon (Yin, 2012). The study was conducted within an organisation that focused on particular context to obtain a rich understanding of the area of the research and answers the research questions.

Interviews were utilised as the data collection. The face-to-face interviews provide a better understanding of participants' beliefs and perceptions, therefore more likely to enable a better interpretation of the findings. Lofland and Lofland, (1995) supports that the best results to explore the mind of another human being can be achieved in face-to-face settings.

Moreover, a semi-structured interview is flexible to allow the researcher to adjust the sequence of questions based on the responses, therefore provides the researcher with more control over the direction of the interview, and assures each respondent gave similar information areas (Turner, 2010). These interviews were conducted to investigate employees' perceptions and opinion on the reason why they stay in the organisation. It enabled the researcher to explore the cause behind the answer. Also provided respondents with freedom to discuss unsatisfactory issues with the researcher into areas that may not have been considered prior, but relevant to the research.

The participant pool of the research is 1850 employees with master degree and 162 employees with doctoral degree. The study used purposive sampling, which is commonly used in case study research and allows the selection of informative participants who able to provide the necessary information for the research (Neuman,

2015). The selected sample includes ten employees with doctoral degree and ten employees with masters' degree qualification, with age range from 33 to 57.

The sampling focus on the respondent who only has experienced in a leader position particularly echelon IV or supervisory level, and Echelon III or line manager, which has a crucial role in running the institution and achieving the goal of the organisation. Therefore, this research excluded the employees with master and doctoral degree whose primary job description are outside the administrator as the such as lecturer, planner, archivist, analyst or auditor.

Next, the research findings and analysis of factor that influences the decision of the employees to stay in the Ministry of Home Affairs are presented and discussed.

It also acknowledged the met expectation theory by Porter and Steers (1973) as well as Steers and Mowday (1981) opinion that turnover decision is influenced by job expectation. It also supports Macedonia (1969) which found that applicants who were provided with a clear description would remain with the organisation.

Therefore, even though the entire respondents admitted the pay dissatisfaction, however, the facts that the civil servant pay is low has been known widely in the society prior to the employment. As the consequences, the respondents' expectation about the pay is lower, lead to more preparation to face the consequences of the circumstances, and search another reason to boost the spirit.

It also confirmed the continuance commitment, one of the category in the organisational commitment by Allen and Meyer (1990). This type of commitment occurs when the disadvantage of leaving is greater than the benefit. The pay dissatisfaction was considered as a fair trade for job security, pension and health insurance that will be received until the end of life.

Additional Income

15 respondents or 75% stated that they have the other sources of income, derived from the main job as a civil servant, or from another job outside the work, or help from the spouse. From the profile data supplied by the respondent, 16 respondents had a spouse who also worked, while 2 were singles and 2 respondents spouse were full-time parent. 60% of the respondents also have a job outside the work. For instance, entrepreneur, breeder and mostly lecturer in the private university. Moreover, the circumstances in the institution enabled employees with higher education and certain position to earn additional income by being a speaker in a public policies seminar that held by the local government as revealed by B8.

This reason partially confirms Simon (1958), Mobley (1977) about job satisfaction and job alternative. Even though pay dissatisfaction occurs, however, the presence of job alternative did not result in a turnover. This circumstance occurred

because the job alternative can be carried at the same time with the primary job as a civil servant. However, the presence of job alternative might cause a disruption in the effectiveness of the organisation, even though in a very low degree. The focus of the employee might not be 100% on the job due to the alternative activity to meet the family need.

However, because of pay dissatisfaction are widely recognised in the organisation, the activities to obtain other sources of income might be considered as a normal practice. It is in line with the social contract concept by Rousseau (1995) which is not included in the literature review. The Social contract can be described as a cultural collective beliefs which determined the appropriate behaviour in a society.

Future Hope

6 respondents stay because they believed that the situation would be better. The interviews also revealed that the organisation is currently undergoing a transition phase which initiated by the bureaucracy reform. The respondents saw promising signs for future improvement, even though still need a revision for perfection. For instance, an open recruitment which stressed on the fairness, transparency and competitiveness was considered as the gate of opportunities for promotion as the career advancement. It changed the perception that an employee only would be promoted based on the personal relationship with the superior.

Participants also considered Bureaucracy Reform as the reason for the improvement the employees' attendance. In the old days, there were employees who only came to the office occasionally, when the manual register was manipulated easily. Therefore, the utilisation of the electronic fingerprint register as the tools to monitor the attendance which determined the amount of pay performance was regarded contributes to the changes.

This changes had good responses from 80% of respondents, even though only 50% clearly stated this factor as the reason for staying. Meanwhile, 15% of the respondent with older age feel dissatisfied with the change. These respondents also had the longest length of service among other respondents in the Ministry of Home Affairs.

Hope is a belief which enables a person to maintain development in achieving goals, meanwhile optimism can be defined as an expectancy of an individual for a good outcome in life (Gillham, 2000). Optimism contains a hope of a propitious result when the adverse circumstances occur. Optimistic individual possess an ability to cope with

thrilling situations (Chemers, et al, 2000; Gillham, 2000). Optimism retrieves people to reconcile with the reality.

Family Responsibility

Two respondents mentioned family responsibilities. Both participants felt the organisation could not fulfil the pay satisfaction. Even though both respondents had a spouse who worked, and had another source of income, it considered unable to cover the family needs.

This statement confirmed the theory by Simon (1958) that the turnover influenced by job satisfaction and job alternative. It also supports Mobley, (1977) that dissatisfaction activate the search for analternative. However, for few employees, the job alternative absent. Therefore, even though the dissatisfaction occurred, turnover could not be a choice. This finding does not support Johnson (1979) and Weiss (1984) that higher education qualification does not always result in the increase of the job opportunities and job mobility.

Only 1 respondent mentioned age as the reason for staying. Highest education level and achieved a superior position. The age was considered as a factor that limited the availability of job opportunities and an obstacle to adapt to the new employment. The age and length of service have created a dependency on the job, and concern about the condition of new employment. The decision to stay because of this reason confirmed Knowles (1964) that length of service determined the likelihood to stay in the current job.

In addition to the findings of the factors which influence the decision of the employee to remain working in the organisation is the major facts emerged which could not be ignored was pay dissatisfaction. The study confirmed that pay dissatisfaction does not contribute to the turnover decision as suggested by Singh and Loncar (2010). The comparison with another institution reflects the unfairness feeling. It confirmed a theory which did not include in the literature review, the equity theory by Adams (1963). This theory suggests that when employees felt treated unfairly, an effort to maintain the equity by comparing the personal effort and the outcome with others. The unfairness might result in reducing the effort to maintain the balance, or caused demotivation.

The Job Satisfaction and Job Alternative Effects on Turnover

This study aims to investigate the factors that influence the decision of the employees with the higher education to stay in the Ministry of Home Affairs. The data collection revealed the findings which utilised to answer the research question. This investigation

results can be used by the management to evaluate the effectiveness of current employee management and the possibility for improvement. Based on the data collection, several factors emerged as the reason of the employees of the Ministry of Home Affairs for staying in the institution. These reasons were job satisfaction, organisational commitment, additional income, future hope, family responsibilities and age. The study discovered that the reason for staying does not stand alone. Each of participant decision to remain working in the Ministry of Home Affairs is influenced by reasons which related one to another.

The findings of the study support the study by Klein and Maher (1966) that employees with a higher education have a lower pay satisfaction. It was also consistent with the study by Singh and Loncar (2010) that there is a negative correlation between pay satisfaction and turnover.

However, it argued that workers with education have less satisfaction by Rogers (1991), conversely, most respondents felt enthusiast and passionate about the job, even though the comparison with the worker with lower education could not be conducted due to time constraint. It also went along with the study by Aquino et al. (1997) that employees who believe that the circumstance will improve are more likely to stay in the organisation.

This research partially supports the foundation of many studies set by Simon (1958) which explains the job satisfaction and job alternative effects on turnover. This study found that the dissatisfaction had activated the search of job alternative. However, the availability of job alternative do not result in turnover but contributes to the legal absenteeism authorised by the superior. It confirmed the study by Hulin (1991); Vroom (1964): Herzberg et al. (1957); and Sheridan and Abelson's (1983) that dissatisfactions do not always result in a turnover, but withdrawal behaviour. An intention to pursue a higher education is a shocking alternative withdrawal behaviour as a way to articulate dissatisfaction found in this research.

Due To Its Context-Specific Nature, The Results Of This Study Cannot Be Generalised And Might Not Apply To Another Context. Similar Studies In Different Settings Are Needed To Expand The Understanding The Reason Why Employees Stay. A Comparative Analysis Of Other Government Entities And Another Group Of Education Level With The Variety Of Respondent Will Be A Real Initiation To Capture The Significance Of The Study On Turnover And Retention In The Civil Service.

Psychological Contract Breach and Violation in Public Servant: The Coping Strategies

Pelanggaran Kontrak Psikologis dan Pelanggaran dalam Pegawai Negeri: Strategi Mengatasi Masalah

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Executive Summary

Interest in the psychological contract field brings this paper to examine the coping strategies of psychological contract breach and violation in public servants. While earlier studies have addressed the antecedents and consequences of psychological breach, the focus to public servants has gained little attention. Using integrative literature review as the methodology, the objective of this review is to bring the antecedents and consequences in public servants' psychological contract concept and findings together to provide a concept of coping strategies as a new research opportunity. Having analyzed such gap, this review first draws a differentiation among private and public servants' psychological contract by some generic dimensions: career development, financial rewards, social atmosphere and work-life balance. Thus by critically reviewing several kinds of the literature of studies, collecting data from related resources, and considering the scholar's observation and experience, three scopes of strategies are drawn: behaviour, affective and cognitive efforts as an adaptive process to cope with the breach and violation. In doing so, gaps in the previous literature are identified, and a research agenda is developed. From this review, it is apparent that there are recommendations can be applied to the context. First and most importantly, managing expectation between public servants and their organisation by a good communication in understanding each other's concern and interest is crucial. Finally, bureaucracy reform in the public sector needs to be accelerated to promote a better attitude of the public service organisations and public servants.

Introduction

As public sector discipline developed to be distinct, it requires a unique set of management approach (Kelman, 2007). For example, the formal contract that public servants have with their organisation has to fit in the rules that are established by the government. Hence, public servants appear to have a "multi-foci psychological contract reality" (Chambel and Fortuna, 2015, p.2856). Further, Buchanan (1975) as one of the first scholar who studied about the difference between public and private sector found that public sector managers reported lower levels of job involvement as they were frustrated with bureaucratic "red tape" (Brewer, Selden & Facer II, 2000, p.255). Thus, many factors may influence the expectations between employee and employer in a public sector, such as social, economic factors (Cullinane and Dundon, 2006), stereotype as a public servant (Willem, Vos & Buelens, 2010), and especially bureaucratic culture. This leads to the understanding that it may build a different psychological contract between employees and employers than private sectors do.

Examining psychological contract in the public servant is important since psychological contract has been proven to have a significant influence on employee behaviour and attitude (Anderson and Schalk, 1998; Guest and Conway, 2000). Thus more attention on this issue is needed to analyse the exchange relationship between public servants and the public organisation.

Further, based on 2000 CIPD Survey of Employment Relationship, central government employees believe that their organisations has made more promises to them but has kept fewer of them than workers in other sectors; two out of five workers do not feel that they are fairly rewarded for the effort they put into their jobs, and finally, survey showed that central government workers report a significantly poorer psychological contract than other workers (Guest and Conway, 2000). In Indonesia especially, earlier studies showed that Indonesia's civil servants get lower payment than the private sector (Filme and Lindauer, 2001). Consequently, this factor may contribute as one of the negative effects since Indonesia is still among the most corrupt countries in the world according to Corruption Perception Index by Transparency International (2015), in which the level of how corrupt Indonesia's public sector are seen as 36 of 100 (Scores range from 0 which is highly Corrupt to 100 which is very clean). Hence, the need to explore psychological contract breach and violation in the public servant, especially in Indonesia, is necessarily moved to the next level.

However, little research has been paid attention to addressing the psychological contracts of public sector employees (e.g. Coyle-Shapiro and Kessler 2002, 2003; Chambel and Fortuna, 2015), especially in Indonesia, and this study intent to do it in more general and comprehensive way. This shows that there is a need to re-examine the theoretical suggestion that has underpinned the psychological contract breach literature. This paper principally addresses these gaps by providing a more precise theoretical review in violation of the psychological contract in public servants.

Having examined the relevant studies, this review raises an extended question: how public servants deal with violation of psychological contract? This paper will review the notion of psychological contract violation in public servants to provide a comprehensive explanation of how public servants cope with psychological contract breach and violation, to finally provide reasonable recommendations of coping strategies that can be used by public servants to decrease its adverse effects.

Conclusion

Being different from its counterpart, private sector, public service organisation has a multidimensional character that causes its employees to be in a pressured position in delivering public service. This requires a unique set of psychological contract to address the issue of a challenging position that public servants have. However, the

fulfilment of the psychological contract in public servants is sometimes being hard to achieve since it has to deal with the bureaucratic system, regime changes, tight financial budget and other factors contribute to the challenging position of public service organisations in treating their employees. This leads to the breach and violation in public servants' psychological contract dimension that can cause negative effects in varied ways, especially for individuals who experienced it and for the organisation as well. Thus this review provides insight into the process of public servant's coping strategies in dealing with psychological contract breach and violation.

Through the psychological contract antecedents and consequences, the need to examine its coping strategies emerges. Exploring Skinner, et al. (2003)'s group of the adaptive process with varied literature, the available coping strategies can be aligned into three big picture of coping strategies: behavioural, affective and cognitive strategy. These coping strategies draw available response choices that public servants used to cope with breach and violation of psychological contract, especially in Indonesia's public servant's case. Individuals can respond in doing some actions, manage their emotional respond and reactions toward the event, or restructuring their cognitive focus and interpretation. Being different in private sector employees, public servants who are experienced unfulfilled expectations in terms of career development, financial rewards, social atmosphere and work-life balance could then focus their responses toward these dimensions using available coping strategies. Despite all the individual's character and situational factors that may be influenced the way in which individuals cope with the breach and violation, it is still necessary to give a wider picture as insight to individuals of the way they can react in a more positive ways to prevent and overcome negative consequences.

Having discussed the coping strategies that are available for employees and applied it to public servants' experiences in psychological contract breach, it can be concluded that through the behaviour, cognitive and affective efforts, public servants may have choices in cope with the breach and violation in psychological contract. It appears that this ideas of strategies enable public servants to reduce negative harms of psychological contract breach and violation, or even prevent it before it occurs.

Recommendation and Implementation Plan

Despite all the factors that differentiate private and public sector, most psychological contract dimensions are equally important to employees (Bellou, 2007). Thus the need to cope with psychological contract breach and the violation is essentially urgent. This study highlights some of the ways in which public servants, especially Indonesian, experienced breach and violation of the psychological contract and adapt responses as strategies to cope with the breach. This review provides practical alternatives that appear as an insight for practitioners, especially public servants to implement the

behaviour, affective and cognitive strategies in the event of psychological contract breach. That insight may reduce the harm caused by breach and violation in individual that will have some effects to organisational level as well.

However, there remain rooms for improvement and prevention to this psychological contract breach and violation, especially in Indonesia's civil servants. Firstly, given that the adaptive process to coping strategies may include two parties, employee and employer, it is essential to invest in understanding each other's interest and concern (Tomprou, Rousseau, and Hansen, 2015). Thus knowing each other's need and intention will prevent negative event before it occurs and prepares individuals to anticipate their responses after the breach happen. Employee's obligation and needs are different and subject to individual, so it is also important to an employer to take some time in rethinking psychological contract, and if it is needed, to re-formulate a new contract. When employee and employer are committed to making the work arrangement in a proper way, the violation resolution will succeed (Tomprou, Rousseau, and Hansen, 2015). In this term of Indonesia's civil service, this can be done through a training programme, the Prajab or Prajabnas (pra jabatan nasional, or national pre-office duty) that is given to all newly recruited public servants (Kristiansen and Ramli, 2006). During the Prajab, public servants should be given the explanation and knowledge about organisation's aim and objective, and also their rights and obligations as well. Therefore, public servants can prepare themselves in managing their expectations to be in line with the organisation's promises.

The training programme can be executed within the public servant's tenure as well. In particular, Indonesia's public service organisations have training centres (Pusat Pendidikan dan Pelatihan, or Pusdiklat) in every organisation to provide a facilitation in developing their human resources in skills, knowledge, setting standards and quality control. Thus the training can be one tool to managing expectation and goals between employee and employer in the public service organisation.

Moreover, a better performance appraisal system is essentially needed to evaluate public servants' performance and find the factors contribute in forming their attitude at work. A human resource department should play its role in evaluating public servants' performance and investigating the causes behind. For example, by providing a 360-degree appraisal, where feedback is received from a variety of different sources, including managers, subordinates, peers, and others (Hutchinson, 2013), that will enable us to draw a more concrete data about public servant's performance. Those feedbacks can be used a way of communication in which the needs and expectation are revealed, so the organisation can provide a better system in the light of public servants' development and finally will encourage public servants to be more engaged in their organisations.

Nevertheless, it is possible that the psychological contract breach and violation happen in their tenure as public servants, given that controlling bureaucrats still being

one of the major problems in most of the developing Asian countries (Tjiptoherijanto, 2007). Hence, there is a crucial need to set a bureaucracy reform in all public servants in Indonesia, which is now still in the ongoing process and become one of the government's priorities of goals. In other words, this reform is extremely needed to promote a better attitude of the public service organisation and public servants as well. Therefore, the psychological contract in public servants may be developed and fulfilled in a more positive way. To date, bureaucracy reform is one of the key priorities in National Mid-Term Development Plan (RPJMN) 2009-2014 (APEC, 2013), and 'more merit HR base policies' (APEC, 203, p.7) is one of the key actions to go forward in bureaucracy reform agenda in Indonesia.

Finally, this review brings hope to inspire scholars to continue adding value through related research in more developed studies to provide a better clarity of this field of research.

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