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PRESCRIPTION DRUGS PRICE SETTING AND GENERIC DRUGS PRESCRIPTION CONCERNING CONSUMER PROTECTION LAWIN INDONESIA

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Abstract

Health is one of the most important human rights in human life. Access to affordable prescription drugs is still a problem for people with out-of-pocket expenses. Generic prescription drugs that are much cheaper than non-generic drugs are still low, especially in non-government healthcare facilities. This research aims to provide suggestions of regulation on price control of prescription drugs and generic prescription drugs that will assure certainty and affordability for the public. The methodology is doctrinal legal research and is supported by empirical studies. The research finding consist of two things, namely the price of prescription drugs and the prescription of generic drugs. The first finding is that Highest Retail Price (HET) set by the manufacturer is potentially to be unlimited because there is no limit control. Currently, there are many drugs sold over HET with minimal supervision from the Government. The absence of law is found as the existing regulations are only for those listed in the National Formulary, while the rest have not been regulated. Therefore, the suggestion is to set ceiling prices for prescription drugs with comparison among generic drugs, branded generic drugs, and the originator; also create a refund mechanism for prices above HET to assure the consumers' rights to get compensation under the Consumer Protection Law. The second finding is that only a few doctors prescribe generic drugs. Additionally, patients have not been involved in the treatment decisions. Therefore, the suggestion is to associate "the action of prescribing generic drugs" with the extension of doctor's license, namely the Registration Certificate (STR); so that doctors will prescribe generic drugs without the need for close supervision due to their interests. With the increase of generic drugs' prescription, the financing of health services, nationwide as well as individually, can become more affordable.

Keywords: *Prescription Drugs Price Setting, Generic Drugs Prescription, Consumer Protection.*

1. INTRODUCTION

Health is one of the human rights in maintaining and improving the quality of life. Constitutionally, the Government is responsible to improve the health of the society by making variousefforts and establishing policies. Among them, planning of sustainable health care programs, creationof regulations, supervision of its implementation, and conducting a thorough evaluation. The basic provisions of the 1945 Constitution (UUD 1945) in Article 28H paragraph (1) and Article 28I paragraph (4) and the operational guidance of the Law on Human Rights No. 39/1999 in Article 9 states that the Government has the responsibility to protect all Indonesians in light of embracing the general welfare and enrich the education of the people. In particular, the rights to healthcare and the rights to self-determination are the aspects of human rights in healthcare. This means that every person is entitled to health care and has the right to make decisions regarding his or her health autonomously. So far, healthcare services to the entire community are pursued through the implementation of quality and sustainable health development. Within that framework, every activity and effort to improve public health is implemented based on no discriminative, participatory, protective, and sustainable principles. All these principles are very important for

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the establishment of healthy, productive, and qualified Indonesian human resources, in line with the improvement of resilience and competitiveness of the nation. In short, the Government needs to implement optimal efforts to maintain and improve health (promotive), disease prevention (preventive), cure diseases (curative), and health recovery (rehabilitative), which is implemented thoroughly, integrated, and sustainably.

Drugs or medicine (hereinafter – drugs) is one of the important components in human healthcare. Therefore, affordable drugs become very important so that the mandate of the 1945 Constitution on healthcare and human rights protection can be realized. As meant by an affordable price is a cheap price or per the regulation so that the lower class or poor people can afford to buy it[1].The Business Competition Supervisory Commission (KPPU) and Pharmacoeconomics experts pointedout that drugs prices in Indonesia are among the highest in Southeast Asia[2]. Therefore, it is necessaryto conduct in-depth research on KPPU's constatation.

Regardless of other relevant variables, the focus of this research refers to the price of prescription drugs which is the final price paid by consumers. The Highest Retail Price (HET) is the highest selling price of drugs in pharmacies, hospitals, or clinics. HET is the selling price to consumers. Therefore, this research also intersects with the issue of consumer protection in Indonesia.

It should be noted that many factors cause the price of drugs to become less affordable in Indonesia. Among others, the imported medicinal materials, promotional costs, and patents. Meanwhile, except for the drugs prescribed in Indonesian National Health Insurance (hereinafter – BPJS), drugs prices in Indonesia refers to the market mechanism. In the marketplace, there are many drugs with different brand names but with the same active pharmaceutical ingredients (hereinafter – API). These drugs are sold at different price scales. Ironically there are non-generic drugs that cost up to 85 times more expensive than generic drugs[3]. BPJS recorded drug spending that reached Rp. 36 trillion in 2018 or 40% of total overall health spending (equipment, facilities, and health workers)[4] compared to the standard 30%. In light of this huge expenditure on drugs, drugs price regulation becomes very important to ensure the achievement of efficiency and effectiveness in providing healthcare services to the society. The issue of drugs prices is also related to aspects of legal certainty and social justice for Indonesians, especially about the access to affordable drugs for the poor.

Admittedly, the Government has issued several regulations to control the price of drugs in themarket. However, the drugs prices above HET and the big price disparity between generic and non-generic drugs have still not changed until now. In addition, society is faced with a situation where they cannot choose the type of prescription drugs (between generic or non-generic drugs), given the knowledge of the disease is less understandable by the layman (patient). Moreover, doctors generally provide limited information to the patients before prescribing the drugs. This

[1] Central Bureau Statistics: The poor are people who have an average monthly per capita expenditure below the poverty line. The Poverty Line in March 2020 was recorded at Rp. 454,652/capita/month. With 4.66 household members, the Poverty Line per poor household on average is IDR 2,118,678/month.

[2] Mila Novita, "Ini Penyebab Harga Obat Di Indonesia Lebih Mahal Dari Negara Lain," *Gaya Tempo*, accessed September 27, 2020, https://gaya.tempo.co/read/1187633/ini-penyebab-harga-obat-di-indonesia-lebih-mahal-dari-negara-lain.

[3] Winda Syahdu, "Formularium Nasional (FORNAS) Dan e-Catalogue Obat Sebagai Upaya Pencegahan Korupsi Dalam Tata Kelola Obat Jaminan Kesehatan Nasional (JKN)," *INTEGRITAS* 4, no. 2 (December 11, 2018): 178, https://jurnal.kpk.go.id/index.php/integritas/article/view/328.

[4] Alwan Ridha R., "Monopoli Obat Paten Bikin BPJS Jadi Defisit," *Indozone*, accessed September 28, 2020, https://www.indozone.id/news/DNsQ39/monopoli-obat-paten-bikin-bpjs-kesehatan-defisit/read-all.

shows fewer chances for consumers to participate in decision-making on the treatment of their healthcare.

Based on the above-mentioned description of prescription drugs pricing and the pattern of prescribing generic drugs, the research questions are as follows firstly, how are 'the prescription drugs pricing and the generic drugs prescription' are regulated and their implementations in Indonesia? Secondly, how will be the ideal prescription drugs price setting and the generic drugs prescription concerning consumer protection in Indonesia?

Both research questions indicate the importance of the Government's role in realizing the basic principles of fair and equitable healthcare development. The assumption is, the Government must be present in the form of policies as the instruments of legislation with three legal objectives, namely justice, along with legal certainty and expediency. It is supported by the thought that "law is for man and not man for the law"[5]. Law for man requires adjustments between law and people or social behavior, including encouraging the desired social change in society. In line with that, efforts to improve the level of public health must be carried out in an integrated and comprehensive manner, both government, pharmaceutical industry, health workers and society.

2. RESEARCH METHODS

This research is doctrinal legal research supported by empirical juridical studies. Both methods examined the aspects of the prescription drugs pricing in the market and the prescribing of generic drugs by doctors, along with their implementation including the impact on people's lives. According to P.M. Marzuki, this research is a sociolegal research which is legal research that examines and analyzes legal behavior of individuals or communities concerning the law and the data come from primary data[6]. This research uses the statute approach and conceptual approach. In addition to secondary data, primary data is collected from the parties directly related to research questions such aspatients, pharmacists, doctors, and others through the implementation of surveys, in-depth interviews and focus group discussions. Total respondents reached 362 people domiciled in Jakarta and several major and small cities. Quantitative and qualitative data analysis were carried out by organizing data,sorting it into manageable units, synthesizing, finding patterns and important facts, then deciding whatto be disclosed[7]. Data validity is also conducted as an important and inseparable element of qualitative research to ensure the results can be trusted academically.

3. ANALYSIS AND DISCUSSION

3.1 Theories and Concepts

Legal research is a process to find the rule of law and legal doctrines to answer the legal issues[8]. Meanwhile, the essence of legal theory is to explain the values of the law up to the ground policy andits philosophy. The theory also functions as an important analysis tool to better understand the research questions. This research uses three theories namely the Law Triad by Gustav Radbruch, the Development Legal Theory by Mochtar Kusumaatmadja and the Contract Theory by Subekti.

[5] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: P.T. Citra Aditya Bakti, 2000), 5.
[6] H. S. Salim and Erlias S. N., *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi* (Jakarta: Rajawali Press, 2018), 20.
[7] Lexy J. Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2018), 248.
[8] Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi. (Jakarta: Kencana, 2010), 35.

In the context of these theories, firstly it is important to quote Radbruch's idea "the idea of lawis defined through a triad of justice, utility and certainty." Meanwhile, the culture is the essence of thelaw, and justice (equality before the law) is the ultimate goal of every legal system. Through his thinking, Radbruch seemed to be more concerned with the value of justice over the statutory law.

In law-making process, the creation of a legal certainty is important as it will determine a clear, firm, and measurable protection. Parallelly, legal norms must follow the purpose of the law as stated by Jeremy Bentham namely the greatest happiness of the greatest number. In short, the objective assessment of whether or not the law is good, fairly depends on the capability of the law to create orderin society. Particularly, regarding drugs price regulation, the value of justice is also very important because being healthy is classified as human rights. If drug prices are affordable to poor people, it means the regulations surely reflect the value of justice, which in turn will improve their well-being. The phenomenon of HET violation shows that there is no legal certainty on this issue. As a result, it is difficult to actualize the expediency, especially in providing the affordable drugs access for society.

Kusumaatmadja believes that a good law must be in accordance with the living law[9]. The living law is a living and actual law that takes place in society. This means the law is not something static, but it keeps changing over time. The living law can be written and unwritten as the rules derived fromculture or customs. This theory is modified from Roscoe Pound's Theory known as "Law as a tool of social engineering"[10]. According to Kusumaatmadja, order and regularity in the development are absolutely necessary. In this regard, the law or norms are expected to direct human activities towards the direction desired by the development. Similarly, prescription drug pricing setting and prescribing of generic drugs should be able to encourage and direct people activities towards a healthy life and to contribute to the healthy society in the long term.

Relating to the norm, an alliance is a legal relationship between two persons or parties, based on one party that has the right to demand something from the other party, and the other party is obligedto meet that demand. Subekti implies that the alliance is born because of an agreement. The agreement is also called consent. The Contract Law adheres to an open system. It means that the law provides freedom to the public or parties to enter into agreements with any contents as long as it does not violate public order and decency. Related to this research, prescribing generic drugs that occur in therapeutic transactions is also an agreement, namely an agreement between doctors and patients[11]. Article 1320 of the Civil Code states that an agreement is considered valid if four conditions are fulfilled, namely the agreement between those who bind themselves (doctors and patients); the ability to ally (adult and not under guardianship); a particular subject matter (health efforts); and a cause that is not forbidden/halal (the purpose is the maintenance and improvement of health). In therapeutic transactions, all conditions are fulfilled.

[9] A good law is in accordance with the living law and it can regulate the interaction between people with different interests to a balanced or proportional way so as not to occur chaos. Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan* (Bandung: P.T. Alumni, 2006), 14.

[10] This theory postulates that law was born, developed and grew in accordance with Indonesian society.Bernard L. Tanya, *Teori Hukum Strategi Tertib Manusia Lintas Ruang Dan Generasi*, IV. (Yogyakarta: Genta Publishing, 2013), 155.

[11] Transaction Therapeutic is an agreement between doctor and patient in the form of in the form of legal relationship that gives birth to rights and obligations for both parties. Desriza Ratman, *Aspek Hukum Informed Consent Dan Rekam Medis Dalam Transaksi Terapeutik* (Bandung: Keni Media, 2018), 18.

Based on the drugs' content associated with patents, drugs can be classified into generic, branded generic, and patented drugs or the originators. The concept of originator is used by pharmaceutical industry to distinguish off-patented drugs from those of branded generic drugs. In practice, there are not many people understand the difference between these three types of drugs. Specifics about generic drugs, people with a better level of literacy understand that generic drugs are marketed with the brand of API content, while branded generic drugs are trademarked. Generic drugsare drugs with the official name International Non-Proprietary Names (INN) stipulated in Pharmacopeia Indonesia[12]. This type of drugs does not use the trademark, for example Paracetamol 500mg. These generic drugs can be produced by all pharmaceutical industries without the need to pay royalties because their patent protection has expired. An example of branded generic drugs for Paracetamol 500 mg is Panadol 500 mg.

Therapeutic transactions are legal relationships that give birth to rights and obligations for doctors and patients. Therapeutic transactions are different from other transactions in general, as it does not promise the results or outputs (*resultaats verbintenis)* but the maximum efforts made for the recovery of patients (*inspannings verbintenis*)[13]. This is the nature of the agreement between the doctorand the patient, and to date relatively still puts the patient in a "lower" position of bargaining power. This situation also occurs in terms of the selection of types of prescription drugs.

In accordance with the Law on Consumer Protection No. 8/1999 (hereinafter – the LCP 1999, patients are consumers and doctors are entrepreneurs. This concept is agreed upon by most of the respondents in this research, including several doctors. This concept where the patient is a consumer be continuously socialized so that patients can have a better bargaining power than just listening and following the doctor's instructions, without asking for a clear explanation. This is a portrait of therapeutic transaction, which based on primary and secondary data, still shows paternalistic or guidance cooperation models[14]. In other words, it has not achieved an equal position between legal andmedical aspects. Consumer protection is all efforts to ensure the existence of legal certainty in providing protection to consumers. By definition, a consumer is any user of goods and/or services available in society, whether for the benefit of oneself, family, others, or other living beings and not for trading[15]. The government established three institutions that specifically handle problems raised byconsumers, namely the National Consumer Protection Agency (hereinafter – BPKN), the Consumer Dispute Settlement Board (BPSK), and the Non-Governmental Consumer Protection Agency (LPKSM). This shows the seriousness of the Government in fighting for consumer protection in Indonesia. As for consumer behavior[16], it can include behavior before purchase, when purchasing and after

[12] Pharmacopoeia Indonesian is a standard and requirement for material of drugs and drugs distributed in Indonesia. Pharmacopoeia Indonesian Edition VI 2020 was developed by Committee of Constituent Pharmacopoeia Indonesia formed by the Minister of Health, and the Representative from Ministry of Health, National Agency of Drugs and Food Control, and for experts from various public and private universities.

[13] Jovita Irawati, "Disharmoni Peraturan Perundang-Undangan Di Bidang Kesehatan Dan Implikasi Hukumnya Terhadap Praktik Medik Dan Eksistensi Majelis Kehormatan Disiplin Kedokteran Indonesia" (Universitas Pelita Harapan, 2016), 7.

[14] Guidance Cooperation is a relationship between doctor and patient with the existence of communication from doctor to patient. But the decision making is still dominated by doctor, and patients are only given explanation about disease, treatment or action to be taken; Patients only follow doctor's decision. On this model, the medical aspect still dominates the legal aspect. Thomas S. Szasz, William F. Knoff, and March H. Hollender, "The Doctor-Patient Relationship and Its Historical Context," *American Journal of Psychiatry* 115, no. 6 (December 1958): 522, http://psychiatryonline.org/doi/abs/10.1176/ajp.115.6.522.

[15] Article 1 paragraph (1) and (2). Indonesia, *Law Number 8 Year 1999 Concerning Consumer Protection*, 1999.

[16] Consumer behavior is the process that a person/organization goes through in searching for, buying, using, evaluating and disposing of a product or service after being consumed to meet their needs. Tengku Ezni Balqiah and Hapsari Setyowardhani,

purchase. To this research, such behavior refers to the process before purchase, when consumers search for information related to goods/services to be purchased. However, in terms of prescription drugs, the search about the drugs, depends heavily on the doctor who performs healthcare services to the patient because it is the doctor with the expertise, competence, and authority to prescribe the drugs.

Basically, the focus of this research is the regulation of prescription drugs pricing and the regulation of prescribing generic drugs associated with consumer protection in Indonesia. Some regulations such as the Laws, Presidential Decree, Presidential Instructions, Ministerial Decree, and Regulations of National Agency of Drugs and Food Control (hereinafter – BPOM) are the main references in this research. Drugs pricing policy is one of the issues stipulated in the legislation. All model of drugs pricing policy basically led to the question of whether the existing policy has improveddrugs access which in turn will also improve healthcare services. Therefore, drugs pricing policy is avery important part of health sector regulatory reform.

3.2 Prescription Drugs Price Setting and Generic Drugs Prescription Regulation and Its Implementation in Indonesia

Before analyzing specific regulations regarding drugs prices and generic drugs prescription, researcher will examine several regulations contain general provisions on healthcare and consumer protection. In general, the Law on Health No. 36/2009 (hereinafter – the LH 2009) governs several principles such as everyone has the rights to obtain safe, good quality, and affordable health services. In addition, everyone has the right to determine independently and responsibly his or her own health. Everyone is also entitled to obtain information about his/her health data including actions and treatments to be received from health workers. Moreover, everyone has the rights to accept or reject some or all proposed medical treatments after receiving and understanding the complete information about the treatment. It is also mentioned in the LH 2009, anything that causes public health problems will generate great economic harm to the country. In line with that, any efforts to improve the degree of public health also means an investment for the development of the country. Consequently, every development plan must have health insights as the foundation.

The Presidential Decree on National Medium Term Development Plan 2020-2024 No. 18/2020 (RPJMN) stated that the availability and irrational use of drugs are still happening. Along with that, the high dependence on the import of medicinal materials and medical devices, as well as drugs and food control systems are also considered not optimal. Improved effectiveness of drugs and food control, focused on expanding the scope and quality of pre- and post-market supervision of drugs and high-risk foods, need to be supported by the improvement of human resources' competence. Therefore,the pharmaceutical industry becomes one of the Government priorities sectors. This Presidential Decree was made before the Covid-19 pandemic (enacted in January 2020). This means that the Government has understood that pharmaceutical industry is a very important sector of its contribution in improving the quality of human resources and the success of national development ultimately.

Furthermore, the Presidential Instruction on Acceleration of Pharmaceutical and Medical Device Industry Development No. 6/2016 is drawn up to achieve independence and improve the competitiveness of the domestic pharmaceutical and medical devices industry and

Perilaku Konsumen (Tangerang Selatan: Universitas Terbuka, 2017), 112.

encourage the mastery of technology and innovation; including the development of medicinal materials, drugs, and medical devices to meet domestic needs and exports.

Related to consumer protection issues, regulated in the LCP 1999 has been valid for more than 20 years. However, Indonesian consumers are still not used to filing lawsuits in case of violations of their rights as consumers. In short, consumer protection aims to increase awareness, courage, and independence of consumers to protect themselves; create a consumer protection system that contains elements of legal certainty and information transparency; and access to obtain information. In addition, to raise awareness of entrepreneurs on the importance of consumer protection so as to grow an honest and responsible attitude in improving the quality of goods and /or services that ensure the sustainabilityof production of goods and/or services; also, health, comfort, and safety of the consumers. In Indonesia, the conception of consumer protection is still not widely understood. This is evident from Indonesian Consumer Empowerment Index that is still low[17]. The main reason for frailty consumer is the low awareness level its rights[18]. This is mainly due to several factors such as low consumer education or literacy, and Indonesian culture that tends to "*nrimo* or surrender" or a considerable level of tolerance in terms of voicing dissatisfaction (complain habit) as a form of legal protection for its rights as a consumer. According to BPKN data, there are only about 200 complaints in 2017, 580 complaints in 2018, and 1518 complaints in 2019[19]. As many as 80% of the total complaints are housing issues, the financial issues (vehicle leasing, mortgages, credit card breaches, insurance, online loans and investments), and e-commerce[20]. Meanwhile, according to Indonesia Consumer Foundation (YLKI) data, complaints about drugs prices and generic drugs prescription can be said to be almost non-existent[21].

3.2.1 Prescription Drugs Price Setting and Its Implementation in Indonesia

One of the important drugs prices settings conducted by the Government is the Decree of Ministry of Health on the Provision of Information of Highest Retail Price of Drugs No. 98/2015 (hereinafter –the MOH 2015), which governs the HET on the smallest packaging of the drugs. The provision of HET information aims to ensure the affordability of drugs prices as well as to meet the principles of accountability, transparency, and provide legal certainty to the public.

HET is the price set by the pharmaceutical industry with an additional margin of about 28% of the Pharmacy Net Price (hereinafter – HNA[22]. The 28% is the margin for pharmacies and hospitals/clinics. In the pharmaceutical industry, HNA is one of the

[17] Public Discussion Program with Indonesia Consumer Club and BPKN: Consumer Empowerment User (IKK) has four levels, that are 80-100 Empowered; 60-80 critical; 40-60 capable; 20-40 understand, and 0-20 aware. In year of 2019 and 2020, IKK of Indonesian are 41.70 and 49.07 respectively. This means Indonesian is still at the level "capable" but not yet too active fighting for its rights as consumer or the complaint habit is still low.

[18] Explanation Part of the LCP/1999, Part I. General: The main reason of frailty consumer is the low awareness level upon its rights. This is mainly due to low level of consumer education.

[19] BPKN, "Dipilih Jadi Anggota BPKN, Andre Garu: Empat PR Besar Harus Kami Selesaikan," *JPNN*, accessed January 17, 2020, https://www.jpnn.com/news/dipilih-jadi-anggota-bpkn-andre-garu-empat-pr-besar-harus-kami-selesaikan.

[20] BPKN, "Ada 3269 Aduan Konsumen 3 Tahun Terakhir, Terbanyak Soal Perumahan," *IDN Times*, accessed February 6, 2021, https://bpkn.go.id/posts/show/id/1736.

[21] Based on the in-depth interview with Tulus Abadi as YLKI Chairman on May 29, 2021.

[22] Article 1 paragraph (3): Pharmacy net Price (HNA) is the selling price inclusive of value added tax (VAT) from Big Pharmacy Distributor (PBF) to pharmacies, drugstores and hospitals/clinics. Minister of Health of the Republic of Indonesia, *Minister of Health Decree Number 98/2015 Concerning the Provision of Information of the Highest Retail Price of Drugs*, 2015.

mandatory data to be informed by the owner of the Marketing Authorization Number (hereinafter – NIE) to BPOM at the time of registering the new product. HET of one product is initially proposed by pharmaceutical company as the NIE owner to BPOM for registration purposes. Thus, the price can be set following the pharmaceutical company's wishes. Furthermore, this HET setting does not limit the frequency of price increases allowed in a certain period e.g., one year. This means the HET has the potential to become unlimited because of the following provisions:

a. HET set by the pharmaceutical industry
b. Price changes can be made at any time
c. Price changes can be done simply by reporting, without the need for approval from the Government.

In its implementation, not only the pharmaceutical company is obliged to include HET on the smallest outer packaging of drugs, but pharmacists are also obliged to provide communication, information and education (hereinafter – KIE) about HET to the public[23]. However, the reality shows that surveillance is difficult to do as evidenced by the number of pharmacies that sell drugs beyond HET. In addition, pharmacists rarely conduct KIE even though it has been stipulated in the MOH 2015. Moreover, the public's understanding of HET is also still very lacking, so the violations have not been a problem for consumers so far. This phenomenon has been going on for quite a long time, considering the HET inclusion regulations came into force since 2006 and no real action or sanctions that can givea deterrent effect to the violation of this Decree.

Regarding the control, both by the Central and Local Governments, it has not been effective because there are still many pharmacies sell drugs above HET, even reached 2.64 times[24]. Functionally BPOM has a duty and responsibility in terms of comprehensive supervision to ensure the quality, efficacy, and safety of drugs and medicinal materials, as well as to prevent irregularities in the management of drugs and drug ingredients during distribution. In conducting drugs surveillance (post-market), BPOM is more focused on violations related to counterfeit drugs, expired drugs, and drugs that are distributed illegally. Three things that become the focus of BPOM supervision is the quality, safety, and efficacy of the drugs. In other words, price or HET has not been the focus of BPOM so far.

Additionally, BPOM admits that they find it difficult to implement the law enforcement despite findingviolations. This is what encourages BPOM to continue to fight for the Draft of Law (Bill) of BPOM that allows the provision of sanctions to create a deterrent effect, considering the form of regulation isthe Law, no longer Ministerial Decree or BPOM Regulation.

The MOH 2015 regulates HET for all drugs except drugs listed in the National Formulary (hereinafter – FORNAS). Drugs prices in FORNAS are determined by the Government through tendering and negotiation with pharmaceutical companies[25]. FORNAS 2019 includes 1043 generic names in API. Other than FORNAS, there are

[23] *Ibid.,* Article 8.
[24] Collection of primary data for 28 generic drugs, 28 branded generic drugs and 17 originators in December 2020 at some pharmacies in Jakarta and some other cities in Indonesia.
[25] Syahdu Winda, *Op. cit,* p.184: FORNAS are drugs that have been selected by the Government after considering quality, efficacy and the most efficient cost. These drugs are expected to overcome 80%of diseases suffered by the community.

generic drugs whose prices are also determined by the Government through the Decree of the Minister of Health on Generic Drugs' HET No. 525/2015 which includes 197 generic names in API[26].

In addition to the drugs in FORNAS and generic drugs regulated by the Government, there are no other regulation on price setting of non-generic drugs. This means that the regulation of drug prices governs a limited number of the drugs distributed in Indonesia (about 17%)[27], where prescription is required through BPJS in public healthcare facilities. Thus, the price setting of other drugs which is the largest amount (about 83%), has not existed until now or there is an absence of law. As a consequence, the price of such drugs is determined based on market mechanism. The reality shows that the price of these drugs becomes uncontrolled or expensive. The following are the findings of primary data on the price comparison of some drugs resulted from a survey to some pharmacies in December 2020:

a. Branded generic drugs sold at 9.9 times of generic drugs' price
b. Originators sold at 9.6 times of generic drugs' price
c. Originators sold at 2.0 times branded generic drugs' price

Based on the above price disparity, it appears that the prices of originators and branded generic drugs are not too much different. While the price disparity of these two types of drugs with generic drugs are far enough, that is almost 10 times. This phenomenon indicates that the drugs price setting, especially prescription drugs, should be established by the Government in order to solve the issue of the absence of law to improve the health of the community.

3.2.2 Generic Drugs Prescription and Its Implementation in Indonesia

The Law on Medical Practice No. 29/2004 (hereinafter – the LMP 2004)[28] governs a series ofactivities carried out by doctors to the patients, including prescription of drugs, in carrying out health services based on science, competence and code of ethics to serve the community. In medical practice, each patient has different characteristics than other patients so there will not be two similar cases due to various factors that affect it, among others clinical conditions, metabolism, and complications that may arise. The best practice of relationship model between doctors and patients or therapeutic transactions has the character of *mutual participation*[29].

Furthermore, the regulation that requires doctors to prescribe generic drugs is the Decree ofthe Minister of Health on The Obligation to Use Generic Drugs in Government Healthcare Facilities No. HK.02.02/MENKES/068/I/2010, which revised the same regulation set in 1989. This shows that the Government has been making efforts to promote generic drugs in improving the health of the Indonesian people since 1989. The achievement of generic drugs prescription is about 76% in government healthcare facilities. It is due to the drugs available in these facilities are almost all generic drugs. Given that the obligation is only imposed in the government facilities, then doctors have

[26] *Ibid.*, p. 187.
[27] *Ibid.*
[28] Fred Ameln. 1991. *Kapita Selekta Hukum Kedokteran*. Jakarta: Grafika Tama Jaya. p. 34: Medical practice is held based on an agreement between doctors and patients in healthcare services.
[29] Fred Ameln, *Kapita Selekta Hukum Kedokteran* (Jakarta: Grafika Tama Jaya, 1991), 34.

no legal obligation to prescribe generic drugs in private healthcare facilities. Consequently, the generic drugs prescription is relatively low. This view is supported by primary and secondary data that pointed out that generic drugs are still rarely prescribed in private facilities.

So far, the view which says that generic drugs have less efficacy compared to non-generic drugs is the opinion of most respondents. In such cases, it is not easy for patients or pharmacists to replace prescription drugs with generic drugs that contain the same API, except when the availability of the drug becomes a problem. On the other hand, primary data shows that patient's confidence is still highin the expertise of the doctors. In these conditions, the role of doctors to ask patients about the choice of drugs type (generic or non-generic) is a concrete fulfillment of the patients' human rights in therapeutic transactions. This concrete action can have a considerable impact on the increase in prescription of generic drugs in Indonesia.

Ironically, doctors generally consider patient's affordability only from the appearance such as clothingor other visible objects, or the insurance form carried by the patient, assuming that patients who possess health insurance are among those who are in middle to high class level of society as the access to insurance in total is still very low (about 1.73% of Indonesia GDP as of January 2021)[30].

It should be clearly stated that legal obligation of a doctor is to diagnose the disease, treat the disease, provide information to the patient (whether requested or not), and obtain approval from the patient after providing information. Consent can be done orally or in writing (informed consent). Currently, informed consent[31] is only used for cases at great risk, unpredictable result, or cases that may cost very expensive. Informed consent is the process in which a healthcare provider (mostly doctor) educates a patient about the risks, benefits, and alternatives of a given procedure or intervention. From legal point of view, it is an agreement to do something or to allow something to happen, made with complete knowledge of all relevant facts, such as the risks involved or any available alternatives[32].

The Decree of the Minister of Health on Patient Safety No. 11/2017 stipulates that it is the rights of the patient and his/her family to obtain information about the diagnosis, procedures, and purpose of medical actions, alternative actions, risks, and complications that may occur, the prognosis of the actions performed, and the estimated cost of treatment. This means that patients as consumers are entitled to an estimate of treatment cost. By having this information, patient can ask the doctor for alternative treatment and choose the appropriate one according to his/her clinical condition and financial capabilities.

Provisions on the obligation of doctors in terms of providing information or explanations about diseases and medical actions, are also regulated completely in several laws and regulations such as theLMP 2004, the Law on Hospital No. 44/2009, and

[30] "Bonus Demografi Berpotensi Tambah Ceruk Bisnis Asuransi," *Media Asuransi News*, accessed March 1, 2021, https://mediaasuransinews.co.id/news- in-brief/bonus-demografi-berpotensi-tambah-ceruk-bisnis-asuransi.html.

[31] Desriza Rahman, *Op., cit.* p. 45: Informed Consent is an agreement or approval from the patient for medical actions that will be done by the doctor to the patient, after the patient has obtained all information from the doctor about the medical actions to be taken to help him, as well as information about any risks that may occur.

[32] Legal Information Institute, "Informed Consent," *Cornell Law School*, accessed August 14, 2021, https://www.law.cornell.edu/wex/informed_consent.

Regulation of the Indonesian Medical Council on Professional Discipline of Doctors and Dentists No. 4/2011(hereinafter – the KKI 2011). However, theprovision of providing information on medical treatment cost is not listed in the LMP 2004, but it is listed in the KKI 2011[33]. Institutionally KKI is an autonomous, independent, non-structural, and independent body, that has the function of regulation, ratification, determination, and coaching of doctors who practice medicine in order to improve the quality of medical services. Therefore, doctors should be guided by the KKI 2011 that regulates more specific things (the principle of *lex specialis derogat legi generali)*[34]. If the KKI 2011 is compared to the LMP 2004, from the point of the hierarchy of legislation there is a principle namely *lex superior derogat legi inferiori*[35] which confirms that theposition of the Law is higher than the KKI Regulation. It is clear that there are inconsistencies of norms in the KKI 2011 that has no normative basis in the LMP 2009, and this may create doubts or confusion in compliance with the law. Drugs prescription is basically the authority of doctors based on expertise and competence as medical workers who have obtained a Registration Certificate (STR) from the Indonesian Medical Council. Therefore, control or monitoring on generic drugs prescription isbasically not possible even though this has been stipulated in the Decree of the Minister of Health on The Guideline for Fostering and Supervising the Use of Generic Drugs in Government Healthcare Facilities No. HK.03.01/MENKES/159/I/2010. This Decree is considered not doable because it requires the report of prescriptions to be sent manually to the Ministry of Health. Therefore, its implementation did not run effectively. Furthermore, actually there are rules on disciplinary punishment for those who violate it. Based on in-depth interviews with several doctors, there is no such thorough monitoring of generic drugs prescription or the imposition of sanctions due to not prescribing generic drugs.

On the other hand, patients have the rights to choose the type of drugs after listening to the explanation from the doctors. The doctors should not refuse to prescribe generic drugs when requestedby the patients. The problem is that the patients are still reluctant or less courageous to ask more detailsto the doctors, including asking about whether or not generic drugs can cure the disease. The reason is due to information asymmetry[36] as well as "*nrimo* culture or surrender" attitude which is still strong in Indonesian culture.

Another factor that also greatly affects the prescription of the drug is the drugs formulary in each hospital. So far, discounts given by the pharmaceutical companies are used by the hospitals for various hospital interests, including to ensure that the hospital

[33] Article 3 paragraph (2h): Failure to provide honest, ethical, and adequate information to patients or their families in conducting medical practice is one of 28 types of disciplinary violations. Indonesian Medical Council on Professional Discipline of Doctors and Dentists, *Regulation of the Indonesian Medical Council on Professional Discipline of Doctors and Dentists No. 4/2011*, 2011.

[34] *Lex Specialis Derogat Legi Generali* means If there is a conflict between the specific laws and the general ones, then the special ones will apply. Enny Agustina, *Etika Profesi Dan Hukum Kesehatan* (Bandung: Refika Aditama, 2020), 38.

[35] *Lex Superior Derogat Legi Inferiori* means If there is a conflict between high and low laws and regulations, the high one must take precedence. *Ibid.*

[36] Information asymmetry is a term in economics that was first used by Kenneth J. Arrow to describe a condition in the field of health care, namely the occurrence of an imbalance in the acquisition of information, because one party to a transaction has more or better information than the other party. Nanik Trihastuti and Kanyaka Parjnaparamita, "Akibat Dari Informasi Asimetris Dalam Pelayanan Kesehatan: Suatu Studi Dalam Perspektif Dalam Hukum Progresif" (Universitas Diponegoro, 2018).

business can continue running well[37]. In this regard, doctors practicing in hospitals are obliged to prescribe the drugs listed in the formulary, unless the required drugs is not available in the formulary. Along with the vigorous promotion by the pharmaceutical industry, generic drugs prescription at affordable prices indeed a hard thing to do except with the intervention from the Government in the form of a clear and firm legislation. In other words, generic drugs prescription is necessary so that doctors are willing to prescribe generic drugs even if they are not in the formulary, especially in private healthcare facilities.

In addition, the LMP 2004 also stipulates that every doctor is obliged to carry out quality control and cost control. What is meant by cost control is that the healthcare cost charged to the patient must be strictly in accordance with the patient's medical needs based on rates set by the regulations[38]. Therapeutic transaction as an agreement with the concept of *inspanning verbintenis*, is said to be *lex specialis* of the Law on Consumer Protection. This means that if there are any disputes betweena doctor and a patient, then the doctor cannot be blamed as long as the doctor has practiced medicine according to standards. In practice, the patient often given a simple and short explanation about the disease, and treatment decisions are made by the doctor with little involvement of the patient. This can be understood because the position of doctors and patients are not in a mutual participation model. Supposedly as a fellow legal subject, there should be no dominance of either party over the other. In principle, rights and obligations must be exercised in full by both parties, including the obligation of the doctor to provide the patient with a choice of drugs and the rights of the patient to choose the type of drugs following the complete information from the doctor.

3.3 The Ideal Prescription Drug Price Setting and Generic Drug Prescription Concerning Consumer Protection in Indonesia

Regarding the ideal rules, it is necessary to pursue interests balancing between the public interests or social interests with personal interests. Law should be able to choose the greater interests through the use of power or by conducting consensus, if possible. Based on this thinking, the law can be used as a tool to reach a consensus or agreement between stakeholders. This is what is meant by the interest balancing. The ideal regulations on prescription drug price setting and generic drugs prescription in relation to consumer protection in Indonesia, must be formulated in two separate regulations to ensure the effective and efficient implementation. A good drugs price setting regulation should be able to improve public access to the drugs, which ultimately lead to improving public healthcare services. This means that drugs price setting is a very important part of health sector reform.

3.3.1 The Ideal Prescription Drug Price Setting Concerning Consumer Protection in Indonesia

The current generic drugs price setting is good enough so that the prices are cheap and affordable by the poor people. But it only covers about 17% of the total drugs with

[37] Tim Investigasi Tempo.co, "Eksklusif: Suap Obat, Bos Rumah Sakit Blak-Blakan Terima Duit," *Tempo*, last modified 2015, accessed July 8, 2021, https://nasional.tempo.co/read/715680/eksklusif-suap-obat-bos-rumah-sakit-blak-blakan-terima-duit/full%26view%3Dok.

[38] Article 49 on Control Quality and Cost Control. Indonesia, *Law Number 29 Year 2004 Concerning Medical Practice*, 2004.

NIE. Consequently, there is still about 83% of the drugs whose prices are not regulated and follow market mechanisms. So, the absence of law in terms of price setting of prescription drugs, in this case the branded generic and the originators are expected to be immediately taken care of by the Government with the development of the Regulations.

The MOH 2015 is intended to control the price of drugs. However, the determination of HET needs to be revised in order to accommodate the interests of stakeholders, especially pharmaceutical companies, consumers or patients, and the Government. Thus, the substance of drugs price setting will become clear and lead to the development of public health.

Based on the researcher's analysis, the ideal prescription drugs price setting should cover all drugs (other than patented drugs) whose current price is not regulated by the Government. Facts shows that the price of branded generic drugs is much more expensive than generic drugs even though the period of patent protection has expired. Therefore, a pricing policy with restrictions on price comparison between those three types of drugs, need to be established in Indonesia. The method used by such a policy model is known as Internal Price Referencing (IPR)[39]. International experts confirmed that the decline in drugs prices is considerable and the effects of IPR implementation are quite successful, associated with the savings of state health budget, patients, and society[40]. Examples of restrictions on price comparison are as follows:

a. Price of branded generic drugs must not exceed 10 times that of its generic drugs' price
b. Price of originator must not exceed 1.5 times that of its branded generic drugs' price
c. or another restriction scheme that locks the HET from sky-rocketing indefinitely as pharmaceutical company's wish.

Regarding consumer protection, the LCP 1999 Article 4 (h) grants the rights to consumers to obtain returns, compensation, and/or replacement if the goods received are not in accordance with the agreement. Therefore, it is necessary to compensate HET excess to consumers in order to educate the pharmacies, hospitals and clinics to carry out their obligations in providing compensation.

3.3.2 The Ideal Generic Drugs Prescription Concerning Consumer Protection in Indonesia

Doctors' prescribing act is not much regulated considering the complexity of other factors beyond the reach of doctors, such as patients' endurance, age, physical condition, the level of disease suffered, patient compliance, quality of drugs and availability of health care facilities. In addition, basically doctors have full authority in drugs prescription to the patients as stipulated in the LMP 2004.The current regulation only mandates doctors to prescribe generic drugs in public healthcare facilities. Monitoring of its implementation that did not run effectively, shows that there needs to be a mechanism that makes doctors encouraged to prescribe generic drugs in order to cure the

[39] IPR is the practice of using the price(s) of identical medicines or similar products or even with therapeutically equivalent treatment (not necessarily a medicine) in a country to derive a benchmark or reference price for the purposes of setting or negotiating the price or reimbursement of the product in the same country. Lisa Bero, Fatima Suleman, and Sabine Vogler, "Access to Medicine and Health Products," in *WHO Guideline on Country Pharmaceutical Pricing Policies*, 2nd ed. (Geneva: World Health Organization, 2020), 77.
[40] *Ibid.,* p. 10.

patients. Thus, the doctors can improve public health with the support from personal motivations because their interests are fulfilled.

In relation to the obligation of the doctor to fulfill the patient's right in terms of "providing information about the disease and medical actions in full" can be fulfilled if the doctor him/herself has the motivation to promote generic drugs directly to the patient. The patient's high trust in doctors will help the patient's understanding of the efficacy of generic drugs. This is evident from the facts in the field which shows that even pharmacist is authorized to replace the prescription drugs with other drugs withthe same efficacy or drugs with same API, it cannot function effectively although the drugs are regarded as expensive by the patient.

4. CONCLUSION

HET is the price set by the industry with 28% of margin (for pharmacies, hospitals/clinics) on top of HNA. HET is proposed by pharmaceutical company as the NIE owner to BPOM for registration purposes. Generally, BPOM approves the company's proposal. Furthermore, there is no limit on the frequency of price increase allowed in a certain period. In other words, HET has the potential to be unlimited as price changes can be done simply by reporting, without the approval from the Government. The monitoring of its implementation is difficult to do as many pharmacies sell drugs beyond HET. Moreover, the public's knowledge of HET is very limited, so the violations have not been problem despite the affordability. This phenomenon has been going on for a long time, since 2006 and no real action was taken to the violation of this Decree. Drugs prescription is basically the authority of doctors based on expertise and competence. Therefore, control on generic drugs prescription is basically not possible even though this has been regulated only for government healthcare facilities. Consequently, the generic drugs prescription is very low in private healthcare facilities. Generic drugs have less efficacy compared tonon-generic drugs, is the opinion of most respondents. In such cases, it is not easy for patients or pharmacists to replace prescription drugs with generic drugs. On the other hand, patient trust in doctoris still high and they have rights to decide the treatments after getting the clear explanation from the doctors. This means doctors' action to proactively ask patients about the drugs type (generic or non-generic) can have a considerable impact in prescription of generic drugs in Indonesia.

Regarding the ideal prescription drug price setting concerning consumer protection in Indonesia, the Government should draw up a new law that includes all prescription drugs that have not been regulated. Considering the contents, the proposed regulation is a Presidential Decree (not only directed by the LH 2009, but also the formulation and stipulation will be simpler as it is stipulated by the President) that essentially contains several important provisions.

Firstly, setting the highest limit of the price comparison between the price of generic drugs, branded generic drugs and originator drugs with the aim that the HET does not depend on the wish of pharmaceutical company. To be more specific, HET of branded generic drugs and originator are associated with HET of generic drugs contains the same API. Determination of HET is stipulated after careful calculation using various pricing methods recommended by WHO and by involving stakeholders in the pharmaceutical industry. An example of the HET determination referred is HET of branded generic drugs should not exceed 10 times of the HET of generic drugs. Secondly, restriction on the frequency of the increase per year. Finally, if the pharmacies, hospitals, and clinics sell any type of drugs beyond HET, this price setting provides

a refund mechanism of the difference between selling price and HET. This is to ensure that this idea is in line with the consumer protection to obtain the compensation if the goods received are not in accordance with the agreement or label. The refund mechanism is a form of sanctions to regulate drugs selling practices that violates HET, to create a deterrent or preventive effect for other violations. The consumers rights to have accurate, clear, and honest information can be fulfilled by this refund mechanism because consumers become aware of the HET in accordance with applicable regulations. Additionally, it also indirectly improves the literacy of the community as consumers of drugs. It is highly recommended to utilize a user-friendly information technology (IT) based applications to be able to implement the refund mechanism of HET effectively and efficiently.

To formulate the ideal regulation of generic drugs prescription concerning consumer protectionin Indonesia, it is recommended to link the prescriptions to the Registration Certificate (STR). The Government needs to revise the provisions in the LMP 2004 as the contents related to STR is stipulated in this Law. To ease patient's understanding, before prescribing the doctor should explain the safety and efficacy of the generic drugs following the clinical condition of the patient. Surely the safety and efficacy of generic drugs must be the most important things as there are diseases for which there are no treatment or therapy with generic drugs. In short, motivation to prescribe generic drugs should come from the doctor him/herself. Under this circumstance, the doctor will explain about the quality, safety, and benefits of the generic drugs. It is highly recommended that the generic drugs prescription to be included in the composition of SKP appraisals system at a certain weight, in addition to the existing SKP factors that have been determined by Indonesian Doctors Association (IDI). Because it is associated with STR, this regulation applies to all doctors in public and private healthcare facilities. Therefore, it is strongly recommended to develop a control mechanism using IT-based application to actualize the monitoring as expected. In this regard, the confidentiality of patient data may become a concern for doctors and healthcare facilities. However, it should not be worried because the monitoring report does not need to have the patient's name as the recipient of the generic drugs prescription. Simply the doctor's name and the generic drugs prescribed are necessary. Consequently, the privacy and confidentiality of the patient's medical data will be well maintained according to the prevailing laws.

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RETHINKING LEGAL STATUS OF POLYTECHNIC IN THE LAW OF EDUCATION SYSTEM

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Abstract

The legal status of polytechnic has been fundamentally changed from time to time. After the Law of National Education System Number 20/2003 and the Law of Higher Education Number 12/2012 came into effect, the polytechnic has been granted a new legal status that offers more diverse programs at various levels. Since then, polytechnic could conduct vocational diploma programs and degree programs in applied sciences from graduate to postgraduate. This legal status raises legal problems whether polytechnic is a higher education institution in vocational or applied sciences. Best education practices in some countries classify applied sciences higher education as academic education, not vocational education. This doctrinal research paper then will examine this legal problem using statute, historical and comparative approach, in the light of the Development Legal Theory. This study shows that the legal status of polytechnic is heavily dependent on government policy. In the absence of a clear and firm ground policy of vocational education, the legal status of the polytechnic has been interpreted differently from time to time. The government ought to reset the vocational education policy and then reform the law of the national education system. Therefore, the legal status of the polytechnic will be more sustainable and have better legal certainty accordingly. Regarding the recent development of higher education, it will be better if the government constitutes polytechnic as a higher education institution in applied sciences.

Keywords: *Polytechnic, National Education System, Higher Education, Vocational Education & Development Legal Theory (DLT).*

1. INTRODUCTION

As a formal education institution, the polytechnic was first established in 1975 as a part of the cooperation between the Republic of Indonesia and Switzerland to develop vocational higher education[1]. The main idea of this project is to fulfill the demand of middle technicians who can support the engineers in executing the project[2]. Polytechnic then offered a 3-year non-degree program to equip graduates of high school with practical technical skills. So, the level of polytechnic graduates was lower than bachelor but higher than high-school graduates. At that time, the legal status of polytechnic was a vocational education institution governed under a university or institute of technology.[3]

The Law of National Education System Number 2/1989 (the LNES 1989)[4] granted a new legal status to polytechnic as an autonomous vocational higher education institution in 1989. State polytechnics established before 1989 had had to do a transitional stage

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[1] "Sejarah," *Polman Bandung*, accessed December 20, 2020, https://polman-bandung.ac.id/sejarah-polman/.
[2] "Sejarah," *Politeknik Negeri Bandung*, accessed December 20, 2020, https://www.polban.ac.id/sejarah/.
[3] *Ibid*
[4] Indonesia, *Law Number 2 Year 1989 Concerning National Education System*, 1989.

accordingly. Furthermore, the government enacted the Law of National Education System 2003 (after this- the LNES 2003)[5] to replace the LNES1989.

Following the new national education system, the government passed the Law of Higher Education 2012 (the LHE 2012)[6]. This law expanded the scope of vocational higher-education programs from diploma to applied sciences degree programs. This development enables polytechnic to conduct programs in applied sciences from bachelor level to postgraduate level. Meanwhile, Article 59 of the LHE 2012 still declares that polytechnic is a vocational higher education institution. The new interpretation of vocational education affects the legal status of polytechnic since the degree program is commonly known as academic education. The legal status of polytechnic becomes fuzzy accordingly.

The issue related to polytechnic's legal status is essential in higher education because it will affect further polytechnic development in Indonesia. The data shows that the total number of polytechnics has gradually increased from time to time. From 1975 until 2000, there had been 47 polytechnics established[7]. Moreover, the statistic of higher education in 2019/2020 exhibit that the number of polytechnics has reached 304 institutions[8]. That is why this issue is urgent to be solved.

This study is therefore intended to determine what the ideal legal status of polytechnic is. The discussion in this paper then will examine how polytechnic should be defined in the light of the education policy and law. After being analyzed, this study will conclude whether polytechnic should be granted legal status as a vocational education institution or an academic one. With an appropriate and firm legal status, the future development of polytechnic will be more sustainable accordingly.

Furthermore, this study will employ a theory formulated by Mochtar Kusumaatmadja known as the Development Legal Theory (DLT)[9]. The basis of his idea refers to sociological jurisprudence thoughts related to law and society[10]. According to Kusumaatmadja, the law should be corresponding with society[11]. Since the development in society is dynamic and sometimes going faster than law, Kusumaatmadja thought that the function of law was to respond to what already happened and anticipate what would happen[12]. He mentioned that law, therefore, could be utilized as a development instrument[13]. Law will oversee the

[5] Indonesia, *Law Number 20 Year 2003 Concerning National Education System*, 2003.
[6] Indonesia, *Law Number 12 Year 2012 Concerning Higher Education*, 2012.
[7] Kementerian Pendidikan dan Kebudayaan Republik Indonesia, *Perkembangan Pendidikan Tinggi Tahun 1999/2000 - 2013/2014 - Buku 2* (Jakarta: Pusat Data dan Statistik Kementerian Pendidikan dan Kebudayaan, 2015)., p. 16.
[8] dan Pendidikan Tinggi Kementerian Riset, Teknologi, *Statistik Pendidikan Tinggi 2019* (Jakarta: Pusdatin IPTEK DIKTI, 2019)., p. 4.
[9] Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan* (Bandung: P.T. Alumni, 2006)., pp. 75-85.
[10] Lili Rasjidi and I. T. Rasjidi, *Pengantar Filsafat Hukum* (Bandung: Mandar Maju, 2007)., p. 80.
[11] Romli Atmasasmita, "Tiga Paradigma Hukum Dalam Pembangunan," *Jurnal Hukum Prioris* 3, no. 1 (2012): 2–26, https://trijurnal.lemlit.trisakti.ac.id/prioris/article/view/354., p. 5.
[12] Kusumaatmadja's thought was influenced by Roscoe Pound. who stated that law often did not respond quickly to the dynamic changing of the society Mochtar Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional* (Bandung: Binacipta, 1975), pp. 3-4; Brian Z. Tamanaha, "Sociological Jurisprudence Past and Present," *Law & Social Inquiry* 45, no. 2 (May 12, 2020): 493–520, https://doi.org/10.1017/lsi.2019.26., pp. 495-498.
[13] Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*.

development process and direct all the elements to the main objectives of development[14]. The function of law is then to ensure the implementation of the development process in order[15]. So, legal certainty is critical in this stage to create sustainability of development[16].

The LNES 2003 and the LHE 2012 can be said as instruments in education development. These laws have imposed a new direction for polytechnic as a vocational higher education institution. Thus, the DLT can be applied as a theoretical framework in this study. It is expected that the analysis of this study will find the root cause of the main problem and some alternative solutions. Then, the ideal legal status of polytechnic can be determined accordingly.

2. RESEARCH METHODS

This study will examine law from an internal perspective and put legal norms as the main object. This kind of method is commonly known as normative legal research[17]. Unlike sociological legal research, which uses primary data, this method will explore and exploit relevant materials from three legal sources[18].

The first is the primary legal source consisting of statutes, such as constitution, act, government regulation, presidential regulation, and other applied regulations. Furthermore, this study locates some theories and juridical thoughts from law books and journals as the secondary legal sources to be used as the basis of analysis and the interpretation of the law. This study puts the DLT as the leading theory. So, this research method will include some relevant literature and works to give a deeper understanding of the framework of the DLT. Finally, the last one is the third legal source comprising some other materials such as encyclopedias and dictionaries. These materials are employed to provide a better experience of some essential terms related to this study.

Moreover, the approaches used in this research are statute approach, historical approach, and comparative approach[19]. The statute approach explores relevant educational statutes, such as the LNES 2003, the LHE 2012, and some related regulations. This approach will scrutinize the relevant statutes to understand the coherency of these acts in the Indonesian legal system.

The second approach is the historical approach to understanding the transformation of polytechnic's legal status from the first polytechnic established until now. The development of the legal status of polytechnic can be divided into three stages: from 1975-1988, during 1989-2002, and after 2003. Some provisions from regulations before LNES 2003 and LHE

[14] Ibid.
[15] Rasjidi and Rasjidi, *Pengantar Filsafat Hukum*; Shidarta, ed., *Mochtar Kusumaatmadja Dan Teori Hukum Pembangunan: Eksistensi Dan Implikasi* (Jakarta: Epistema Institute, 2012)., pp 123-125.
[16] Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*; Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty, 1996)., pp. 32-33.
[17] Johny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia, 2007); Sidharta, "Penelitian Hukum Normatif: Analisis Penelitian Filosofikal Dan Dogmatikal," in *Metode Penelitian Hukum: Konstelasi Dan Refleksi*, ed. S. Irianto and Shidarta (Jakarta: Yayasan Obor Indonesia, 2009)., pp. 142-143.
[18] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajawali Press, 2015)., p. 4.
[19] Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif*., pp. 300-302.

2012 will be traced back and explored to get a historical background of the development of the legal status of the polytechnic.

Eventually, the comparative approach is chosen as the third approach. Based on history, polytechnics development in Indonesia resulted from the bilateral cooperation between the Republic of Indonesia and the Confederation of Switzerland and some other countries.[20] Accordingly, a comparative study is needed to get the original conception of polytechnic and vocational education. Some regulations and best practices from Switzerland, Germany, England, Singapore, and Japan will be compared with Indonesia.

3. ANALYSIS AND DISCUSSION

3.1. Overview of Development Legal Theory

Mochtar Kusumaatmadja, one of the prominent legal scholars in Indonesia, introduced his thought of law as a development instrument (DLT) in the early seventies[21]. His theory emphasizes three essential principles, such as comprehensiveness, inclusiveness, and applicableness[22]. Firstly, the law could not be drafted based on conceptual thinking merely.[23] Empirical matters shall be taken as the primary basis as well. Hence the content of the law will be comprehensive and conformed with the reality in society.[24] Secondly, law-making shall consider not only legal matters but also other elements from other fields.[25] Society is dynamic because of many factors such as economic, cultural, and other related factors. Thus, lawmakers shall understand both law and non-law factors. Finally, the applicability of law is significant. Law should be able to respond, mitigate, and anticipate the dynamic changes of society[26]. Therefore, laws will be able to direct and control the development of society[27].

The framework of this theory assumes that every development will change society[28]. Some distractions may happen as an effect of the development process. This transitional situation often disturbs the execution of the development plan. Thus, the government shall set forth a sound policy and regulations to ensure the implementation of the development programs in order[29]. Therefore, in this sense, the law can be employed as an instrument that states development goals and gives clear directions to keep the process in order.[30]

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[20] Polman Bandung 'Sejarah'.
[21] Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*., pp. 75-79.
[22] Lili Rasjidi and I. B. W. Putra, *Hukum Sebagai Suatu Sistem* (Bandung: Mandar Maju, 2003), p. 126; Atip Latipulhayat, "Khazanah: Mochtar Kusumaatmadja," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 1, no. 3 (2014): 626–642, http://jurnal.unpad.ac.id/pjih/article/view/7100., pp. 629-630.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Atip Latipulhayat, "Roscoe Pound," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 1, no. 2 (2014): 413–424, http://jurnal.unpad.ac.id/pjih/article/view/7083., pp. 413-414.
[27] Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*., pp. 89-91.
[28] Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*., pp. 2-5.
[29] Ibid.; Shidarta, *Mochtar Kusumaatmadja Dan Teori Hukum Pembangunan: Eksistensi Dan Implikasi*.
[30] *Ibid.*

The government, theoretically, has the authority to determine the policy by itself. However, the policy-making process shall involve all related stakeholders. Kusumaatmadja mentioned that this kind of process is known as 'open process' which means that the process considers legal matters and other elements from non-legal fields[31]. This process needs constructive collaborations from jurists, legal scholars, and experts of some related areas. Thus, the involvement of all associated stakeholders will give a solid basis to the formulated law. The framework above shows that the idea of DLT is strongly influenced by sociological jurisprudence thoughts and some ideas from American scholars[32]. Kusumaatmadja's thought was of the idea of Eugen Ehrlich, Roscoe Pound, and 'New Haven School' such as Filmer Northrop, Harold Lasswell, and Myres McDougal[33].

At first glance, his idea of law as a development instrument seems similar to the idea of law as a tool of social engineering formulated by Pound. Nevertheless, he argued that his thought was different from the Pound. Firstly, the meaning of 'a tool of social engineering' was too mechanical[34]. It seemed that society could be shaped and developed by the law solely. Meanwhile, there were many instruments involved in every development. So, the law, in his view, was not the only instrument in development[35]. Secondly, he also argued that Pound's study was based on the atmosphere of the common law system[36]. Law to this extent was mainly expressed in the judge's decisions. The role of judges was very crucial accordingly. The situation in Indonesia and other civil law countries was different. The role of statutory law was dominant.

Kusumaatmadja also acknowledged that his thought was in line with the views of New Haven Scholars, such as Northrop, Myres, and McDougal[37]. Filmer Northrop was a legal scholar that triggered lawmakers to deem the culture when adopting law from other countries[38]. Meanwhile, Harold Laswell and Myres McDougal urged the critical role of policy in law-making, which is later known as policy-oriented theory[39]. Northrop

[31] Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*. pp. 83-84.; Sidharta, *Mochtar Kusumaatmadja Dan Teori Hukum Pembangunan: Eksistensi Dan Implikasi*. pp. 331-333.

[32] Rasjidi and Rasjidi, *Pengantar Filsafat Hukum*, 66–67; D. Darmodiharjo and Sidharta, *Pokok-Pokok Filsafat Hukum* (Jakarta: Gramedia, 2005), 128–130; Rasjidi and Putra, *Hukum Sebagai Suatu Sistem*, 182–183; Sidharta, "Penelitian Hukum Normatif: Analisis Penelitian Filosofikal Dan Dogmatikal," 337; Shidarta, *Refleksi Tentang Struktur Ilmu Hukum* (Bandung: Mandar Maju, 2009), 7; A. Cahyadi and E. F. M. Manulang, *Pengantar Ke Filsafat Hukum* (Jakarta: Kencana, 2015), 119–121.

[33] The term 'New Haven School' refers to the ideas and thoughts from some professors at Yale University – Law School.Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*; Jack van Doren and Christopher J. Roederer, "McDougal-Lasswell Policy Science: Death and Transfiguration," *Richmond Journal of Global Law & Business* 11, no. 2 (2012): 148, https://scholarship.richmond.edu/global/vol11/iss2/2; Rasjidi and Putra, *Hukum Sebagai Suatu Sistem*; M. D. Rabban, "Pound's Sociological Jurisprudence: European Roots and American Applications," in *Public Law & Legal Theory Research Paper Series No. 630* (Texas: University of Texas School of Law, 2015), 113–116.

[34] Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*.

[35] Ibid.

[36] Ibid.

[37] Rasjidi and Putra, *Hukum Sebagai Suatu Sistem*, 182–184.

[38] Shidarta, *Refleksi Tentang Struktur Ilmu Hukum*, 330.

[39] Rasjidi and Putra, *Hukum Sebagai Suatu Sistem*.

stated that law could not be separated from society and its culture[40]. Every country had a unique atmosphere related affected its positive law.

Consequently, other countries could not automatically adopt its law unless some adaptation had been made.[41] Therefore, the adopted law should be adjusted in conformity with the situation of the society in the respected country.[42] Kusumaatmadja reminded lawmakers to look and pay attention to domestic values.[43] Implementing those regulations without adjustment will face some obstacles.[44] These arguments clearly showed that the culture-oriented approach introduced by Northrop persuaded his thought.

Furthermore, Kusumaatmadja realized that a sound policy that conformed with society's needs would be an essential basis of a good law.[45] In this sense, his thought was influenced by the policy-oriented approach of Lasswell and McDougal[46]. It was crucial in a policy-making process to consider multi-dimension factors, including non-law factors[47]. Therefore, the role of stakeholders was very significant in formulating such a policy. A collaborative effort between academicians and practitioners, both from law and non-law fields, was material in every law-making process.[48]

After having the overview above, three insights can be pulled out from this theory. First, the law based on a good policy will be an essential instrument in development. Second, a good law shall be based on both law and non-law factors. Third, the good law can be utilized as an instrument to direct and control the development.

Eventually, the function of law in development is to ensure sustainability. It means that legal certainty is vital in the development process. However, it does not mean that legal certainty will put aside other fundamental values of law, such as justice and expediency[49]. After examining the DLT, the author thinks this theory will suit this study because its central issue is education development. The LNES 2003 and the LHE 2012 have been used as an instrument of higher education development. One of the goals of

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[40] His thought was trigerred by the domination of western law in international law after the World War II. See Edward McWhinney, "Western and Non-Western Legal Cultures and the International Court of Justice," *Washington University Law Review* 65, no. 4 (1987): 873–874, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2112&context=law_lawreview; F. S. C. Northrop, "The Method and Some Findings of Anthropological Jurisprudence," *Louisiana Law Review* 16, no. 2 (1956): 455, https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2365&context=lalrev.

[41] Northrop, *Ibid.*

[42] *Ibid.*

[43] Kusumaatmadja, *Loc.cit.*

[44] See also Shidarta, *Loc.cit.*

[45] Rasjidi & Putra, *Loc.cit.*

[46] Harold D. Lasswell and Myres S. McDougal, "Jurisprudence in Policy-Oriented Perspective," *University of Florida Law Review* XIX (1966): 486–487, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3594&context=fss_papers&httpsredir=1&referer=.

[47] Harold D. Lasswell and Myres S. McDougal, "Criteria for a Theory About Law," *Southern California Law Review* 44 (1971): 374–375; Lasswell and McDougal, "Jurisprudence in Policy-Oriented Perspective," 500–501.

[48] *Ibid.*; see also Shidarta, *Op.cit.* p.332

[49] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: P.T. Citra Aditya Bakti, 2000), 45–47; Heather Leawoods, "Gustav Radbruch: An Extraordinary Legal Philosopher," *Washington University Journal of Law & Policy* 2 (2000): 492–494, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1516&context=law_journal_law_policy.

these laws is to reform polytechnic. Therefore, the framework of this theory will be compatible to be used in analyzing legal issues related to the development of polytechnic, especially its legal status.

3.2. Regulation of Polytechnic in Indonesia

3.2.1. From 1975 – 1988

The earliest polytechnic project was carried out due to cooperation between Indonesia and the Swiss government in 1973.[50] The first polytechnic was operated in 1975 under Institut Teknologi Bandung (hereinafter- ITB).[51] So, the name of this institution was Politeknik Mekanik Swiss-ITB (hereinafter- PMS-ITB). The program offered in this polytechnic was a 3-year Diploma which implementing Swiss' vocational education model. As a new type of higher-education institution, polytechnic had not been recognized by prevailing law.[52] After being officially inaugurated by Minister of Education and Culture Decree 0416/U/1981, PMS-ITB was bestowed legal status as a vocational education institution governed under higher education institutions.[53]

After successfully establishing the first polytechnic, the government started the Polytechnic Project I based on the General Director of Higher Education of Ministry of Education and Culture Decree No. 03/DJ/Kep/1979. There were six new polytechnics to be established within six higher education institutions. All Polytechnics in the Project I was officially launched in 1985 and given the same legal status as the first polytechnic by the General Director of Higher Education of Ministry of Education and Culture Decree No. 115/Dikti/Kep/1984.

The government continued the expansion of the polytechnic through the Polytechnic Project II. According to the General Director of Higher Education Decree Number 14/Dikti/Kep/1984 and Number 80/Dikti/Kep/1985, Polytechnic Project II started developing vocational education in engineering, business administration, agriculture. There were eight-teen polytechnics to be established in this project. Referring to the General Director of Higher Education Decree Number 14/Dikti/Kep/1984 and Number 80/Dikti/Kep/1985, all polytechnics established in this project were given the same legal status as in the previous one as higher education institutions governed under university or institute of technology.

Instead of this project, a polytechnic was formed by a bilateral agreement between Institut Teknologi Sepuluh-Nopember (ITS) with Japan International Cooperation Agency (JICA) in 1986[54]. The total of state polytechnic established by the government from 1975-1986 was 26 institutions. All of them offered a 3-

[50] See Polman Bandung 'Sejarah', https://polman-bandung.ac.id/sejarah-polman/ accessed on 20 December 2020.
[51] *Ibid.*
[52] According to Article 6 of The Law of Higher Education Institution 1961 (the LHEI 1961), polytechnic was not of four types of higher education institutions recognized by law.
[53] This decree had retroactive effect and declared that PMS-ITB was officially launched in 1975.
[54] "Tentang PENS," *PENS*, accessed May 25, 2020, https://www.pens.ac.id/tentang-pens/.

year diploma program in various fields of vocational education. During this period, the legal status of each state polytechnic was a higher education institution governed under university or institute of technology.

3.2.2. During 1989-2002

The development of polytechnic came into the second stage when the LNES 1989 was enacted. The legal status of polytechnic was formally stated in Article 16 of the LNES 1989 as one of the higher education institutions in Indonesia. This article stated that higher education was further for secondary-level graduates who conducted academic and professional track education. Polytechnic was mentioned in Article 16 as a higher education institution conducting applied education. Furthermore, Article 16 (3) & (4) connoted the term 'applied education' as professional education.

Article 16 and 17 of The LNES 1989 upheld the definition of polytechnic used in the Polytechnic Project I and II. These articles stated that polytechnic was a professional education institution that offered diploma programs and specialist programs. Article 6 of the Government Regulation Number 30/1990 (after this-GR 30/1990) declared that the diploma programs consisted of four levels from 1-year program to 4-year program. Like in the early stage, the diploma program was still categorized as a non-degree program. Nevertheless, based on Article 18 of the LNES 1989, the graduates from the diploma program would be conferred a professional attribute.

Following Article 16, the government enacted the Minister of Education and Culture Decree Number 0313/O/1991, which imposed that all state polytechnics would have official status as higher education institutions in 1993. This development stage had created a significant impact on polytechnic's milestones. Finally, this institution was officially recognized as a vocational higher education institution. However, it did not mean that full autonomous status would be given immediately to these polytechnics. The government decided that respected universities/institutes still supervised state polytechnic administration for some time. Full autonomy status would be granted to such polytechnics starting from 1997.

3.2.3. After 2003

The LNES 2003 has created some fundamental changes in the national education system. The term vocational education was officially introduced. According to the elucidation of Article 15 of the LNES 2003, vocational education is a kind of education specially designed to equip students with applied knowledge and skill related to particular jobs in some levels in which its highest qualification level is equivalent to a bachelor in academic education. The LNES 2003 also states in Article 20 (1) that polytechnic is one of the higher education institutions in the National Education System.

After having a very long process, the government eventually passed the LHE 2012. Following Article 59, the legal status of polytechnic is reaffirmed as a

vocational higher education institution[55]. However, regarding Article 16, the kind of programs offered in vocational education in the LHE 2012 have been expanded from diploma to master and doctoral programs in applied sciences. This article creates confusion in education practices because degree programs in applied sciences/arts are commonly known as academic education. The term vocational introduced by the LHE 2012 is getting fuzzy accordingly.

This ambiguous definition of vocational education in Indonesia has substantially impacted the polytechnic's legal status. On the one hand, the polytechnic is deemed as a vocational higher education institution. On the other hand, the government has developed polytechnic somehow into an applied sciences higher education institution[56]. The legal status of polytechnic is getting obscured and uncertain accordingly. Thus, to end this problem, the government shall decide first the legal term of vocational education. Then the most appropriate legal status for polytechnic can be determined. A firm legal status for polytechnic is vital. Otherwise, further development of polytechnic will be facing unclear direction.

3.3. The Ideal Legal Status of Polytechnic

The regulations from a historical perspective show that there have been three different legal statuses of polytechnic since the first initiation. Polytechnic firstly appeared as a vocational institution governed by existing higher education institutions such as universities and institutes. The position of polytechnic was then equivalent to a faculty or school within a university or institute. As a result, the entity of polytechnic was embedded in its parent organization. In the absence of such autonomy, polytechnic could not determine its operational policies by itself. Therefore, the first legal status of the polytechnic is a vocational education institution under a university/institute that offers non-degree programs.

Polytechnic, at this stage, conducted vocational non-degree programs, which referred to the Switzerland education model[57]. However, the term polytechnic used in Indonesia has a different meaning from such a term in Switzerland[58]. The vocational

[55] It means Indonesia implements dual-track system. This system separates students into two different pathways. See the further explanation of tracking system in Paryono, "A Cross-National Analysis of When and How Vocational Education Is Offered," *SEAMEO VOCTECH Journal* (2005): 41–43, https://online.anyflip.com/pgln/slqh/index.html; More explanation regarding the history of education in Indonesia, see P. Basundoro, "Sejarah Pendidikan Tinggi Di Indonesia," accessed August 3, 2020, http://helm-mmpt.pasca.ugm.ac.id/opini/opini/sejarah-pendidikan-tinggi-di-indonesia.

[56] See Article 16, the LHE 2012.

[57] M. T. C. Henninges and C. Kleinert, Tracking and Sorting in the German Educational System (Bamberg: Leibniz Institute for Educational Trajectories, 2019), 4; See also R. H. Strahm, Vocational and Professional Education and Training in Switzerland (Bern: HEP, 2016), 82.

[58] P. Schellenbauer, "Combining Effort for Switzerland's Higher Education System," accessed August 3, 2020, https://www.avenir-suisse.ch/en/combining-efforts-switzerlands-higher-education-system/; Thomas Dessinger, "The German 'Philosophy' of Linking Academic and Work-Based Learning in Higher Education: The Case of the 'Vocational Academies,'" *Journal of Vocational Education & Training* 52, no. 4 (December 20, 2000): 607–609, http://www.tandfonline.com/doi/abs/10.1080/13636820000200134.

non-degree program in Switzerland was only offered by a professional college[59]. The term polytechnic in Indonesia was somewhat similar to such a term in England and Singapore[60].

Since the enactment of LNES 1989, the polytechnic had officially become a vocational higher education entity. Polytechnic could offer four kinds of Diploma Programs in vocational education. Graduates from each program were awarded professional attributes, not degrees. After the LNES 2003 was enacted, the legal status of polytechnic was reaffirmed as a vocational higher education institution. Nevertheless, the problem occurred when vocational education at the higher education level was formally expanded by the LHE 2012.[61] The new interpretation of vocational education has created ambiguity concerning the essence of vocational education. First, when the 4-Year Diploma Program is officially stated as Bachelor of Applied Sciences/Arts Program, it seems that the scope of this program has been expanded beyond the boundaries of vocational education. Second, the provision that scaling up the program to the postgraduate level shows that the definition of vocational education has been partially shifted to applied sciences/arts education. Polytechnic eventually becomes a higher education institution that runs both vocational education programs and academic education programs. The legal status of polytechnic is getting unclear accordingly.

The LHE 2012, in the light of the DLT, can be seen as an instrument of higher education development.[62] This law ideally should have been based on a clear and firm vocational education policy. However, such a policy has never been wholly made since the first polytechnic was established. Some fundamental aspects of vocational education, such as the meaning of vocational education and polytechnic, have not been clearly defined. It seems there has not been a common understanding among stakeholders regarding this matter.

Furthermore, in the absence of ground policy, the government expanded the meaning of vocational education in the LHE 2012. The scope of vocational higher education programs imposed in this law is not in accordance with standard practices of vocational education. Some education programs eventually deal with higher degree programs that are commonly conducted in academic education. This situation has impacted the legal status of the polytechnic.

To end this problem, the government shall draw up a new policy on vocational education. When formulating the new policy, the government shall consider both law and non-law factors to align with the best practices in education.[63] This policy will give a solid basis for the new law. As a vocational education development instrument, this

[59] Strahm, *Loc.cit.* See also Article 2 (b) & 26 of the Federal Act of Vocational and Professional Education and Training (Swiss)

[60] Elaine Penn, *Educationg for Professional Life* (London: University of Westminster Press, 2017), 13–17; Pak Tee Ng, *Learning from Singapore: The Power of Paradoxes* (New York: Routledge, 2017), 28; "Singapore," *SEA-VET*, accessed September 25, 2020, https://sea-vet.net/singapore.

[61] See Article 16 of the LHE 2012

[62] See Kusumaatmadja, *Op.cit.*, pp. 89-91.

[63] See the 'open policy' mentioned by Kusumaatmadja, *Op.cit.* pp. 83-84; Shidarta (2), *Op.cit*. pp. 331-332; See the policy-oriented approach in Rasjidi & Putra, *Loc.cit;* Lasswell & McDougal, *Op.cit.* pp. 500-502 and Lasswell & McDougal, (2), *Op.cit*. pp. 374-376.

law will create sustainability and legal certainty along with expediency and justice.[64] The ideal legal status of the polytechnic will then be determined accordingly.

There are some issues to be concerned about the new policy. Firstly, the government shall review and decide which education track system will be implemented. Then, secondly, the government shall determine the meaning of vocational education and its scope. Finally, the government shall rethink the definition of the polytechnic.

Regarding the first issue, the dual/separated system has been implemented in Indonesia since many years ago. Article 7 point 3 of the Education Law Number 12/1954 showed that, in the early stage, the separated track had been implemented at the secondary school level after Indonesia became an independent country. This separated system was then reaffirmed in the LNES 1989. However, the policy and regulations related to enrolment in the higher education level were unclear. Students, notwithstanding their pathways, could apply to polytechnic. The differentiation of higher education institutions based on the separated system has been gradually immaterial.

According to Articles 15, 18, and 20 of the LNES 2003, Indonesia still implements the separated track system. However, in Indonesia, this system is based on student choice.[65] Students here can decide whether they will continue their study to general education or vocational education. Meanwhile, in Switzerland, Germany, and Singapore, the implementation of the separated track system is based on a regulated system.[66]

This implementation of the education track policy in Indonesia looks not in line with standard education practices. The government then shall rethink which track system will be suitable for Indonesia. If the separated track is chosen again, the government shall consider that each pathway must be implemented consistently. It means vocational education will be delivered by vocational education institutions only. Its programs in the higher education level will be non-degree programs that focus on practical skills and knowledge in a particular area related to specific jobs. Concerning the current education policy in which the government vows the vital role of vocational education, it will be better if the government decides to stay on a dual-track system.[67] However, some operational policies and regulations that are not in line with the dual-track system should be reset and renewed.

The next issue to be solved is the meaning of vocational education and its scope. This issue has been crucial after the LHE 2012 introduced the applied sciences program within the vocational education system. The applied sciences program in the LHE 2012 consists of bachelor (also known as Diploma 4), master, and doctor. The definition of vocational education becomes quite complicated since vocational education, unlike academic education, does not deal with degree programs. It seems the term vocational education in Indonesia has been widely construed. Since the term applied sciences

[64] See Rasjidi & Rasjidi, *Op.cit.* pp. 80-82 and Atmasasmita, *Op.cit.* pp. 5-6.
[65] Paryono, *Op.cit.* pp. 44-45
[66] *Ibid.*
[67] See President Regulation Number 2/2015 concerning the Development Plan 2015-2019.

program has been known in the education system of some countries, a comparative study is beneficial to get the original idea of applied sciences program.

The applied sciences program can be found in German-speaking countries.[68] This program was designed in response to industry and business sectors that need academic higher education graduates with more practical skills. The government then established the university of applied sciences conducting a particular program that educates and trains students with a more practical approach.[69] This program comprises bachelor level and master level. Since this program deals with the degree, the applied sciences program is then categorized as academic education.

Meanwhile, the current development of higher education shows that the trend of applied sciences education has been increased due to the convergence of academic and vocational education[70]. The development of technology and the complexity of industry and business affected some academic programs to use a more applied approach[71]. In contrast, some vocational education programs also increase theoretical content to equip the students with advanced technology. It seems the dichotomy of academic and vocational to some extent has been considered as immaterial.[72] Furthermore, some countries form a new type of university known as 'professional university', which offers academic programs containing some vocational subjects.[73]

Learning from higher education practices in Germany, Switzerland, England, and some other European countries, it is clear that degree program is only conducted by academic education institutions[74]. Notwithstanding the more practical programs, degree programs conducted by applied sciences or professional universities are determined as academic education programs. Even a unique degree program combining academic and vocational subjects in Germany run by the cooperative university (dual-Hochschule) is also classified as academic education[75].

The situation in single-track education countries such as the United States of America and Japan is different.[76] All education programs in secondary school contain both general/academic subjects and vocational subjects.[77] There is no differentiation

[68] See Schellenbauer, *Loc.cit* and Deissinger, *Loc.cit*
[69] *Ibid.*
[70] CEDEFOP, *The Changing Nature and Role of Vocational Education and Training in Europe (Volume 6: Vocationally Oriented Education and Training at Higher Education Level: Expansion and Diversification in European Countries)* (Luxembourg: Publication Office of the European Union, 2019), 1–9.
[71] The trend of vocationalized academic education is getting popular in some European countries, See *Ibid;* A similar trend is also found in Japan. See in Motohisa Kaneko, "The Formulation of Professional and Vocational Universities: Background and Challenges of a New Institution Type in Japan," *Japan Labor Issues* 3, no. 13 (2019): 33–34, https://www.jil.go.jp/english/jli/documents/2019/013-03.pdf.
[72] CEDEFOP, *Loc.cit*
[73] *Ibid.*
[74] Dessinger, "The German 'Philosophy' of Linking Academic and Work-Based Learning in Higher Education: The Case of the 'Vocational Academies'"; Schellenbauer, "Combining Effort for Switzerland's Higher Education System"; John Pratt, *The Polytechnic Experiment: 1965-1992* (Buckingham: The SRHE & Open University Press, 1997), 223–228.
[75] "History," *Baden-Wuerttemberg Cooperative State University*, accessed August 5, 2020, https://www.dhbw.de/english/dhbw/about-us/history.
[76] See Kaneko, *Loc.cit.*
[77] See Paryono, *Loc.cit.*

regarding the type of institution in secondary education. However, an institution is established to deliver vocational education at higher levels, such as community colleges or professional colleges. Nevertheless, all degree programs are only conducted by academic higher education institutions such as universities and institutes.[78]

What can be inferred from the comparative study above, the vocational education program is different from the applied sciences program. The vocational education program is more focused on developing practical skills and competencies related to specific jobs[79]. In other words, vocational education can be understood as 'workforce education' or 'occupational education' or 'career and technical education'[80]. Meanwhile, the applied sciences program is specially designed to equip students with practical skills and research skills to develop sciences and technology. That is why applied sciences programs can be delivered at the postgraduate level.

After considering education practices in some countries, the government shall decide that applied sciences program is a part of academic education in the national education system. The convergence of academic and vocational education does not mean the scope of vocational education can go beyond the boundary. This program, therefore, shall be taken out of the scope of vocational education. However, since the content of this program combining some vocational subjects, this program may be open for graduates from both general secondary schools and vocational secondary schools. This non-law factor ought to be concerned when formulating the new policy.[81] Therefore, the meaning of vocational education and applied sciences education in the new policy will align with standard education practices.

Prevailing laws then shall be replaced by the new ones. The term vocational education and its system then will have a more precise legal meaning that conforms with education practices. This new law eventually will also abolish the ambiguous status of applied sciences programs. Since the scope of the vocational area is in education and training, it should be considered to set up a special act on vocational education and training. This particular act will be more comprehensive because it considers national education system laws and respective laws from some ministries such as the ministry of industry, manpower, and other respective ministries. The further development of vocational education and training will be aligned accordingly.

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[78] *Ibid*

[79] CEDEFOP, *Vocational Education and Training at Higher Qualification Levels* (Luxembourg: Publication Office of the European Union, 2011), 14; United Nations Educational Scientific and Cultural Organization, "TIVETipedia Glossary," *UNEVOC*, accessed May 2, 2020, https://unevoc.unesco.org/home/TVETipedia+Glossary/lang=en/filt=all/id=474.

[80] Paryono, "A Cross-National Analysis of When and How Vocational Education Is Offered," 43; Dorothy Harnish and Jurgen Wilke-Schnaufer, "Work-Based Learning in Occupational Education and Training," *The Journal of Technology Studies* 24 (1998): 21, https://files.eric.ed.gov/fulltext/EJ574864.pdf; Ellen Hansen, *Career Guidance: A Resource Handbook for Low- and Middle-Income Countries* (Geneva: International Labour Organization, 2006), 24–26.

[81] See the discussion about non-law factor in the DLT in Kusumaatmadja, *Loc.cit*; Shidarta (2), *Loc.cit;* The influence of policy-oriented approach in the DLT in Rasjidi & Putra, *Loc.cit;* See also the notion of policy-oriented approach in Lasswell & McDougal, *Loc.cit* and Lasswell & McDougal, (2), *Loc.cit.*

Regarding the term polytechnic, there are various definitions in higher education practices. It seems the definition of polytechnic in every country depends upon their education system. Polytechnic in some countries is recognized as a vocational education institution. Nonetheless, in other countries, this institution is defined as an academic education institution. Polytechnic itself was initially introduced by Napoleon[82]. This term was used to name an institution offering special education and training in various technical and traditional craft fields.

As a vocational education institution, polytechnic commonly provides practical education and training only in technical or non-technical areas related to specific jobs or professions. In line with the definition of vocational education, the education program offered by polytechnic is not related to degree programs. Then the duration of its program usually is up to four years or equivalent to bachelor level. This polytechnic is found in England (in its old education system), Indonesia (during 1975 – 2011), and Singapore[83].

In contrast, the polytechnic in Switzerland is reckoned as an academic institution. This term is known as another name of the institute of technology[84]. However, after 1995, the polytechnic was also construed as another name of the university of applied sciences[85]. Furthermore, this term has a slightly different meaning in Germany. Polytechnic in this country is not recognized as a synonym of the institute of technology but is better known as a similar term for the university of applied sciences.[86]

Another meaning of polytechnic is also found in Japan. This term has a plain meaning as 'many technical fields'[87]. This meaning is employed to describe an institution at the secondary or higher education level that offers education and training in various technical fields.[88] So, there are various educational institutions that use this term, such as polytechnic school, polytechnic college, and polytechnic university. The term polytechnic university is known as one of academic higher education institutions[89].

Meanwhile, the definition of polytechnic in Indonesia after the LHE 2012 coming into effect is unique. On the one hand, this institution is still stated as a vocational education institution. Nevertheless, the core program of polytechnic seems to be

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[82] L. Preston Mercer and Judith A Ponticell, "Polytechnic Education - A Proposed Key to Regional Economic Development," *Synesis Journal of Science, Technology, Ethics and Policy* (2012): 46, http://www.synesisjournal.com/vol3_t/Mercer_2012_T45-51.pdf.

[83] Regarding polytechnic in England prior 1965, see Penn, *Educationg for Professional Life*; "Polytechnic in Singapore in Ministry of Education Singapore," in *Post-Secondary Education* (Singaporee: Ministry of Education of Singapore, 2019), 2; Nuffic, *The Education System of Singapore* (The Hague: Nuffic, 2019), 8–10.

[84] "History," *EPFL*, accessed May 2, 2020, https://www.epfl.ch/about/overview/history-of-epfl/.

[85] Schellenbauer, "Combining Effort for Switzerland's Higher Education System"; State Secretariat for Education and Research, *Higher Education in Switzerland* (Bern: SER, 2006), 13–21.

[86] Deissinger, *Loc.cit.*

[87] Human Resources Development Bureau, *Overview of Human Resources Development Administration* (Tokyo: MHLW, 2013), 9–10.

[88] *Ibid*

[89] JEED, "Polytechnic University," accessed February 28, 2021, https://www.uitec.jeed.go.jp/english/index.html#eng03; For more explanation regarding education system in Japan, see also NIAD-UE, Overview Quality Assurance System (Tokyo: National Institution for Academic Degree & University Evaluation, 2009), 6; Nuffic, The Education System of Japan (The Hague: Nuffic, 2020), 11.

partially shifted to academic education[90]. Polytechnic can conduct degree programs at various levels, including postgraduate level, instead of several vocational diploma programs. Polytechnic, therefore, becomes a vocational higher education institution that runs both vocational and academic education programs.

The current situation in Indonesia is almost similar to England from 1965 until 1992. During that time when 'the binary policy and the polytechnic policy' was implemented[91]. Polytechnic, as a vocational education institution, could conduct vocational programs and degree programs simultaneously. These policies finally created some difficulties for polytechnics in managing 'sandwich' degree programs in which special approval from the Council for National Academy Awards was needed[92]. Eventually, these policies were terminated. After the Further and Higher Education Act 1992, all degree programs were constituted as academic education[93]. Moreover, the academic program could only be conducted by the university. Consequently, the legal status of polytechnic had had to be transformed into a university since 1992.

Learning from the experiences above, the government must rethink whether polytechnic in Indonesia will be defined as an academic education institution or vocational education institution. Regarding the proposed legal status of the polytechnic, the government must first decide the education area in which polytechnic should be. This decision is crucial because it will affect the term of the polytechnic. The clear definition of polytechnic will result in a firm legal status. Considering this matter, it would be better if the government decided to choose a definition that conforms with current education practices and its future development.

There are two choices to be decided. First, the polytechnic will be defined as a vocational education institution that conducts non-degree programs. Second, polytechnic will be determined as an applied sciences education institution that offers degree programs at various levels. Applied sciences education at the higher education level is categorized as academic education. Thus, polytechnic, to this extent, is an academic institution. Concerning that academic higher education institutions in Indonesia are eligible, with regards to certain conditions, to conduct vocational education programs as well, it will be better if the government defines polytechnic as an academic higher education institution.

The government's decision on the issues above will eventually create a fundamental change in vocational education in Indonesia. Hence, the current vocational education policy ought to be reset. The government must formulate a new policy on the national education system. Furthermore, the new policy shall be transformed into new education laws in order to get legal force. Eventually, the legal status of the polytechnic, vocational education, and applied sciences program will be more confirmed with best education practices and firmer accordingly. On top of that, it is expected that the future development of polytechnic will be more sustainable.

[90] See Article 16 (1) & (2) of the LHE 2012.
[91] Pratt, *Op.cit.* pp. 11-13.
[92] *Ibid.* pp. 223-228.
[93] See Articles 74, 76 & 77 of Further and Higher Education Act 1992.

Finally, there are four essential findings in this study. First, some vocational education programs and institutions have partially been adopted from foreign countries without a deep and comprehensive understanding. It seems that the development of vocational education law did not implement a cultural-oriented approach properly[94]. This study reveals that, in the early stage, although the idea and the education model referring to Switzerland, the definition of polytechnic was somewhat similar to England's old education system. Then in the following stage, the vocational higher education system seems to be influenced by the vocational education system in Germany[95]. Then in the final stage, polytechnic seems to be developed into a professional academic institution like German's applied sciences education institutions.[96] The legal status of the polytechnic has become a quasi-academic vocational education institution. The insight from this finding: adopting education programs from other countries without adaptation will create problems in the education system and its regulations.

Second, education policy has not determined essential terms, such as vocational education, polytechnic, and applied sciences education. The milestone of the development polytechnic shows that the transformation of vocational education from stage to stage has not been based on a sustainable policy[97]. This finding shows that the policy-oriented approach has not been well employed in developing vocational education regulation.[98] The laws regulating vocational education have not been sustainable accordingly. Thus, the definition of some basic terms becomes somewhat elastic. The insight from the second finding: the role of basic terms in the ground policy to positive laws is essential.

Third, the development of vocational education and polytechnic in education laws is only based on the point of view of each regime. This finding reveals that the configurative method in policy-oriented approach has not been duly implemented.[99] The scope of vocational education in education policy has been changed from time to time. This scope has affected the legal status of polytechnic. The milestone of polytechnic development shows that the legal status of this institution has been changed three times. The development of polytechnic has become unsustainable accordingly. The insight from the third finding: the education policy takes a pivot role in formulating the education development and its regulations. A firm policy will create sustainable development.

Fourth, without a clear direction, the role of law in polytechnic development has created some problems in its implementation. The study points out that the LHE 2012

[94] The DLT emphasize the role of cultural-oriented approach. See Rasjidi & Putra, *Loc.cit.* & Northrop, *Loc.cit.*
[95] See the vocational higher education level in Germany in Thomas Eckhardt, ed., *The Education System in the Federal Republic of Germany 2016/2017* (Bonn: KMK, 2019), 28–29.
[96] *Ibid*
[97] Sustainability is one of the problems of education development in Indonesia. See Arwildayanto, Arifin Suking, and Warni Tune Sumar, *Analisis Kebijakan Pendidikan Kajian Teoritik, Eksploratif, Dan Aplikatif* (Bandung: Cendekia Press, 2018), 17–18.
[98] Kusumaatmadja, *Loc.cit;* see also Lasswell & McDougal, *Op.cit.* pp. 486-487 & 500-501.
[99] *Ibid.*

as a development instrument has not been worked well. This finding shows that the substance of law governing vocational education has not conformed with the standard education practices.[100] The lawmakers, therefore, have not been concerned about the role of non-law factors.[101] As a result, the direction of polytechnic development in this law is ambiguous. Then, the implementation at the operational level faces some obstacles. As the last insight: the non-law factors are essential to make the substance of law corresponding with the respected fields.

As a closing remark in this subchapter, the law governing education development in Indonesia lacks sustainability. In this case, it seems the expediency is more dominant than certainty. Meanwhile, the DLT strongly emphasizes that order and certainty are essential in development instead of justice and expediency.[102]

4. CONCLUSION

Based on the discussion and analysis above, it can be concluded that the legal status of polytechnic in Indonesia is heavily affected by the vocational education system in the policy and law of the national education system. The various interpretations of polytechnic occurred due to the absence of ground policy that defined some basic terms in vocational education. The current policy on vocational education, therefore, has to be reset accordingly. Then the government shall draw up a new law of the national education system based on the new ground policy corresponding with standard educational practices. Finally, the new legal status of polytechnic can be determined appropriately.

Since vocational education is different from applied sciences education, there are two choices concerning the new legal status of the polytechnic. Polytechnic can be constituted as either a vocational higher education institution or an applied sciences higher education institution. Regarding the recent development of education in many countries, it will be better if polytechnic in Indonesia is granted legal status as an applied sciences higher education institution. Therefore, the new legal status of polytechnic will be equal to institute in specific ways or university of applied sciences. In other words, the ideal legal status of polytechnic will be as an academic higher education institution.

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[100] See Rasjidi, *Op.cit.* pp. 134-135; See also Darmodiharjo & Shidarta, *Op.cit*, pp 128-129; & Rabban, *Loc.cit.*
[101] See Kusumaatmadja, *Loc.cit;* Lasswell & McDougal, *Loc.cit.*
[102] Kusumaatmadja (2), *Loc.cit.*

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STRENGTHENING THE LAW ON THE CONSTRUCTION OF HIGH-RISE BUILDING THAT IS BENEFICIAL TO SUPPORT NATIONAL DEVELOPMENT

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Abstract

The number of high-rise buildings in the big cities of Indonesia is increasing along with land being more limited and its prices being very high. Most of these high-rise buildings are in Jakarta and some of them are facing the risk of building failure that may cause business and operation interruption. These buildings that have been erected and operating need to receive regular maintenance and supervision to ensure the building's condition and safety. Many building owners and managers do not conduct and plan maintenance and supervision properly causing these buildings of being at risk of fire and building structure – mechanical failure / damage. For this reason, rigorous regulations, and its enforcement in building construction and maintenance are needed to ensure that these buildings operate reliably and encourage building owners and facility manager to comply with them properly. Cultivated Penalty and strict sanctions need to be renewed and must be implemented properly by Government bodies and local authority. Building Audit Institute can be formed to assist the central government and local governments (Governor) in carrying out their functions to ensure the safety and security of buildings, including their users. Strengthening existing laws and regulations will greatly assist in law enforcement and certainty for owners, building managers and building users, which in turn will support national development.

Keywords: *Indonesian Law on Construction of High-rise Buildings, building maintenance*

1. INTRODUCTION

Strengthening building construction laws is clearly needed to support national development which is being actively advanced. Owners, building managers and building users will benefit greatly from the strengthening of building laws, especially in the operation of buildings that can meet the standards that have laid out. Juridically, the legal basis for construction law has been stipulated in Law No. 28 of 2002 concerning Buildings (hereinafter Law No. 28 of 2002), which was enacted on December 16, 2002. The elucidation of Law No. 28 of 2002 chapter 1 states that a building is a place for humans to perform their activities and plays a very strategic role in the formation of the realization and the identity of the builder. Building arrangement still refers to the respective regional spatial arrangement in accordance with the applicable local government legislation.

Amendments to Law No. 2 of 2017 concerning Consultant Services, the sanction and penalty do not generate awareness to consultant to perform in the satisfactory level[1]. The sanction and penalty must lead consultant to work properly and avoid of mistake during service terms. Consultants can be more responsible for the services or construction of the buildings they make. Legal sanctions need to be included in this law to ensure the safety of the buildings it builds and operates within guided schedule and technical standards.

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[1] Indonesia, *Law Number 2 Year 2017 Concerning Consultant Services*, 2017.

In accordance with current provisions, each building must meet two requirements: administrative and technical requirements related to the function of the building, these two requirements must be met in every building. Administrative requirements include status of land rights which includes proof of land tenure/ownership such as: property rights, building use rights, cultivation rights, management rights and rights to use. While the technical requirements include building layout requirements covering designation, intensity, architecture, and environmental impact control and building reliability requirements covering safety, health, comfort, and convenience[2].

Even though there is a clear and comprehensive regulation, standard, and guideline to build and maintain the building, the problem of building fires and damage to buildings due to misuse of their functions every year continues to occur in Indonesia. The case of a building fire that occurred in the main building of the Attorney General's Office on August 22, 2020, is also a clear example, where early fire protection and prevention of fire propagation in the building do not function properly. The fire that spread and burned the building for 11 hours proved that the main prosecutor's office building was not equipped with good fire protection facilities[3]. This is a reminder that all buildings in Jakarta need to be audited to check their security and safety systems so that they all meet qualified safety and security standards.

The number of fatalities and physical as well as material losses should be avoided or at least minimized if the legal rules regarding buildings are complied with. The parties involved in the planning, construction, operation of the building and supervision must carry out their respective functions with full discipline and a sense of responsibility. In this regard, law enforcement for each violation must be carried out seriously, carefully, and strictly. Among them, law enforcement officers must be able to find out who is responsible for cases that occur and can use them as a reference to prevent similar cases that have the potential to arise in the future.

In addition to the problem of compliance with laws and regulations, the problem of buildings functions being transferred is also an issue for enforcement. In this case the function of the building changes from its original function. For example, the change in utilization from an office function to a warehouse and trade. This change in function makes the building load increase and the existing building structure is unable to support this additional load. The failure of the building structure to carry the load usually will not be obvious to the layman. Therefore, it takes someone who understands the structure of the building to check the condition of its strength. The case of the collapse of the hallway of the Jakarta Stock Exchange building, one of the most famous buildings and the center of the stock exchange in Indonesia, is an example of a shift in function of a building[4]. University of Indonesia construction expert Yuskar Lase said that the case of the JSE building hallway that collapsed on Monday afternoon, January 15, 2018, contained several possible causes.

[2] Article 7 paragraph (1) Law No. 28 of 2002 and Elucidation of Article 8 paragraph (1) letter a Law No. 28 of 2002

[3] Ryana Aryadita Umasugi, "Kebakaran Besar Di Gedung Kejaksaan Agung RI, Mahfud MD: Ini Luar Biasa," *Kompas* (Jakarta, August 22, 2020), accessed July 21, 2021, https://megapolitan.kompas.com/read/2020/08/22/21370551/kebakaran-besar-di-gedung-kejaksaan-agung-ri-mahfud-md-ini-luar-biasa.

[4] "Kemenaker Bergerak Sigap Dalam Peristiwa Runtuhnya Selasar Gedung BEI," *Kompas* (Jakarta, January 16, 2018), https://biz.kompas.com/read/2018/01/16/144157828/kemenaker-bergerak-sigap-dalam-peristiwa-runtuhnya-selasar-gedung-bei.

The first possibility is planning that was not careful enough, the second possibility is the construction of buildings that can also collapse due to the lack of careful execution or construction. Meanwhile, the third possibility relates to changes in the function of the building, which could also trigger the building to collapse[5].

Furthermore, building maintenance must also be carried out to ensure the proper functioning of equipment. Good and routine maintenance can minimize the risks that can be caused by fire and water and gas leaks. Fire, gas, and water leak detectors must be able to function properly to ensure a building can be operated safely according to its designation. Moreover, the risk of accidents and disasters can be reduced to a minimum. It must be admitted, that so far, the supervision of building maintenance has not been well coordinated, for this reason, related agencies that are directly related to maintenance problems need to be formed to ensure that each building is properly maintained and is in a functional condition.

Consummation of such normative rules and technical standards is needed to meet the standard and government regulations. Currently with limited land availability, several construction projects have been built underground and Government does not have a detail regulation and its sanctions. Underground construction, such as MRT, tunnels, basements, have been built and will continue to be built in the future. This fact requires us to have building safety standards that are more reliable and better to prevent unexpected accidents. Safety standards for buildings below and above ground level will be different and need a more capable hazard detection and prevention system.

On technical administrative, a Building Permit (*Izin Mendirikan Bangunan* or IMB) is one of the main requirements in building construction. This IMB will be issued by the local government after considering input from the technical aspects of the relevant agencies. Regulation of the Minister of Public Works and Public Housing No. 5 of 2016 concerning Building Permits, which was enacted on February 22, 2016, provides guidelines on procedures for administering IMBs as well as legal sanctions for violators of this regulation[6]. Legal sanctions for violators of this regulation are thought to be rather light and only focus on administrative sanctions. Penalties for violations during the construction period are only in the form of a warning letter up to the maximum revocation of the IMB and suspension of construction development. The development process sometimes continues even though there are sanctions in the form of warnings and forced terminations in the field.

Although it had caused controversy, the Job Creation Act or *Ciptaker* was finally successfully enacted with the birth of Law Number No. 11 of 2020. The law was designed with the aim of reducing the time and cost of the land use permit process which often makes investors difficult, especially for Micro, Small and Medium Enterprises. To overcome this problem, the *Ciptaker* Law is expected to be a solution that benefits various parties because this Law can provide facilities to people who are really trying to create economic progress and added value in the land and property sector. On the other hand, this law is also expected to overcome and stop the bad practices of speculators and licensing brokers. This is answered

[5] Yusar is a Lecturer University of Indonesia, Statement on Tempo Magazine. Edition 21 January 2018. p. 30

[6] Minister for Public Works and Public Housing of the Republic of Indonesia, *Regulation of the Minister for Public Works and Public Housing Number 5 Year 2016 Concerning Building Permits*, 2016; Indonesia, *Government Regulation Number 36 Year 2005 Concerning Implementation of Law Number 28 Year 2002 Concerning Buildings*, 2005.

through a licensing mechanism that is transparent, accountable and guarantees legal certainty.

In terms of regulatory material, the *Ciptaker* Law also removes several articles within Law No. 28 of 2002 concerning Buildings. Article relates to License to Build a Building (IMB) has been deleted and replace with Building Approval (PGB). The purpose and objective of the abolition of these articles is to simplify permits that are felt to hinder development and investment in the construction and property sectors in Indonesia. Replacement of Building Permit (IMB) with Building Approval (PBG), is not intended to remove permits and technical aspects in construction development. The PBG will ease the licensing process, which is usually a lengthy process, and the central government will play more of a role in issuing this PBG, especially for construction projects that require large investments. The local government will act as a partner to the central government in making the Detailed Regional Spatial Plan which is the basis for the issuance of a Building Approval permit. The PBG permit application process is designed to be made online, so that the application process can be completed quickly. All technical and administrative aspects of PBG submissions can be submitted online so that intervention from various parties who are not interested can be avoided. Moreover, the time for issuing permits is also expected to be shorter.

The local government will play a role in the preparation of the Regional Spatial Detail Plan (RDTR – made in collaboration with the central government), the issuance of the Functional Eligibility Certificate (SLF) for buildings[7] and the supervision of the operation of existing buildings in their area. For new buildings, after building construction is completed and ready for operation, the building owner can apply for this SLF permit to the local government. This SLF is valid for 5 years and can be extended for another 5 years. Furthermore, the extension can be carried out again with due regard to the requirement to fulfill the requirements for the feasibility of the building's function.

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Maintenance, consistent and periodic certification, and reliability tests are priorities in the awarding of a Building Functions Eligibility Certificate (SLF). To be certain, without this certificate the building basically cannot be operated and fully functional. The local government in this case has the authority to seal off the building and prosecute violators. In the issuance of this SLF, several related agencies were involved in the building design process (including the granting of initial permits and building permits), the building process (implementation of the project) and control at the utilization stage. The relevant agency apparatus must test whether this building and its machinery can still be categorized as

[7] Indonesia, *Government Regulation Number 16 Year 2021 Concerning Implementation of Law Number 28 Year 2002 Concerning Buildings,* 2021., Chapter 1 Point 18.

"functionable" or "Not functionable". Relevant agency officials, who are experts in the fields of Structural, Electrical Mechanics, Fire hazard prevention and safety (K3 – Occupational Safety and Health) must be formed to validate the Certificate of Eligibility for Functions

So far, the data held by the Fire and Rescue Service provides a very clear record of the condition of high-rise buildings in Jakarta. Of the total 897 high-rise buildings, only 617 units, or around 69%, meet the requirements of strong safety and fire protection[8]. This means that 31% of high-rise buildings in Jakarta are in danger of fire which can cause material and loss of life for people who work in these buildings. Building owners are faced with legal sanctions as stipulated under Article 46 of Law No. 28/2002. This article obliges the building owner to be responsible for the use of his own building and any violation that results in material (property) loss, an accident resulting in lifelong disability, or the loss of another person's life can be prosecuted with imprisonment of between three and five years and a fine of Rp. 10% - 20% of the value of the building.

The main critical issues relate to lack of control and building maintenance monitoring from local government. Some buildings operate and function without proper regular maintenance and scheduled repair program. Sanctions stated in the regulation do not make stakeholders obey the law, the local government fail to implement sanction and penalty to owner of the buildings.

Furthermore, Jakarta Regional Regulation No. 8 of 2008 concerning Prevention and Management of Fire Hazards, also stipulates sanctions for building owners who cannot meet the building safety standards that have been set. The provisions of Article 59 emphasize administrative sanctions which can be in the form of warnings to closing / prohibiting the use of the building entirely. Meanwhile, the provisions of Article 51 apply criminal sanctions for violators of the regulations with a maximum term of imprisonment of 3 months or a maximum fine of fifty million rupiah[9].

In this paper, there are 2 issues relate to Indonesia building Laws will be highlighted and discussed. The first is why the implementation of current building law has not been well executed by local government, consultants, and building owners. And secondly is what the ideal legal system to develop compliance, awareness, and public participation in supporting the effective and adequate implementation of the law on high-rise building constructions.

2. RESEARCH METHODS

This research is normative legal research with a qualitative analysis that examines legal rules or regulations as a system related to a legal event[10]. This research was conducted with the aim of providing legal arguments as a basis for determining whether an event is right or wrong and how the event should be interpreted according to the law and focused on examining the legal concept of a criminal act which violates the comprehensive regulations or laws concerning buildings that are currently in effect. Normatively, this legal concept has

[8] Subejo, "Data Report," in *Fire Risk Management Seminar by Universitas Pelita Harapan Faculty of Science and Techonology* (Jakarta, 2018).
[9] Provincial Government of the Special Capital Region of Jakarta, *Regional Regulation of DKI Jakarta Number 8 Year 2008 Concerning Prevention and Management of Fire Hazard*, 2008.
[10] Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Empiris*, IV. (Yogyakarta: Pustaka Pelajar, 2017).

been regulated under the applicable law. However, the regulation still has many weaknesses, both in terms of its substance and in its application.

The legal issue encountered in this study is how to find the concept of an integral criminal policy in handling cases of violations of the law on high-rise buildings. In Law Number 8 of 2002 concerning high-rise Buildings, the handling and application of criminal sanctions for violators of this law is already regulated. However, in practice there have been disparities and discretion in judge decisions. There have also been conflicting prepositions in the law so that the aspects of certainty, justice, and the utility of the law in the case are disturbed.

The type of research used is normative law or literature, namely legal research conducted by examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. These materials are arranged systematically, studied, then a conclusion is drawn in relation to the problem under the study[11].

3. ANALYSIS AND DISCUSSION

3.1. Theory of Law Enforcement – Lawrence M. Friedman

Lawrence M. Friedman said that the effectiveness and success of law enforcement depends on three elements of the legal system, namely the legal structure, legal substance, and legal culture. The legal structure concerns the existing law enforcement officers, the legal substance includes statutory instruments and legal culture is a living law adopted in a society[12]. The relationship between the three elements of the legal system is like a mechanical work. Legal structure can be likened to a machine, legal substance is what machines do and produce, while legal culture is anything or anyone who decides to turn on and turn off the machine and decides how the machine is used. When associated with the legal system in Indonesia, Friedman's theory can be used as a benchmark in measuring the law enforcement process in Indonesia. The police are part of the structure along with the organs of prosecutors, judges, advocates, and correctional institutions. The interaction between these legal servants determines the strength of the legal structure. However, the enforcement of the law is not only determined by the strength of the structure but is also related to the legal culture that exists in society. However, until now the three elements as stated by Friedman have not been implemented properly, especially in the legal structure and legal culture. For example, in the legal structure, the Regional Government which is expected to be the supervisor of the construction and operation of high-rise buildings, its own members are involved in providing documents that are not in accordance with the regulations and policies of their own Regional Government. Likewise, the prosecutors, until now there are still prosecutors who are not honest in solving cases.

The legal structure relates to institutions or law enforcement including their performance (implementation of the law) and a structural system that determines

[11] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajagrafindo Persada, 1995).
[12] Lawrence M. Friedman, *Introduction to American Law* (Jakarta: PT. Tatanusa, 2001)., page 7.

whether the law can be implemented properly. The legal structure based on Law No. 8 of 1981 includes starting from the Police, the Prosecutor's Office, the Court, and the Criminal Correction Body (*Lapas*). Weak mentality of law enforcement officer results in law enforcement not running properly. Many factors affect the weak mentality of law enforcement officers including weak understanding of religion, economics, recruitment processes that are not transparent and so on. In the application of the legal structure of Law No. 28 of 2002, there are several parties outside the police who are involved in enforcing the law. In the event of a building failure or a fire in a building, the regional urban planning service and the fire department will be involved in law enforcement efforts by providing the results of their investigation to the police. Based on the data provided by this agency, the Police can take further legal action, including prosecuting the parties involved in the failure or fire of this building.

In several cases of building failures in Jakarta, most of the cases do not fall under a continuous legal domain in court, although many of the causes are the negligence of the building owner or manager. There are no clear legal sanctions performed for building owners and managers in the case of the building collapse in Slipi - Jakarta and several high-rise building fires that occurred in Jakarta[13]. The local authority / government must perform a thorough study and research when these cases occur to determine the root cause of building failures. The Office of Supervision and Control of Buildings (P2B) should be able to give warnings and reprimands if discrepancies and irregularities are found in one building and at the same time can close all activities in that building.

If there is no detailed and clear written evidence, it is very difficult to hold the violators responsible for the building failure. It can be emphasized that law enforcement factors play an important role in the functioning of the law. If the regulations are sound, but the quality of law enforcement is low, then there will be problems. Likewise, if the regulations are poor while the quality of law enforcement is good, the possibility of problems arising is still open. Judging from the government regulations and regional regulations which are derived from Law No. 28 of 2002, it is clear enough to provide legal direction and certainty for the parties involved in the implementation of high-rise buildings. Indeed, there are several articles that need to be revised to clarify the obligations and rights of the parties involved, but the implementation of the law has not been implemented properly. The difference between accidents and negligence in building management must be clarified, if there is an accident it does not mean that the entire building will be damaged and not functioning. The fire at the Attorney General's Office proves that there is no good building safety factor in preventing the spread of fire throughout the building.

The legal structure is a pattern that shows how the law is carried out according to its formal provisions. This structure shows how the courts, lawmakers and legal entities and processes operate and are carried out. In relation to the law concerning buildings, law enforcers (investigators/police) need to understand building management techniques and the latest technologies that are currently developing rapidly because they

[13] Emral Firdiansyah, "Runtuhnya Bangunan Gedung Mid-Rise Di Slipi Sebuah Kegagalan Fata," *Investor Daily* (Jakarta, January 7, 2020), accessed July 10, 2020, https://investor.id/national/runtuhnya-bangunan-gedung-midrise-di-slipi-sebuah-kegagalan-fatal.

are related to applicable standards and regulations. The P2B and fire services are authorized to examine the veracity of complaints or statements relating to criminal acts in buildings and to conduct examinations of parties who commit criminal acts. They can also ask for information and evidence from the parties in connection with a criminal act and conduct an examination of the bookkeeping, records and other documents relating to the crime committed. In their duties, they can report the results of their investigations to the Investigators of the State Police of the Republic of Indonesia. Once the investigation has been completed, they submit the results of their investigation to the Public Prosecutor through the Investigator of the State Police of the Republic of Indonesia keeping in mind the provisions of Article 107 of the Criminal Procedural Code.

Building law enforcement is related to the implementation of the law, which still has many weaknesses in its practice in the field, either due to the lack of skilled law enforcement officers or the public's lack of understanding about the implementation of high-rise buildings. Law enforcement officials who are directly related to buildings still do not understand about the application of legal sanctions so that the quality of law enforcement is not satisfactory even though there have been many building failures in the field.

Basically, the function of law as a "means of renewal of the community" is relatively still in accordance with the current development of national law, but it also needs to be equipped with bureaucratic empowerment that puts forward the concept of role models or leadership in law enforcement, so that the function of law as a means of reform can create harmonization between bureaucratic elements, and society. Buildings owned by the central and local governments should meet the applicable regulatory standards. In the case of fire at the Attorney General's Office, many regulations and standards were violated so this does not set a good example for building administrators in Indonesia. Insurance companies that cover high-rise buildings also do not play much role in helping law enforcement, police reports can be directly used as the basis for paying claims submitted. Investigations into building failures were not carried out by a team of experts so many aspects of accidents became the basis for claim payments.

The substance or content of the law as a reference in law enforcement has an important role as a guide or guide for law enforcers in carrying out their authority. This means that the weakness of the content of the law will result in ineffective law enforcement so that the objectives to be achieved are not met. Provisions on the basis for providing legal protection in the operation and utilization of high-rise buildings as stated in Article 37 of Law no. 28 of 2002 reads:

1) Building owner or users may use the building after the building has been declared to comply with conditions of proper function.
2) Building is declared to have complied with proper function conditions after fulfilling technical conditions, as set forth in Chapter IV of this law.
3) Periodic maintenance, handling and inspection must be performed so as to comply with conditions concerning proper functions.
4) In utilizing the building, owner and users have rights and obligations as governed in this law.

5) Procedure on how to maintain, take good care and inspect the building periodically as set forth in paragraph (3) hereof shall be further governed in a Government Regulation.

Building Functions Eligibility Certificate (SLF) is the basis for the operation and use of buildings, the rules regarding the Guidelines for Function-worthy Certificates are issued by the Ministry of Public Works through Regulation No. 25/PRT/M/2007 and the procedure for obtaining SLF is clearly stated in the regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia no. 27/PRT/M/2018 concerning Certificate of Feasibility of Building Functions[14]. However, many buildings that have not received SLF are still operated by building owners and users. There are no strict legal sanctions applied by law enforcement, the P2B service lacks resources to supervise and control existing buildings, the number of staff tasked with supervising and controlling is very minimal so it cannot carry out inspections for buildings around Jakarta[15]. The fire department only requires every year the building owner / user to report the maintenance activities of fire extinguishers and fire hazard mitigation simulations in the building. The fire department lacks the resources to exercise physical control over each existing building[16].

The provisions of paragraph (3) clearly require building owners and managers to carry out maintenance, handling, and inspections on a regular basis to keep meeting the requirements for proper function. However, legal sanctions for violators are not clearly stated in this law and its derivative regulations. Sanctions only focus on issuing warning letters and sealing off buildings and which are often not strictly enforced. Rarely seen in the field of buildings that are permanently sealed and violators are prosecuted for not meeting the technical requirements that have been set.

There are obligations that must be fulfilled by building owners or users, Law No. 11 of 2020 which is a revision of Article 44 of Law No. 28 of 2002, explains that there are administrative sanctions that must be faced if they fail to fulfill their obligations which result in losses for other parties. Article 41 also expressly stipulates the rights and obligations of building owners and users, and for this reason, the Building Functions Eligibility Certificate must ensure that the data is correct during its validity period. Functional tests of mechanical-electrical equipment and building structures must be carried out regularly and this is the responsibility of building owners and users. Articles 46 and 47 explain in detail about criminal sanctions for violators who do not meet the provisions or due to negligence causing the building to be unfit for function[17].

The provisions in Articles 46 and 47 are further regulated in Government Regulation No. 16 of 2021 concerning Implementation of Regulation of Law No. 28 of 2002 concerning Buildings. However, in this PP Building, it does not mention further

[14] Minister for Public Works and Public Housing of the Republic of Indonesia, *Regulation of the Minister for Public Works and Public Housing Number 27/PRT/M/2018 Concerning Functional Eligibility Certificate for Buildings*, 2018.
[15] Wahyu Kusumosusanto, "Kebijakan Dan Strategi Penyelenggaraan Bangunan Gedung," in *Buidling Maintenance Training Conducted by Direktorat Bina Penataan Bangunan*, 2017.
[16] Deny Andrias, "MKKK: Lima Tahap Bangunan Gedung Untuk Mendapatkan SLF," *Dinas Pemadam Kebakaran & Penyelamatan Kota Baubau*, accessed July 19, 2021, https://damkar.baubaukota.go.id/index.php//652125/pengetahuan/pengetahuan-umum.html.
[17] Articles 41, 44, 46, and 47. Indonesia, *Law Number 28 Year 2002 Concerning Buildings*, 2002.

provisions regarding the procedure for imposing sanctions. Fitriani A. Sjarif, a member of the Governor's Team for the Acceleration of Development (TGUPP) for the Harmonization of Regulations, explained that basically the article remains binding and can be implemented, the order to impose sanctions already exists, the procedure becomes free authority for the authorized apparatus according to its interpretation[18].

The procedure for maintenance and care has been stated in the Regulation of the Minister of Public Works No. 16/PRT/M/2010 concerning Technical Guidelines for Periodic Inspection of Buildings[19], however, the sanctions for building owners and users who do not carry out building maintenance and maintenance are still not clearly stated in this regulation and regional regulations. Broadly speaking, the laws and regulations below have included articles that regulate legal sanctions for violators, indeed there are sanctions that are not explained in detail causing law enforcement to still be lacking, especially in areas negligence of building maintenance.

Legal culture is defined as its belief system, values, ideas, and assumptions. Legal culture refers, then to general cultural habits, ways of doing opinions and thinking towards the social power of law and in certain ways. In other words, whether the climate of social thought and social forces inevitably determines how the law is used, avoided, or abused. Legal culture concerns legal culture which is human attitudes (including the legal culture of law enforcement officers) towards the law and the legal system. No matter how well the legal structure has been arranged to carry out the stipulated legal rules and no matter how good the quality of the legal substance that is made, without the support of legal culture by the people involved in the system and society, law enforcement will not run effectively.

The cultural attitudes of the Indonesian people who themselves do not fully comprehend the Law on Buildings and additionally are not supported by adequate legal awareness, often misinterpret that legal protection and lawsuits for building users are not in line with local culture and customs. This kind of situation must be corrected and continue to be guided so that the culture of respecting the rights of building users can be enforced realistically. The owner and manager of the building must pay attention to the condition of the building and ensure that the operation of the building can provide a sense of security and comfort for all building users. This can be created if sanctions for violations due to negligence and carelessness can be applied properly and consistently.

Compliance and public awareness of building users to comply with existing regulations is still lacking, this can be seen from their indifference in paying attention to building maintenance problems. Many buildings have not received SLF and have not renewed their SLF, but they continue to carry out activities and transactions for buying and leasing the building. This causes building owners and users not to worry if the building has not received SLF. Existing data shows that there are still many buildings that have not received SLF but can still operate normally without any legal sanctions

[18] Norman Edwin Elnizar, "Jerat Hukum Bagi Pemilik/Pengguna Bangunan Gedung Yang Sebabkan Kecelakaan," *Hukumonline.Com*, last modified 2018, accessed January 10, 2020, https://m.hukumonline.com/berita/baca/lt5a5ebc0a6a558/jerat-hukum-bagi-pemilik-pengguna-bangunan-gedung-yang-sebabkan-kecelakaan/?page=2.

[19] Minister for Public Works and Public Housing of the Republic of Indonesia, *Regulation of the Minister for Public Works Number 16/PRT/M/2010 Concerning Technical Guidelines for Periodic Inspection of Buildings*, 2010.

that educate and encourage building owners and users to meet these main requirements. *Appersi* (Association of Indonesian Flats Residents Association) reports that there are still many apartments and flats that violate the SLF but have been traded and still function[20]. Building users still feel comfortable and safe working, living and doing business in buildings that most likely do not meet qualified building safety standards.

In society, it is rare that SLF is required in building rental and purchase transactions (strata title), even building purchase and rental transactions are carried out while the building is still in the construction stage and without including the building SLF requirement in the purchase contract. Many buildings are operated and occupied by the community even though the SLF requirements cannot be met by the building owner (Developer), so accidents or disasters can happen at any time. The local government as the party that is expected to be able to enforce the law does not appear to be carrying out strict sanctions on the grounds that the building owner is entering and managing documents to complete his SLF.

3.2. Weakness in Regulations in the Field of Buildings and Construction

Law No. 28 of 2002 concerning Buildings has been laid out in government regulation No. 16 of 2021 and detailed by the Jakarta Regional Government through Regional Government Regulation No. 7 of 2010. Several legal issues in the regulation of building and construction services lie within the Regional Government Regulation No. 7 of 2010 of Government Regulation no. 16 of 2021 concerning the Implementation of Law No. 28 of 2002 concerning Buildings. Several issues in the form of the relationship between government and regional regulations are not in line, which are described as follows:

1) Article 10 of the Regional Regulation on the classification of buildings does not mention the specific classification of buildings, but the Government Regulation states that the regulation regarding this matter is regulated in a Ministerial Regulation, and there is no ministerial regulation that explains this.
2) Regarding the ownership status of the building under Article 13 of the Regional Regulation do not align with the contents of Article 303 of the Government Regulation, therefore the articles of the Regional Regulation must be corrected immediately.
3) Article 26 of the Regional Regulation on Buildings regulates the architectural requirements of a building, regarding the requirements for the appearance of the building which should not be required, however the Government Regulation does not regulate the appearance of the building.
4) Under Article 27 of the Regional Regulation, the Governor may require the appearance of buildings with certain architectural characteristics based on the area, but the Government Regulation does not stipulate this requirement.

[20] Puput Tripeni Juniman, "Appersi: Hampir Seluruh Apartemen Melanggar SLF," *CNN Indonesia*, October 11, 2016, accessed January 19, 2020, https://www.cnnindonesia.com/nasional/20161009222937-20-164349/appersi-hampir-seluruh-apartemen-melanggar-slf.

5) Under Article 57 of the Regional Regulation, all buildings must be equipped with protection against fire hazards, except for simple residential houses. This means that all buildings must be equipped with fire protection equipment.

Article 46 of Law no. 28 of 2002 mentions criminal sanctions. Government Regulation No. 16 of 2021 does not stipulate the existence of criminal sanctions, while Regional Regulation No. 7 of 2010 regulates criminal sanctions. The Criminal Sanction under Article 46 regulates the limit on the restricted fine (*ultimum remedium*), namely a maximum imprisonment of 3 years, 4 years, 5 years in accordance with the risks arising from acts of negligence in the implementation of building construction, as well as fines of a maximum 10%, 15% and 20% of the building value.

The penalty of confinement in Regional Regulation No. 7 of 2010, a maximum of 3 months and a maximum fine of Rp. 50,000,000, (fifty million rupiah) for violations related to Article 24 Paragraph (1), Article 42 Paragraph (1), Article 51, Article 64, Article 137 Paragraph (1), Article 144 Paragraph (2), Article 150, Article 151, Article 152, Article 162 Paragraph (1), Article 189 Paragraph (1), Article 198 Paragraph (1), Article 195, Article 206 Paragraph (2), Article 219, Article 220, Article 253 Paragraph (1), Article 255 Paragraph (1), and Article 259 Paragraph (1).

Meanwhile, the maximum imprisonment is 6 months and a maximum fine of Rp. 500,000,000 for violations related to Article 13 Paragraph (3), Article 15 Paragraph (1), Article 124 Paragraph (3), Article 183 Paragraph (1), Article 186 Paragraph (4), Article 188 Paragraph (1), Article 191, Article 192, Article 195, Article 231 Paragraph (1), Article 237 Paragraph (1), and Article 245 Paragraph (1).

Therefore, in the provision of criminal sanctions, it is necessary to see further why in Government Regulation No. 16 of 2021 is not regulated while the criminal provisions are regulated in Regional Regulations No. 7 Year 2010 The regulation on the use of buildings in Law No. 28 of 2002 is not regulated in sufficient detail regarding sanctions for owners and managers if they do not carry out building maintenance. Only DKI Regional Regulation No. 7 of 2010 includes sanctions for this violation, but the sanctions do not have a positive impact on building owners, managers and users in Jakarta which operates its buildings without SLF.

The application of sanctions which should be carried out by the DKI Regional Government cannot be carried out optimally because of the limited number of personnel, it is impossible with the existing staff to inspect and supervise all buildings in Jakarta. The SLF given to buildings is valid for 5 years and should be at least every year the maintenance of existing buildings is monitored and checked for reliability. The owner should be able to request building inspection services from a third party registered with a construction service agency accredited by the government to carry out routine building inspections and report the results of the inspection to the local government as evidence of the maintenance and upkeep of the building. If there is a violation, the service provider who submits the report may be subject to severe sanctions.

One of the weaknesses in Law No. 2 of 2017 is concerning the sanctions in the event of a building failure. As for this Law, building failure is given the following meaning: a condition of the collapse of the building and/or the non-functioning of the

building after the final delivery of the Construction Services. Thus, the condition for building failure which is included in the scope of building failure in the Construction Services Law is the failure of the building that has been submitted to the Service User, so that it is not included in the collapse of the building before the final delivery of the results. For this reason, when the final delivery of the results of construction services is crucial, which in practice is proven by written evidence as stipulated in the construction work contract.

The next question is who bears responsibility in the event of a building failure. In the construction work contract as the legal basis for the implementation of construction services, there are 2 (two) parties who are bound, namely the Service Provider and the Service User. Under the 2017 Construction Services Law, Service Providers are responsible in the event of a building failure caused by the implementation of construction services that do not meet the security, safety, health and sustainability standards stipulated in the 2017 Construction Services Law for building failures that occur after the expiration of the service provider's coverage period for building failures. The coverage period for building failure which is the responsibility of the service provider is stated in the construction work contract which is adjusted to the construction age plan. Even though the planned construction age is more than 10 (ten) years, the service provider is only responsible for the failure of the building for a maximum of 10 (ten) years from the date of final delivery of construction services. Here the liability of the service provider is limited to the duration of the guarantee stated in the agreed employment contract. If the building failure occurs after the work contract guarantee ends, the service provider cannot be held accountable again. This becomes a problem if the building failure occurs after 10 years, the full responsibility lies with the building owner and manager. Whereas the failure of the building can occur due to the fault of the service provider in the implementation of construction or building design, and the damage occurs after the guarantee period of the building ends.

The implementation of construction services is a complex matter and involves many interests, therefore in the event of a building failure it is necessary to have a party capable of providing an objective and professional view regarding the responsibility for the failure of the building. If the failure of the building is caused by the service provider, this must be considered carefully the main cause of the failure of this building, considering that service providers in construction services can involve more than one function because the expertise of the service providers is different from one another. Therefore, to determine the cause of a building failure and the party responsible for the failure, this law appoints an expert appraiser to perform this function.

The articles in this law do not include criminal sanctions for service providers involved in building failures. Article 63 only mentions that the service provider is obliged to replace or repair the Building Failure as intended which is caused by the fault of the Service Provider. Article 67 states that service providers and/or service users are obliged to provide compensation in the event of a building failure. Article 98 explains that service providers who do not fulfill the obligation to replace or repair building failures may be subject to administrative sanctions.

With the abolition of criminal sanctions for construction service actors, the 2017 Construction Services Law places the relationship between service users and construction service providers in the realm of civil law which is in accordance with the basic legal relationship between the parties, namely the construction work contract. Actually, under the 1999 construction services law, criminal sanctions were stated for service providers who fail to provide their services which lead to building failures. The criminal sanction can be in the form of a fine of 10% of the contract value or a maximum sentence of 5 years in prison.

Even though Law No. 2 of 2017 only regulates non-criminal sanctions, the determination of who is responsible can continue to the imposition of a criminal article when it causes a third civil or fatal victim to cause material losses, is stated under Law No. 28 of 2002. The enforcement of criminal and civil law can involve elements of the police and the prosecutor's office. However, according to Article 60 of Law No. 2 of 2017 simultaneously or before the police element enters to investigate this incident, it is necessary to first determine the expert appraiser appointed by the Minister of PUPR.

The expert appraiser oversees investigating the events that occurred, to determine whether they are categorized as building failures or not, and to determine who can be held accountable. The expert appraiser involved must have a certificate of competence and expertise issued by the official institution in Indonesia, and have sufficient experience in investigating a building failure, and be registered as an expert appraiser with the government.

Within the span of 30 days, the Minister must appoint an expert appraiser since receiving the report on the event of a building failure. Expert appraisers must have done and reported their work within 90 days at the latest. In the process of assessment and investigation, the expert appraiser must be independent and objective in determining the responsible party. The results of the determination by the expert appraiser will be one of the clues or evidence when the event enters the criminal or civil realm.

Several work accidents in the implementation of construction and recent building failures should be thoroughly investigated with regulated legal. This is to build public confidence that the current infrastructure and building development process does not only meet the aspects of speed and timeliness, but also meets the aspects of building safety and sustainability.

The weakness in this investigation and assessment is in determining who is responsible in the event of a building failure. For example, in the process of building fires, it is very difficult to determine who is at fault in managing the building, whether there is an element of negligence or intent in it, even very basic questions such as: why is there not enough budget to maintain the building? Why is building maintenance not being carried out? Why are there no periodic building maintenance reports? Why are the results of the fire department audit not followed up? In the end there was no good settlement, and the case was forgotten.

Preventive actions should be given priority in the application of this building law. It is unfair for the victims to only receive compensation due to the failure of the building that occurred, if in fact this failure event could have been prevented if the owner and building manager carried out their obligations to maintain the building.

So far, there have been regulations regarding excellent standards and rules for maintaining and maintaining buildings, but the existence of these standards and rules does not seem to be able to be applied optimally if the existing sanctions are not coercive and educate building owners, managers and users to obey them. The sanctions contained in Law No. 28 of 2002, its implementing regulations and the existing regional regulations are felt to be too light, so that there are still many violations that occur. The local government as well as the party that can provide guidance and application of the law, cannot perform its function properly due to a lack of staff and poor details of sanctions.

It is unexpected if the state budget and private sector investment are used for construction sector development activities, both in infrastructure or high-rise buildings, the value of benefits and sustainability are not proportional to the frequent occurrence of accidents or building failures. In other words, do not let the series of accidents in the last decade give you a conclusion or perception that the construction was carried out not in accordance with the standards or procedures that have been regulated. Law enforcement on recent building failures can be an entry point in realizing the objectives of Law No. 28 of 2002 and Law No. 2 of 2017 to improve the governance of safe, quality, and accountable construction of infrastructure and buildings.

3.3. Strengthening Policies and Sanctions

As a means of development, the law functions to provide policy guidance in the implementation of the life of the nation and state. The law also has the aim of protecting people's lives through the order of norms with dimensions of justice, utility, and legal certainty. The purpose of such a law is carried out in various ways. Among other things, actively creating conditions for people's lives that are orderly, regulated, safe and peaceful. Along with that, the law also works in preventing violations and abuse of authority. All these lead to order, and justice for the whole society.

The Law No. 28 of 2002 concerning Buildings and Law No. 2 of 2017 concerning Construction Services require reorientation and strengthening of policies in the fields of security, safety, health and construction sustainability, especially high-rise buildings that have been built or are currently being built. Policy reorientation is needed to ensure the conception of legal protection for building owners, managers, and users. The redirection is to clarify the rights, obligations, and responsibilities of the owners, managers, and users of the building. Related to that is the participation of the community in supervision which still needs to be encouraged. In this case, the role of local governments in supervision is still not fully reflected in operational technical regulations through Regional Regulations or Governor Regulations. These legal instruments have not been able to guarantee the realization of legal protection as expected. For this reason, amendments to the law are a necessity and the provision of operational technical rules is a logical consequence in the context of realizing effective legal protection for owners, managers, and users of buildings and society in general.

Specifically, the strengthening of legal sanctions is required, both in terms of normative regulation and implementation. Both are related to the aspect of legal certainty, as one of the legal objectives to be realized in the legal regulation of high-rise

construction in Indonesia. In the perspective of legal substance, what needs to be imposed are regulatory norms regarding accident prevention in the process of building high-rise buildings and negligence which must be minimized, including in building management in accordance with the standards of suitability for use. System-wise, policy strengthening also addresses the need to establish a building auditing institution to audit the construction and management of high-rise buildings in a transparent, credible, and accountable manner. The position, duties, and functions, as well as the authority of this building audit institution still need to be regulated firmly and clearly.

Furthermore, what is also important to be strengthened in the regulatory norms is the regulation of criminal sanctions. These provisions serve as guidelines for the implementation of law enforcement in the field of buildings and construction services, in accordance with the Theory of the Purpose of Sentencing and is based on the Principles of Dignified Justice. Dignified Justice provides guidelines for resolving legal problems that occur by considering the root causes, to restore a balance between the rights and obligations of owners, managers, and users of buildings as well as the wider community.

4. CONCLUSION

The implementation of current building Law in Indonesia is not well implemented, stakeholders are still looking for the loophole in avoiding their duties and obligation to maintain and control the existing buildings. It is necessary to make amendments to Law No. 28 of 2002 concerning Buildings, especially those that regulate in detail the legal sanctions for violators of the norms of the law. In the amendment, the role of local governments must be clearly stated, so that the application of sanctions and law enforcement can be carried out properly. Amendments also need to be made to Law No. 2 of 2017 concerning Consultant Services, the sanction and penalty do not generate awareness to consultant to perform in the satisfactory level, so that consultants can be more responsible for the services or construction of the buildings they make. Legal sanctions need to be included in this law to ensure the safety of the buildings it builds and operates. In this Law on Construction Services, it is necessary to regulate associations (organizations) that can provide certificates of expertise for companies or individuals, so that their expertise can be guaranteed. The government must be able to regulate the credibility of the association so that it can truly provide accountability for the certificate it provides.

Amendments to these two laws need to be made to ensure existing buildings operate according to good safety and comfort standards. The Functional Eligibility Certificate must be used as a tool to control the operation of the building. For this reason, periodic audits need to be carried out to ensure the proper functioning of this building. The legal sanctions contained in each of these laws must be developed to provide a sense of justice for the implementation and management of buildings in Indonesia. After all, Indonesian law is built based on the philosophy and noble values of a nation that is believed to be true. The concept of justice in this law must truly reflect the two precepts of Pancasila, namely just and civilized humanity, and social justice. Strict sanctions should be applied to prevent building failures. Within the framework of this law enforcement, local governments must play a greater role in conducting periodic inspections of each existing high-rise building. Local

governments can work with consultants or associations to conduct building audits to ensure that all buildings have adequate fire/building failure detection. Provisions regarding the number of fines also need to be adjusted and implemented properly so that they can provide a deterrent effect for violators.

The ideal legal system to develop compliance, awareness, and public participation in supporting the effective and adequate implementation of the law on high-rise building constructions, the Government needs to establish a Building Audit Agency to be able to review the condition of existing buildings, as well as provide technical recommendations for the maintenance and repair of the building. The technical recommendations given must be used as a basis for applying sanctions for building operators who fail to provide suitable buildings. This audit obligation can be included in a Regional Regulation to stipulate that every building in the area is monitored regularly / periodically to ensure that maintenance and repair activities are carried out properly.

The Building Audit Institute can be formed from a Professional Expert Team (TPA), a Technical Assessment Team (TPT), and a Building Expert Team (TABG) which are permanently formed by the Regional Government/Governor. This Building Audit Institute can be formed to assist the central government and local governments (Governor) in carrying out their functions to ensure the safety and security of buildings, including their users.

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NOTARY MALPRACTICE IN CARRYING OUT THEIR DUTIES AND AUTHORITIES

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Abstract

As an official whose duty and authority is making authentic deeds, a Notary is responsible for all the content of the deed he/ she made and all the information relating to the deed made before/ by him/ her, based on the Official Oath of the Notary and Notary Law. Notary is a noble position (*noblese obligue*), and Notaries are expected to keep their dignity as official. The consequences of such honorable position and authority of Notary is that Notaries are obliged to do everything that is regulated in the Notary Law and obey everything that is prohibited by the law, regulations, and the Notary's Code of Ethics, in carrying out both their duties and authority, Notaries are responsible for any consequences arises from any violation of the position of a Notary. For any malpractice committed by a Notary, a Notary may be held liable to civil and criminal lawsuits. This article explains about: (1) The law and regulations applied to Notary in Indonesia in carrying out their duties and authorities. (2) How does the Notary practice in Indonesia in carrying out their duties and authorities. (3) How the ideal Law and Regulations should be applied to Notary, so that Notary malpractice can be eliminated, or at least reduced, and Notaries can carry out their duties and authorities as they are mandated.

Keywords: *Notary malpractice, authentic deed, Notary's Code of Ethics*.

1. INTRODUCTION

Every society needs a figure whose statements are reliable, trustworthy, whose signature and the seal to provide guarantees and strong evidence of an impartial expert and legal advisor who has no defects (*onkreukbaar* or unimpeachble)[1]. The position of a Notary in the community plays an important role to meet the needs of the community in making an authentic deed. Society needs someone with an honorary position who can answer their needs in making authentic deeds, can provide legal certainty, and can provide confidence in the making of written authentic evidence. So, in addition to being responsible to oneself, a Notary is obliged to be legally responsible to the public in providing legal services. The written evidence referred to is the authentic deed as stated in Article 1868 of the Civil Code[2]. As a continuation of Article 1868 of the Indonesian Penal Code, a law was enacted to appoint public officials who were authorized to make an authentic deed and therefore the Notary was appointed as the official[3]. Notary is an authorized official to make an authentic deed and other authorities as stipulated in the law[4].

Indonesia is a state law[5]. In the current era of globalization, Notary position play an important role in the society. Administering law as one of the efforts to create legal certainty and legal protection for the society. Administering the law is done in the form of documents, and authentic documents present as strong evidence inside and outside the court. The Notary position exist to serve the society, in particular by making authentic deeds.

[1] Tan Thong Kie, *Buku I Studi Notariat Dan Serba Serbi Praktek Notaris* (Jakarta: Ichtiar Baru Van Hoeve, 2011)., page 162.
[2] Articles 1866 and 1868 of the Indonesian Civil Code Book. R. Soebekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 2004).
[3] G. H. S. Lumban Tobing, *Peraturan Jabatan Notaris*, 3rd ed. (Jakarta: Erlangga, 1992)., page 33.
[4] Indonesia, *Law No. 2 Year 2014 concerning of Amendment of Law No. 30 Year 2004 Concerning of Notary Official*, State Gazette No. 3 Year 2014, Additional State Gazette No. 5491, Article (1) number (1).
[5] Indonesia, *1945 Constitution*, article 1 verse (3).

The function of the State is to provide services to the society in order to improve the general welfare of its citizens[6]. Indonesia as a state of law, also adheres to the principle of the Welfare State, as stated in the 1945 Constitution. So that in short, the Indonesian Law State based on the 1945 Constitution is a Welfare Law State[7]. Indonesia as a Welfare State is a country that is towards justice and shared prosperity in a just and prosperous society text by providing services to the society in order to improve the general welfare of its citizens. Improving the society welfare is also applied in the context of making a good and correct notarial deed with no malpractice actions.

The regulation of the position of Notary was originally regulated in *Staatsblaad* 1860 Number 3, which is currently replaced by Law Number 30 Year 2004[8] concerning Notary Position and has been amended by Law Number 2 Year 2014[9] concerning Amendment to Law Number 30 Year 2004 concerning Notary Position. Notary is a Public Official authorized to make authentic deeds and other authorities as referred to in the law.[10]

Whereas in carrying out their duties, Notaries are sometimes found doing malpractice in making notarial deeds, which can detriment the interest of the parties related in the deed. The malpractice carried out by the Notaries in making the authentic deed is caused by various factors, including but not limited to honor fee, unfair competition among the Notaries, Notaries acts that violate Notary's Code of Ethics which demean the honor and dignity of the Notary's position, Notaries' limited understanding and knowledge of the rules and laws that are applies, the alignments of Notaries to any side, and/ or the negligence of the Notary himself. Various malpractice cases carried out by the Notary decrease public trust in the position of Notary, which in turn gives bad prejudice to Notary position.

In practice, notaries sometimes found doing malpractice in carrying out their duties and authorities, such as violations found in cases in court (judicial cases) and cases resolved by the Notary Supervisory Council (non-judicial cases). An authentic deed made by a Notary sometimes disputed by one of the parties in the deed because it is considered to be detrimental to its interests. The dispute related to an authentic deeds includes but not limited to denying the contents of the deed, signature and presence before the notary, even the allegations that in the authentic deed is found false information. Some Notaries commit malpractice in executing their position due to lack of knowledge of law and regulations, but also tempted by high-paid fee offered from the clients for making such deed as the clients' required.

The malpractice actions carried out by the Notary harms the parties in the deed and in result, Notary position has lost public trust in the society. To overcome this, the need for certainty and legal protection for the society for the making of an authentic deed by a notary. Apart from that, the Notary also needs to get legal certainty and protection in carrying out his position. When both side, Notary and the parties have the legal certainty and legal protection, then the law is present for justice.

Considering the number of violations of malpractice cases, it is necessary to understand the causes of the notary malpractice cases, and how the ideal legal arrangements that should be applied so as to reduce the number of malpractice cases committed by the Public Notary.

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[6] Bewa Rawagino, *Hukum Tata Negara* (Bandung: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Padjadjaran, n.d.)., page 8.

[7] J. C. T. Simorangkir, *Hukum Dan Konstitusi Indonesia* (Jakarta: PT. Gunung Agung, 1986)., pp. 188-189.

[8] Indonesia, *Law No. 30 Year 2004 concerning Notary Position*, State Gazette No. 117, Additional State Gazette No. 4432.

[9] Indonesia, *Law No. 2 Year 2014 Concerning of Amendment of Law No. 30 Year 2004 Concerning of Notary Position, op. cit.*

[10] Indonesia, *Law No. 30 Year 2004, op. cit.,* Article (1) number (1).

Notary as an official position stated by Law Number 30 Year 2004 concerning Notary Position, where the position of Notary as a position that is expected to assist public in making authentic deeds, which in the end, the Notary has a role as a State representative to achieve community welfare.

With the issuance of Law Number 30 Year 2004 concerning Notary Position promulgated on October 6, 2004 in conjunction with Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position promulgated on January 15, 2014, the regulation of the position of Notary has been well applied to the public, especially those who need legal certainty towards making authentic deeds. Nevertheless, the number of Notaries malpractice cases still found inside and outside the court, so that another amendment of Notary Law need to be published, in order to reduce the Notaries malpractice cases. In this article will be elaborated about: (1) The law and regulations applied to Notary in Indonesia in carrying out their duties and authorities. (2) How does the Notary practice in Indonesia in carrying out their duties and authorities. (3) How the ideal Law and Regulations should be applied to Notary, so that Notary malpractice can be eliminated, or at least reduced, and Notaries can carry out their duties and authorities as they are mandated.

2. RESEARCH METHODS

The research was conducted based on a normative juridical approach, including research on the principles of law, sources of law, theoretically scientific legislation that can analyze the issues discussed. In this research, the statute and the legal concept analysis (analytical & conceptual) approach were used. The statute approach was carried out by examining all laws and regulations relating to legal issues that are handled. The statute is the legislation and regulation. Primary legal material consisted of: Law Number 30 Year 2004 concerning of Notary Position, Law Number 2 Year 2014 concerning of Amendment of Law Number 30 Year 2004 concerning of Notary Position, and Notary's Code of Ethics. Whereas secondary legal material consisted of the writings of legal sources that can provide an explanation of primary legal materials, such as law books, journals, legal researches, *et cetera*.

3. ANALYSIS AND DISCUSSION

3.1 Public Notary in Indonesia

Public Notary is a public officer authorized to prepare authentic deed and having other authorities as referred to in UUJN.[11] Position as Public Notary is an important part of Indonesian Country as referred to in Article 1 paragraph (3) of the 1945 Constitution of the Republic Indonesia.[12] Through the principles, the State guarantees legal certainty, order and legal protection within society[13]. One of guarantees for the legal certainty is provided through legal protection realized from the strongest and the most complete evidential item having very important role, called Authentic Deed.

Authentic Deed prepared before/ by Public Notary has the most complete and the strongest evidence so that its authenticity is not doubtful (*voldoende bewijs*). Therefore, in exercising his profession, the Public Notary should be careful and guided on any regulations enacted and if the Public Notary is negligent then the general public will be harmed.

[11] Indonesia, *Law No. 30 Year 2004, op. cit., Article* 1 number 1.
[12] Indonesia, *the 1945 Constitution of the Republic of Indonesia, op.cit.,* Article 1 paragraph (3).
[13] Syafran Sofyan, "Notaris Openbare Amtbtenaren," *Jimly School*, accessed January 31, 2020, https://www.jimlyschool.com/baca/9/notaris-openbare-amtbtenaren-syafran-sofyan.

Public Notary has main duties to prepare authentic deed with respect to any actions, agreement, and decision required by any laws and regulations and/or desired by any party concerned for declaration in authentic deed, guarantee the certainty of date of the deed preparation, keep the original deed, provide photocopy, copy and quote of the deed, all of which is carried out insofar as the preparation of the deed is not assigned or excepted to any other officer or other person specified by law.[14]

Public Notary also has any other duties to make legalization, *waarmerking, copy colationee,* acknowledgement to the true photocopy of the original, provide legal counseling in relation to the preparation of deed, prepare certificate related to land affairs (in his capacity as PPAT/ Land Deed Official), prepare the deed of minutes of auction.[15]

On any deed he prepared, Public Notary has obligation to read out the deed, and that read out, or not read out must be stated at the end of the deed. Objectives of the foregoing are to make each party knows whether at the time of preparation the deed is read out or not. If the deed was read out, then each of the appearing persons is considered to have known the contents of the deed.

Public Notary has obligations such as having existing office with address, and they have to act honest, careful, neutral, and guard the interest of the parties, to make the notarial deed and keep it safe in Notary protocol, issue the copy of the deed, giving service to the society (unless there is lawful reason to refuse), keeping secret of the parties testimonies, to make bundle of the deed, to make the deed list, protest list, testament list and report it to the Indonesian Law and Human Rights Department monthly, giving free notarial service to the poor society, showing the deed only to the parties, their hereditary, or the rightful party by law. Notary Law Number 30 Year 2004 applies the principles of refusal rights *(verschoningsplicht)* of Public Notary. Public Notary who is asked to act as witness may refuse or is discharged from his obligations to give testimony. [16]

Prohibitions to Public Notary shall have intentions to guarantee legal certainty for any people using the Public Notary services, and to simultaneously prevent unfair competition among the Notaries Public in performing their profession. Prohibitions for the Public Notary are set forth in Article 17 paragraph (1) of UUJN.[17] The prohibitions are also specified in Chapter III Article 4 of the Amendment to the Public Notary Code of Ethics as a result of the Extraordinary Congress of the Indonesian Public Notary Association held in Banten on 29-30 May 2015.[18] Sanctions to any Public Notary who make violation of the aforesaid provisions may be in the form of oral warning, written warning, suspension, honorable discharge, or dishonorable discharge.[19] Laws and regulations regulating Public Notary in Indonesia exist since the era of Dutch East Indies colonial until today, which we can see in Codes of Civil Law that still regulates Public Notary in carrying out their position to the society.

The theory of Lawrence M. Friedman, which mentions three main elements of the legal system that determine the success of law enforcement, as follows: first legal Structure, including legal institutions, law enforcement officers, and law enforcement systems. Existing legal

[14] Indonesia, *Law No. 2 of 2014, op. cit.*, Article 15 paragraph (1).
[15] *Ibid.*, Article 15 paragraph (2).
[16] *Ibid.*, Article 1909 paragraph (3) in conjunction with Article 16 paragraph (1) e), f) of UUJN.
[17] Indonesia, *Law Number 30 of 2004, op. cit.,* Article 17 paragraph (1).
[18] *Kongres Luar Biasa Ikatan Notaris Indonesia* (the Extraordinary Congress of the Indonesian Public Notary Association), *op. cit.*, Chapter III, Article 4.
[19] Indonesia, *Law Number 30 of 2004, op. cit.,* Article 85.

structure in the notarial sector lays on Notary Regional Supervisory Council (Majelis Pengawas Daerah Notaris/ MPDN). When a Notary malpractice occurs regarding authentic deed made before/ by Notary, the injured party can report to the Notary Supervisory Board (Majelis Pengawas Notaris) and the initial inspection is carried out by the Notary Regional Supervisory Council (MPDN), followed to the next level with the Assembly Regional Notary Supervisor (Majelis Pengawas Wilayah Notaris/ MPWN), and at the final level with the Notary Central Supervisory Council (Majelis Pengawas Pusat Notaris/ MPPN).

Second legal Substance/ Substance Rule of the Law, encompassing all written and unwritten rules, both material law and formal law. In the field of notary, the legal substance is Notary Law (Undang-undang Jabatan Notaris/ UUJN), including Law Number 30 Year 2004 concerning Notary Position, Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position, Indonesia Law and Human Right Minister Regulations, Notary Ethics Code, Articles of Association/ Bylaws of the Indonesian Notary Association (INI), jurisprudence and other relevant implementing regulations and third, legal Culture, is an emphasis on the culture in general, habits, opinions, ways of acting and thinking, which direct the social forces in society[20]. In the notarial sector, legal culture concerns how the behavior of a Notary in carrying out his position in accordance with the regulations of the Public Notary and the Notary Ethics Code that applies.

Legal structure in Notarial sector is the Notary Regional Supervisory Board (Majelis Pengawas Daerah Notaris/ MPDN), Notary Area Supervisory Board (Majelis Pengawas Wilayah Notaris/ MPWN), and Notary Central Supervisory Assembly (Majelis Pengawas Pusat Notaris/ MPPN). Whenever there is Notaries malpractice cases arise, MPDN can take actions after receiving report from the society.[21] After investigated by MPDN, the cases will go to the next procedure to MPWN, and then to MPPN. Legal substance in Notarial sector is the Notary Law. Notary malpractice case that violate the Notary Law for example is violation of Article 13 of Law Number 30 Year 2004, which reads:

"The notary is dishonorably discharged by the Minister because he was sentenced to prison based on a sentence that has obtained permanent legal force for committing a crime that is threatened with imprisonment of 5 years or more."

Legal culture in Notarial sector can be seen in the behavior of the Notaries themselves, how they conduct according to the Notary Law and Notary's Code of Ethics. Notaries malpractice cases regarding of the legal culture as a violation of Article 12 letter c Notary Law Number 30 Year 2004, which regulate that notary is dismissed with no respect if it violates the dignity of the position of the Notary.[22] The elucidation of Article 12 letter c Notary Law Number 30 Year 2004 states that the intended acts are gambling, drinking, drug use, immoral acts.[23]

Another theory can be applied is Gustav Radbruch's theory, which teaches 3 (three) basic elements of law, which is justice, expediency and legal certainty. Where legal certainty in the notarial sector is in the Notary Law Law Number 30 Year 2004 concerning Notary Position, Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position, Indonesia Law and Human Right Minister Regulations, Notary Ethics Code,

[20] Lawrence M. Friedman, *The Legal System, A Social Science Perspective* (New York: Russel Sage Foundation, 1975)., pp. 12-16.
[21] Indonesia, *Law No. 30 Year 2004, op. cit.,* article (71) letter e.
[22] *Ibid.,* Article 12 letter c.
[23] *Ibid.,* Elucidation of article 12 letter c.

Articles of Association/ Bylaws of the Indonesian Notary Association (INI), jurisprudence and other relevant implementing regulations.

In terms of expediency, it can be seen that clients benefit from obtaining an authentic deed which can be used as the strong evidence when legal actions committed. In terms of justice, the Notary Law gives protection to the parties that made the authentic deeds, whenever Notaries malpractice case arise, the public can report to the Notary Regional Supervisory Board (MPDN) for the case settlement. The Notary Law also gives Notaries the right to deny a summons from the Police/ Public Prosecutor with their own reasonable reason. The Notary Honorary Council's decision will give permission/ to refuse the Police/ Public Prosecutor summons to the Notary. Legal protection for both the public and Notaries is a form of justice provided by the Notary Law.

3.2 Regulation and Supervision of Public Notary

3.2.1 Regulation on Public Notary Position

For any violation of law and regulation by Notary, Notary may be subject to sanctions by the Notary Supervisory Council in the form of verbal warning, written warning, honorable discharge, dishonorable discharge.[24] Civil charges and criminal charges could also subject to the Public Notary through court. In case of trial resolved by the Notary Supervisory Council.

It is necessary to make supervision on violation made by the Public Notary, as set forth in Article 67 of the Law Number 2 of 2004. Supervision to the Public Notary shall be executed by the Minister of Laws and Human Rights of the Republic of Indonesia who delegates his authorities to the Notary Supervisory Council.[25]

A matter related to the Notary Supervisory Council where the Chairman of Regional Supervisory Council is always held on *ex officio* basis by the Head of Regional Office of the Ministry of Laws and Human Rights of the Republic of Indonesia, and such position as the Head of Regional Office of the Ministry of Laws and Human Rights of the Republic of Indonesia quickly changes in bureaucracy, the newly appointed official/ the Head of Regional Office of the Ministry of Laws and Human Rights of the Republic of Indonesia can not perform his duties either as the Chairman of Regional Supervisory Council or as the Chairman of Regional Honorary Council before being inaugurated by the Laws and Human Rights of Republic of Indonesia Minister, and therefore, this causes many malpractice cases of the Public Notary could not handled properly.

3.2.2 Supervision of Public Notary in Carrying Out their Authorities

Supervision to Public Notary is required for Notary in carrying out their authorities, to comply with their official oath and with the laws and regulations. Before legislated by Notary Law Number 30 Year 2004, supervision to Public Notary conducted by District Court.[26] Furthermore, the authorities of supervision and examination to Public Notary, after the legislation of Notary Law, belong to the Minister of Laws and Human Rights which in execution thereof the Minister shall form the Notary Supervisory Council. The Minister as the Head of Department of Laws and Human Rights of the Republic of

[24] *Law No. 30 of 2004, op. cit.,* Article 85.
[25] *Law No. 2 of 2014, op. cit.,* Article 67.
[26] Indonesia, *Law Number 8 of 2004 regarding Amendment to Law Number 2 of 1986 regarding General Court*.

Indonesia has duties to assist President in administering partly the government affairs in the field of laws and human rights as set forth in Article 67 of the Law Number 30 of 2004.[27]

Supervisory Council is an entity having authorities and obligations to make supervision and patronage on Public Notary.[28] Supervision to Public Notary is intended that the Public Notary in exercising his professional duties will fulfill any requirements and execute his duties pursuant to the provisions of the prevailing laws for the benefit of general public. Principal duties for supervision to Public Notary are intended to make any rights and authorities or obligations granted to Public Notary in exercising his duties as set forth in relevant basic regulation, are always exercised according to law, morality, and professional ethics for protection guarantee and legal certainty to the public. Form of supervision may be differentiated into preventive and repressive supervisions. Preventive supervision will be conducted before the issuance of government decision/ruling. Repressive supervision will be executed after the issuance of government decision/ ruling, so that it is corrective in nature and cures an incorrect action[29]. On the other hand, patronage is a curative action of anything made by Notary Supervisory Council to Public Notary in exercising his position and provides guarantee on legal certainty and protection to his service users and people in general covering the patronage of Public Notary behavior, and Public Notary professional performance.[30]

3.3 The Role of Notary Supervisory Council in Supervising Public Notary

Notary Supervisory Council is an entity having authorities and obligations to make supervision and patronage on Public Notary.[31] Its role is to protect the society as the service user of Public Notary according to the Justice Theory, Utility Theory, and Legal Certainty Theory.

Notary Supervisory Council comprises of Sub-regional Supervisory Council (MPD), Regional Supervisory Council (MPW), and Central Supervisory Council (MPN). Notary Supervisory Council (MPN) shall be appointed by the Minister of Laws and Human Rights RI. Supervision by the Minister of Laws and Human Rights RI shall be delegated to MPN.[32]

Each of the Supervisory Council has different domicile, where the Sub-regional Supervisory Council (MPD) is domiciled in Regency/ Municipality[33], and the Regional Supervisory Council (MPW) is domiciled in Provincial Capital[34], and the Central Supervisory Council (MPW) is domiciled in State Capital.[35]

There are 3 (three) elements of Notary Supervisory Council which comprises of 3 (three) persons from the Government, 3 (three) persons from Public Notary Organization, 3 (three) person from the Academic Community. In exercising their duties, the Supervisory Council will

[27] Indonesia, *Law Number 30 of 2004*, *op. cit.*, Article 67.
[28] *Regulation of Minister of Laws and Human Rights RI No.* M.02.PR.08.10 of 2004 *in conjunction with Regulation of Minister of Laws and Human Rights RI No. 40 of 2015*, Article 1 paragraph (1).
[29] Diana Hakim Koentjoro, *Hukum Administrasi Negara* (Tangerang: Ghalia Indonesia, 2004)., page 73-74.
[30] Indonesian Minister Law and Human Rights, Regulation of Minister of Laws and Human Rights of Republic of Indonesia No. M.02.PR.08.10 of 2004, *op. cit.*, Article 1 number 5.
[31] Ministry of Laws and Human Rights, *Regulation of Minister of Laws and Human Rights RI Number 40 of 2015*, Article 1 number 2.
[32] *Law No. 30 of 2004*, *op. cit.*, Article 67.
[33] *Ibid.*, Article 69 verse (1).
[34] *Ibid.*, Artilce 72 verse (1).
[35] *Ibid.*, Article 76 verse (1).

be assisted by Inspection Council and Supervisory Council Secretariat.[36] Inspection Council have duties to conduct initial inspection and trial preparation, whereas Sub-regional and Regional Supervisory Council Secretariat have duties to provide support on administration, technical inspection and work program preparation, budget, and report to the Supervisory Council, whereas Central Supervisory Council Secretariat have duties to make development on administration, human resources, budget, means and infrastructures, and trial management of the Notary Supervisory Council. Notary Supervisory Council is the only authorized institution to supervise, inspect, and impose sanction for Public Notary

All levels of Notary Supervisory Council (MPN), namely MPD (Sub-regional Supervisory Council), MPW (Regional Supervisory Council and MPP (Central Supervisory Council) have their respective authorities.

Authorities of Sub-regional Supervisory Council (MPD) are set forth in Article 66 of UUJN regarding the taking of photocopy of the minutes of deed or any document attached to the minutes of deed or Notary protocol and Notary summons by Investigator/ Prosecuting Attorney/ Judge. The authorities are absolute to Sub-regional Supervisory Council (MPD), not owned by either MPW or MPP.[37] However, based on the last amendment to the Notary Law Number 2 of 2014, the authorities change into Authorities of the Notary Honorable Council.

Authorities of Regional Supervisory Council (MPW) are not only set forth in UUJN but also specified in the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number 40 of 2015.

MPW is authorized to impose sanction specified in Articles 73, 85 of Notary Law, and Article 26 of the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number M.02.PR.08.10 of 2004.[38]

Authorities of Central Supervisory Council (MPP) are not only set forth in UUJN, but also specified in the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number M.02.PR.08.10 of 2004, and the Decree of the Minister of Laws and Human Rights of the Republic of Indonesia Number M.39-PW.07.10 of 2004.

Authorities of MPP are set forth in Article 77 of UUJN.[39] Imposition of administrative sanction shall be applied in stages from the lightest sanction until the most severe sanction. In certain case, Public Notary who commits serious violation to professional obligation and prohibition may be directly imposed by administrative sanction without applying sanction in stages.

3.4 Notary Honorable Council

Notary Honorable Council (MKN) is an entity having authorities and obligations to provide approval or rejection on investigation and judicial process.[40] This entity is formed to protect a good reputation of Public Notary from Investigator, Prosecuting Attorney, or Judge with respect to the taking of the minutes of deed and Notary summons. It means that the Investigator from police can not directly call the Notaries for judicial process. Since the renewal

[36] *Ibid.,* Articles 17-18.
[37] Indonesia, *Law Number 30 of 2004, op. cit.,* Article 66.
[38] Ministry of Laws and Human Rights RI, Decree of *Minister of Laws and Human Rights of Republic of Indonesia NumberM.39-PW.07.10 of 2004 regarding Supervisory Council's Duties*, number 2 items 1 and 2.
[39] *Law No. 30 of 2004, op. cit.,* Article 77.
[40] Ministry of Laws and Human Rights, *Regulation of Minister of Laws and Human Rights Number 7 of 2016 regarding Notary Honorable Council,* Article 20.

of Notary Law by 2014, there are any alterations to the provisions of Public Notary summons mechanism, particularly in Article 66. Beside the addition of paragraph in the Article 66, there is also Article 66A as insertion.

Notary Supervisory Council (MPN) and Notary Honorable Council (MKN) have similarity in case of patronage on Public Notary. Difference of both institutions is that Notary Supervisory Council (MPN) is an entity having authorities and obligations to conduct patronage and supervision to Public Notary[41] while Notary Honorable Council (MKN) is an entity having authorities to carry out patronage on Public Notary and obligations to provide approval or rejection on investigation and judicial process, on the taking of photocopy of the minute of deed and Notary summons to be present in examination related to deed or notary protocol kept by Public Notary.[42]

3.5 The Ineffective Law Enforcement of Public Notary's Authority

3.5.1 The Ineffective Law Enforcement of Public Notary's Authority from the Regulatory Aspect

Ineffective law enforcement reviewed from regulatory aspect can be seen from **the authorities of Sub-Regional Supervisory Council (MPD)** only limited to giving recommendation of sanction without having the authorities of execution.[43] Pursuant to Notary Law, the authorities of Sub-Regional Supervisory Council (MPD) should include dispute settlement by issuing binding decision, except appealed. Furthermore, Inspection Council needs authorization to close the access of Notary who fails to immediately remedy mistake when sampling test is conducted. In this case, the mechanism of dispute settlement easily accessed by the public and effective dispute settlement, as requirement for effective law enforcement, is not achieved[44].

Other weakness on regulation related to Notary Supervisory Council which they can only act whenever there is a report from public regarding the violation of Public Notary authorities, without such report, no legal action can be taken, whereas there are many findings of violation by Notaries Public.[45]

Other issue is that **there are any Notaries Public who hold double positions.** Legal conception on the formulation of Article 11 (obligatory leave as Government Official) and Article 17 of UUJN (prohibition of double position) is contrary to each other, so that no legal certainty is applied to Public Notary appointed as Government Official, and Article 17 paragraph (2) of UUJN Number 2 of 2014 doesn't specify strict sanction for any violation of the double position prohibition.[46] Effectiveness of law according to Lon Fuller

[41] *Ibid.,* Article 1 paragraph (3).
[42] *Ibid.,* Article 1 paragraph (1).
[43] Ministry of Laws and Human Rights RI, *Decree of Minister of Laws and Human Rights RI No. M.39-PW.07.10 of 2004 regarding Guidelines for Implementation of Notary Supervisory Council's Duties* Dated 28 December 2004, *loc. Cit.,* specifying that Examination Team only existing in Sub-regional Supervisory Council. Report submitted by the public to MPD will be examined in trial and further submitting recommendation to MPW for follow-up.
[44] Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum* (Jakarta: P.T. Rajagrafindo Persada, 2002)., page 80.
[45] *Regulation of Minister of Laws and Human Rights RI No. M.02.PR.08.10 of 2004* and interview with Mister Nur Ichwan, S.H., as the Head of Legal Service Division of the Ministry of Laws and Human Rights of the Republic of Indonesia of East Kalimantan Province on October 2019, explaining that the Sub-regional Supervisory Council practically encounter supervisory obstacles because the Sub-regional Supervisory Council may take action only after obtaining report from the public.
[46] *Law No. 2 of 2014, op. cit.,* Article 11 paragraph (1) in conjunction with Article 17 paragraph (2).

requires consistency in legal conception. Formulation of norm set forth in the articles is inconsistent in legal conception to Public Notary appointed as Government Official. Hopefully, in subsequent amendment to UUJN any articles as mentioned above will be altered with clear and consistent legal concept to avoid conflict. Accordingly, it is necessary to amend the Notary Law to solve the issues.[47]

3.5.2 The Ineffective Law Enforcement of Public Notary's Authorities from the Law Enforcer Aspect

Weak/ ineffective law enforcement regarding Public Notary/s authority from the aspect of law enforcer can be seen from institutional issues of Notary Supervisory Council (MPN) and Secretariat of Notary Supervisory Council. The Notarys Supervisory Council pursuant to Articles 67 and 68 of UUJN has no sufficient budget and administration personnel support so that the organization of patronage and supervision is not well planned. Notary Supervisory Council Secretariat appointed to assist Sub-Regional Supervisory Council (MPD), Regional Supervisory Council (MPW), and Central Supervisory Council (MPP) is ineffective and unable to be execute optimally because the position is not their principal duties.

Requirements for effective law enforcement are legal system certainty, administration support, mechanism of dispute settlement easily accessed by the public, and effective dispute settlement.[48] Although MPN has institutional structure, but its structural institution is not an institution with management organization having management structure, budget, and any other supports, and accordingly MPN position should be confirmed.

Other impact of the institution of MPN is insufficient support from administration personnel as a normal office, and therefore, the organization of patronage and supervision is not well planned. There are no personnel who prepare patronage and supervision planning that must be carried out within 1 (one) year, plus no budgeting support, and this make the institution of Supervisory Council (particularly MPD) not optimal in performing their works.

Issues include **the membership of the Supervisory Council** comprised of 3 (three) elements, from Government, Public Notary, and Academic Community. Pursuant to Article 67 of UUJN, the Supervisory Council can not make optimal contribution in performing their duties because of not their principal duties. Any other issues include the elements of government/ academic community sometimes having little understanding on notarial law so that patronage and supervision are less effective.

Other issue that **supervision to MPD shall be conducted at least 1 (one) time within 1 (one) year,** whereas there are many Notaries Public in some Regencies/Municipalities, so that supervision can not be executed effectively. In addition, MPD is passive in examining any complaint from the public as set forth in Article 23 paragraph (1) f) of the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number 40 of 2015 specifying that,' receiving complaint from the public with respect to any alleged violation of the code of ethics of the Public Notary or

[47] Interview with Mister Dr. Bambang Rantam Sariwanto, S.H., as Secretary General of Ministry of Laws and Human Rights of Republic of Indonesia and Chairman of Central Supervisory Council in November 2019.
[48] *Ibid.*

any breach of the provision of Law."[49] contrary to Article 1 paragraph 5 of the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia No. M.02.PR.08.10 of 2004 specifying that, "Supervision is any activity being preventive and curative in nature including patronage conducted by the Supervisory Council to Public Notary."[50]

Accordingly, MPD should be provided with authorities to make preventive and curative supervision by amending the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number 40 of 2015 in order to more protect the public interest.

3.6 Notary Malpractice in Indonesia

As we have known that Notary is an honored title to those who hold it, yet we see some weakness/ ineffectiveness in law enforcement regarding Notary's authorities from regulatory aspects and law enforcers. These weaknesses combine with the Notary's character's themselves create the opportunities to do some malpractice we sometimes find in reality.

In the practice of implementing notarial position regulations according to Notary Law, often found disharmony between these laws and their application by the Notaries, where in their practice, with the discovery of several cases, the Notary does not carry out his position in accordance with the provisions of the laws and regulations. Cases of violations committed by a notary can be found both in the court (judicial case) and outside the court (non judicial case). This is not in accordance with the aspect of expediency, where the existing legal arrangements and have provided legal certainty for the community, as if it is not useful to provide legal protection for the community.

The consequence of violation of the Notary Law and regulation is that Notary is responsible for the deed he made, and the Notary may be subject to sanctions in accordance with the violation he has committed. A notarial deed may be canceled or become null and void if it violates the law and regulation in Notary Law.

When viewed from the legal structure, legal substance, and legal culture, the regulation of the position of Notary still needs to be refined. If viewed from the legal structure, in the Notary Supervisory Council, where the Regional Supervisory Council can only act to overcome malpractice carried out by the Notary when there is some public report. If viewed from the legal substance, there are several regulations regarding the position of a Notary that can be refined to reduce malpractice taken by a Notary. If viewed from a legal culture, the practice of Notaries in carrying out their positions needs to be directed at improving the moral quality and knowledge of the Notaries, so that the number of Notary malpractice cases that occur can be reduced.

In the practice of implementing the regulations of the Public Notary, there are many violations as in the provisions such as breaking the oath/ promise of a Notary's position and in carrying out his/ her office must act honest, thorough, independent, impartial, and safeguard the interests of parties involved in legal actions, notary obligtation to keep their behavior, and will be

[49] Indonesia, Regulation of *Minister of Laws and Human Rights of Republic of Indonesia No. 40 of 2015 regarding Organization Structure, Procedures of Member Appointment, Member Discharge, and Working Management of Supervisory Council, op. cit.,* Article 23 paragraph (1) f).

[50] Indonesia, Regulation of Minister of *Laws and Human Rights of Republic of Indonesia No. M.02.Pr.08.10 of 2004 regarding Procedures of Member Appointment, Member Discharge, Organization Structure, Working Management, and Procedures of Examination by Notary Supervisory Council, op. cit.,* Article1 number 5.

dishonorably dismissed from his position by the Minister if he/ she commits a violation of the dignity of the position of the Notary, obligation to read the deed in front of the parties, in reality it is often not read by the Public Notary, prohibition for Notaries for serving as advocates, prohibition to make a deed in a state of leave, the act of notarization should have been made by his substitute. In the Notaries malpractice cases, there is a Notary which in a state of leave, makes a deed in front of his clients. The deed made in Notary's leave status will have no authenticity, since it violates the Notary Law.

When Notary commits malpractice, such as not reading the deed in front of the parties, the sanction is Notary could get written reprimand or temporary termination for 6 months from their position, and the deed will lost its authenticity.

When Notary dropping their honor fee arbitrarily shows that their violating the Notary Ethic Code of Conduct which can lead them to get both verbal and written reprimand, and their membership removed from the Notary Organization (Ikatan Notaris Indonesia).

Notary Law provides legal protection for Notary who has carried out his position in accordance with the law and his oath, as reflected in Article 66 UUJN Number 2 of 2014, which stated if there is a summon from the Investigator/ Public Prosecutor to Notary for examination, this must be with the permission of the Notary Honorary Assembly (Majelis Kehormatan Notaris/ MKN), with the aim of the Notary concerned being summoned before the Notary Honorary Assembly, so that Notary Honorary Assembly can get explanation from the deed he made, and if the Notary Honorary Assembly considers that the deed he/ she made is in accordance with Notary Law, then the summons request will be rejected. This is because Public Notary is a noble position that needs to be protected from such criminalization. An ideal law and regulation regarding the position of a Public Notary should give legal certainty and protection for the public using their services, as well as guarantees of legal certainty and protection for the position of a Public Notary.

4. CONCLUSION

Notary as a public official authorized to issue authentic deed and other authorities as referred in Notary Law. Public Notary service is required by the society for issuing authentic deed which can provide legal certainty. Law and regulation regarding the position of Notary as stated in the law, implementing regulations, Notary Ethics Code, and other related regulations, but the existence of such regulation has not been able to eliminate the occurrence of malpractice in Notaries in Indonesia.

Notary, both in world and Indonesian history, hold a noble position (*noblese obligue)* for giving such notarial service to the society, but nowadays we could find some malpractice in notary's deed making. The weakness/ ineffectiveness in law and regulation, the law enforcers, and the Notary's character's themselves has created opportunities for such malpractice which decrease the nobility position itself. When some malpractice occured, Notary could get sanctions both from the Notary organization (INI) and through the court sentence.

Ideal arrangement related to the implementation of the Position of Notary, such as giving authorization for Notary Supervisory Board (MPN) to take action against Notaries who violate the oath of office and the implementation of the Notary's position, not only based on public reports, but can also be based on law facts (for example: court sentence), providing an equivalency test from the Indonesian Ministry of Law and Human Rights to prospective Notaries to be appointed, expanding authority of the Sub-Regional Supervisory Council (MPD), giving authorization for Notary Supervisory Council from initially passive to active with preventive supervision, cooperation between the Indonesian Ministry of Law and Human Rights with the police in the context of law enforcement

and legal protection for public who need Notary services could help numbers of notaries malpractice cases to reduce, and the legal certainty, expediency, and justice can be served to the public.

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THE PLEA BARGAINING SYSTEM AS A CRIMINALIZATION MODEL UNDER THE LAW NUMBER 19 YEAR OF 2016 ON ELECTRONIC INFORMATION AND TRANSACTION ACT AND THE DIGNIFIED JUSTICE

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Abstract

From the perspective of economic analysis of law theory, the increasing number of criminal convictions would indicate that the Indonesian criminal Code and regulations have not been effective in reducing the rate of crimes. By combining a preliminary hearing, hearing of cases through a special route and the application of the principle of bargaining for sentence in the plea bargaining system, a new mechanism may be formulated in the Indonesia criminal justice proceedings. This criminal justice approach employs the dignified justice principle (*teori keadilan bermartabat*) approach, whereby, the trial of cases using a preliminary hearing as a special route under a sole judge that is intended for an accused who pleads guilty and bargains for a sentence. Accordingly, this research attempts to explore the use of the principles of the plea bargaining system as a criminal justice model under the Law Number 19 year of 2016 on the Electronic Information and Transaction Act ("EIT Act"). Equally important, this research employs the juridical-normative method, statute, case, and conceptual approaches in order to obtain a comprehensive result.

Keywords: *Plea bargaining system, Indonesian Criminal Justice system, Theory of Dignified Justice, Indonesian Law on Electronic Information and Transaction Act (UU ITE)*

1. INTRODUCTION

Nowadays, the rapid progress in the field of information technology (IT) has contributed profoundly in the development of digital transactions.[1] However, it is undeniable that such progress on the one hand brings blessings to humanity but on the other it also brings harm to the same.

Whenever various forms of crime grow, but there is no law that regulates and is coercive in nature, these crimes will kill the community where they were committed. However, making legal provisions for a rapidly changing field is not an easy matter; so, a paradigm shift in responsive legal models is needed in line with the dynamics of the development and progress of cyberspace. The characteristics of cross-border activities in the cyberspace that are no longer subject to territorial boundaries and traditional laws require responsive law, because certain articles of the Criminal Code are considered insufficient to answer legal issues that arise as a result of activities in cyberspace.[2]

The Law Number 19 year of 2016 on Electronic Information and Transactions ("EIT Act") EIT Act was introduced to control all human activities carried out through the

[1] Part of the considerations of Ruling No. 50/PUU-VI/2008 of the Bench of the Supreme Court in the Judicial review of Article 27(3) of the Electronic Information and Transaction Act , the request for which has been submitted by Narliswandi Piliang (also known as Iwan Piliang)
[2] *Ibid.*

cyberspace as the development of such activities were not initially accompanied by the provisions of laws and regulations. Accordingly, the EIT Act may be said as a form of response from the government to tackle abuse of electronic business (e-commerce) practices and criminal acts committed through cyberspace.

Considering that criminal offences against EIT are carried out through electronic media, everyone who commits such acts really understands, comprehends and intends to do such acts regardless of whether his actions have legal consequences.

Hence, such acts are deemed to be intentionally and deliberately committed. The type of intention has been referred to as an intention for certain purposes, or in other words, as written by Kartanegara, an opzet (or intention) is a goal.[3] Deliberateness is the conscious direction of the will towards certain evils.[4] According to van Hattum, opzet, linguistically only means intention in the sense of purpose and will.[5] This certainty results in the absence of any other way for criminals under the EIT Act to escape from legal snares other than to accept the fact that their actions have fulfilled the criminal provisions of the EIT Act and may be subject to a criminal sentence.

The introduction of laws and regulations must be seen as a moral responsibility, as these have a public dimension and legal consequences for the public. Laws cannot be introduced by ignoring their intents. Soetopo Conboy and Seno Adji write, as follows[6]:

> "Legal liability is usually based on problem solving and decision making using certain methodologies. In the context of government policy, Economic Analysis of Law (EAL) is applied in the formulation of laws and regulations".

In order to make the introduction and application of criminal laws efficiently and to lower the rate of crimes through a means in the form of the EAL, it is necessary to consider the plea bargaining system as a model of the procedural law in the criminal justice process. The lower the rate is the more effective and efficient the adoption and application of legal provisions will be.

The plea bargaining system has 2 (two) inherent characteristics of the justice system, namely, of the criminal justice system and the criminal justice process. Hagan, as quoted by Atmasasmita, writes[7]:

> "A criminal justice process is every stage of a decision that confronts a suspect in a process that leads to a criminal sentence against him. The criminal justice system is the interconnection between the decisions of each agency involved in the criminal justice process."

The plea bargaining system is part of the criminal justice process and the criminal justice system. The inquisitor method is an inherent part of the former system, as it focuses on resolving upon cases through guilty pleas. The accused's plea serves as a basis for the public prosecutor to resolve upon the criminal offense charged against him. The plea bargaining system is also inherently accusatory as the sequence of conclusions of the

[3] Leden Marpaung, *Unsur-Unsur Perbuatan Yang Dapat Dihukum(Delik)*, (Jakarta: Sinar Grafika, 1991), P..14
[4] Schaffmeister, Keizer dan E.P.H Sutorius, *Hukum Pidana*, (Yogyakarta: Liberty, 1995), p. 88
[5] Andi Hamzah, *Hukum Pidana Indonesia*, (Jakarta: Sinar Grafika, 2019), p. 107
[6] Maria G.S Soetopo Conboy dan Indriyanto Seno Adji, *Economic Analysis of Law Krisis Keuangan dan Kebijakan Pemerintah*, (Jakarta: Diadit Media, 2015), p.28-29.
[7] Romli Atmasasmita, *Sistem Peradilan Pidana Perspektif Eksistensialisme dan Abolisionisme*, (Bandung: Binacipta, 1996), p. 14

criminal indictments against the accused continues to be carried out through the procedural law mechanism based on the Indonesian Criminal Procedure Code (KUHAP), embodied in the Law Number 8 year of 1981.

Ramadhan writes that "In addition to admitting guilt, the accused or his lawyer may make an agreement with the public prosecutor regarding the form and length of a sentence which is generally lighter."[8] Alschuler, as quoted by Nelson, writes, "Plea bargaining is an exchange of rights offered by law enforcement agencies in exchange for an admission of guilt for the accused.

This exchange may be in the form of a sentence handed down by a court of laws or a serious criminal charges brought by a public prosecutor, the crime charged, or various other conditions."[9]

According to the Black's Law Dictionary, Eight Edition, plea means 'an accused's formal plea of being guilty, not guilty, or no contest, to a criminal charge.'[10] Furthermore, Curzon defines plea bargaining as an informal procedure, conducted usually in chambers, whereby the accused could agree to plead guilty as an exchange for the prosecution's dropping other charges (or a sentence concession, ie, sentence bargaining) [11]. Based upon the expositions abovementioned, this research attempts to analyze as to how to model the resolution of the EIT criminal acts based upon the dignified justice principles?

2. RESEARCH METHODS

In order to obtain holistic and verified results, this research applies a juridical-normative method using several approaches, namely, the statute, approach, conceptual.[12] Sources of legal material are important tools used to discuss and solve legal issues in the research. In order for these legal issues to be solved, the sources are needed. The sources consist of:

a. Primary legal materials[13] which are authoritative, meaning they have authority. Primary legal materials consist of legislation, notes or minutes in the making of legislation and judge's decisions.[14] The primary legal materials used in legislation and a judge's decisions.[19] The primary legal materials used in the research include the Criminal Code, the CPC, the Electronic Information and Transactions Act Number 11 of 2008 (EIT ACT), amended by Act Number 19 of 2016 concerning the Amendments to the EIT Act.

[8] Choki Risda Ramadhan, http://mappifhui.org/wp-content/uploads/2015/10/891632jalur-special_plea-bargaining_crr_edited_mappi.pdf, accessed on 27 November 2020

[9] Febby Mutiara Nelson, *Plea Bargaining &Deferred Prosecution Agreement Dalam Tindak Pidana Korupsi*, (Jakarta: Sinar Grafika, 2020), p.29-30

[10] B. A. Garner, *Black Law Dictionary, Eighth Edition*, (: Thomson West, 1999), p. 1189

[11] L.B Curzon, *Dictionary of Law*, Sixth Edition, (Essex England: Peason Education Limited, 2002), p.318

[12] P.M.Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Kencana, 2015), p.93

[13] Soerjono Soekanto and Mamudji (2007-12), "In research, in general, a distinction is made between data obtained directly from the community and from library materials. Those obtained directly from the community are called primary data (or basic data), while those obtained from library materials are usually called secondary data. ***See***, Soekanto, Soerjono & Sri Mamudji, *Penelitian Hukum Normatif*, (Jakarta: PT. Rajagrafindo, 2007), p.12

[14] P.M. Marzuki, *Op.Cit.*, p.141

b. Secondary legal materials are all publications on law that are not official documents, including textbooks, legal dictionaries, legal journals and commentaries on court decisions.[15]

3. ANALYSIS AND DISCUSSION

Pancasila (or the State Five-Rule Philosophy) as a way of life for the Indonesian people states the spirit of material and spiritual justice. Material justice is an important matter that must be reflected in formal law enforcement and spiritual justice places humans in an honorable position even though they may be the perpetrators of a crime. The existence of material and spiritual justice in Pancasila was the main *impetus* for Teguh Prasetyo to introduce dignified justice principle (*Teori Keadilan Bermartabat*). [16]As dignified justice has both material and spiritual dimensions, the researcher uses this theory as an analytical tool to engineer a criminalization model that is in accordance with the articles of the EIT Act regarding prohibited activities.

The values of dignified justice stated in Pancasila have the characteristics of mutual cooperation, whereby the spirit of mutual cooperation is the resolution of every problem in society, including legal issues, amicably. This manner is possible if each party is given an equal opportunity to express themselves about a problem.

The manifestation of dignified justice must be seen from the purpose of the law itself, in that the purpose of criminal law is to realize dignified justice with its material and spiritual dimensions. This objective may be enforced through criminal procedural law as a formal provision. Loqman[17] writes that the objectives of criminal procedural law are:

a. To seek and obtain or at least approach the material truth, which is the complete truth of a criminal case by applying the provisions of the criminal procedural law fairly and accurately;
b. To find and then indict the perpetrators of a crime; and
c. To ensure that those who are innocent are not indicted irrespective of indictments of a crime.

One interesting feature of the application of the theory of dignified justice is that it is possible for the perpetrators of criminal acts to bargain for a sentence before or during the trial, so that a resolution may be taken quickly and efficiently if they plead guilty. In addition, they or their attorneys may reach an agreement with the public prosecutor on the form and length of a sentence which is generally lighter.[18]

In the past, when the Revised Indonesian Regulation (RIR) was still in effect in the country, the concentration of case resolution powers rested in the hands of the prosecutor, as stated by Loqman[19],

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[15] *Ibid.*
[16] Teguh Prasetyo, *Keadilan Bermartabat Perspektif Teori Hukum*,(Bandung: Nusa Media, 2015), p. 16
[17] Loebby Loqman, *Pra Peradilan di Indonesia*, (Jakarta Timur: Ghalia Indonesia, 1990), p. 8
[18] Choki Risda Ramadhan, http://mappifhui.org/wp-content/uploads/2015/10/891632jalur-special_plea-bargaining_crr_edited_mappi.pdf, accessed on 27 November 2020
In several discussions relating to a guilty plea, this matter has indeed caused new problems, especially the existence of several principles inherent in criminal law such as non-self incrimination and presumption of innocence. A guilty plea is deviant from non-self incrimination and presumption of innocence.
[19] Loebby Loqman, *Op.Cit.*,p.23

> ”In the RIR, the preliminary cross-examination consisted of two stages, namely, the first involves the investigation carried out on the suspect by the police and the second further investigation by the prosecutor's office to wrap up its charges, and in essence the prosecutor had the full authority in carry out the preliminary cross-examination, as the police were the 'hulp megistraat', so that during the preliminary cross-examination, the police acted only as assistants, and the judge acted to grant a temporary detention extension, ordered that the relevant evidential documents be submitted to him to cross-examine and to determine when the prosecutor should submit the case”.

As a result, it may be concluded that, in the preliminary cross-examination process, the prosecutor was a central figure and the police an assistant to him, and the judge provided control, especially in the extension of temporary detention.[20]

From the date of the promulgation of the CPC, the dominance above has shifted to the police. The duty of the prosecutor is purely to prosecute the Accused in the trial process. In Loqman's notes, it is found that[21],

> "... in the system adopted by the CPC, the power for preliminary cross-examination, in the sense of an investigation of a person suspected of committing a crime, entirely rests with the police (Article 6 of the CPC), and the prosecution power entirely with the prosecutor acting as a Public Prosecutor (see Article 13 of the CPC).”

The initial determination of a criminal as a suspect is an important step for the next legal process. The police must ensure the fulfillment of two valid pieces of evidence to determine a person who is firmly suspected of being the perpetrator of a criminal act as a suspect. The significance of this determination for Reksodiputro relates to the limitation of the suspect's freedom during the legal process. He writes[22]:

> “The determination of person as a suspect of a crime (i.e., the charging decision) is a very important step. The consequences for this suspect are very serious. First, this will severely limit his freedom.”

The stage of cross-examination of a suspect will begin with his arrest. Each step of the cross-examination will determine his legal status in the criminal process. The investigation stage places the perpetrator as a suspect; the prosecution stage as an accused, and the stage of implementing a court decision as a convict. Hence, schematically, one may say that the activities or stages of the judicial process according to the criminal justice system start at the cross-examination of lawbreakers by criminal justice agencies, ranging from determining the status of the perpetrator (as a suspect) by the police, the status of the perpetrator as an accused by the prosecutor, hearing of the accused by the judge, followed by a decision by the judge, to the determination of the perpetrator to undergo such a decision in a correctional institution, and then his return to society.[23]

If we use Packer's[24] scheme, we may know the full sequence as follows:

a. The period counting from the arrest time through the decision to charge the suspect with a crime.

[20] *Ibid*., p. 23-24
[21] *Ibid*., p. 25
[22] Topo Santoso and Choky Risda Ramadhan, *Prapenuntutan dan Perkembangan di Indonesia*, (Depok: PT. Rajagrafindo Persada, 2019), p.230
[23] Kadri Husin and Budi Rizki Husin, *Sistem Peradilan Pidana di Indonesia*, (Jakarta: Sinar Grafika, 2016), p.92
[24] *Ibid*., p. 92-93

b. The period of sentence for committing a crime after the determination of guilt.
c. The stage of review and correction of errors that have been accrued during the earlier periods.

The criminal justice process is not solely aimed at law enforcement but also sentence control. In relation to efforts made to achieve dignified justice, the use of the plea bargaining system model is expected to include the dimensions of sentence control and law enforcement. Sentence control is closely related to the realization of spiritual justice, namely, putting the principles of humanity in the legal process, or in other words, the legal process must prioritize the principle of respecting humans as they are. Law enforcement is the embodiment of material justice which includes legal certainty which has been widely discussed by western scholars. Atmasasmita further writes[25],

> "A control system within these limits is defined as a management tool which means controlling or controlling or exercising restraint. If the criminal justice system is defined as a means of law enforcement, it should include legal aspects that focus on the operation of laws and regulations in an effort to tackle crimes and aim to achieve legal certainty."

However, in Hulsman's views, the criminal justice system is a social problem. His understanding is motivated by several notes, namely[26]:

a. The criminal justice system creates suffering;
b. The system cannot work in accordance with the goals it aspires to reach;
c. The system is out of control; and
d. The approach used by the system is fundamentally flawed.

The criminal justice system in Indonesia is like the wheels of a machine that only functions when a criminal act or legal case arises. Even worse, law enforcement officers are part of the wheel of the machine, as they are only law enforcers, not as seekers of material legal issues. Unfortunately, this fact occurs due to the boredom and even laziness to explore and develop a legal issue that is accepted and will be handled.

From the dates of their respective enactments, the RIR and the CPC have made, virtually no progress in their roles played as the systems capable of solving the problem of the high number of cases being cross-examined. The judiciary branch has been stagnating and been an institution that carries out routines without trying to get out of the zone of routine that binds them. The judiciary branch has made virtually no innovation and contribution to reduce the high number of cases that enter and burden the state's finances. This criticism is summarized by Harahap[27] as follows,

> "Dispute resolution is slow, costs of hearing are high, the judiciary branch is not responsive, court decisions do not solve problems, court representatives often do not provide legal certainty and are unpredictable, and the judges are generalists."

The issue raised by Hulsman was tested when there was a difference in perception between the police and the prosecutor's office regarding the pre-prosecution process as described by Santoso and Ramadhan[28], as follows:

[25] Romli Atmasasmita, Sistem Peradilan Pidana Perspektif,*Op.Cit*.,p.15-16
[26] *Ibid*., p. 98
[27] M. Yahya Harahap, *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa*, (Bandung: PT. Citra Aditya Bakti, 1997), p. 240-246
[28] Topo Santoso dan Choky Risda Ramadhan, *Prapenuntutan dan Perkembangan di Indonesia*, *Op.Cit*., p.101-102

Table 1 Police and Prosecutors' Perspectives on the Pre-Prosecution Process

No	Police Officer's Opinions	Prosecutors' Opinions
1.	Prosecutors often give vague clues. They give instructions to change questions X, Y, Z, but after that, the questions are changed; the prosecutors even ask for further corrections, so that they will become questions A, B, C and so on.	The police often don't carry out the instructions from the prosecutors properly, so they have to go back and forth, wasting time.
2.	Prosecutors often do not understand that general criminal investigators are much more difficult than those into special crimes	Police do not understand that special criminal investigations are much more difficult than general crimes and require extensive knowledge
3.	The police should be the main investigators, as they are responsible for the results.	the prosecutors must participate in the investigation as they hold a central and most responsible position in court
4.	Prosecutors often change the contents of articles of indictment given by the police, thereby weakening the results of police cross-examinations in court, even though the police have worked hard on that	The police often provide a weak legal basis for cross-examination, so that prosecutors are assessed as being weak in court hearings. Hence, the prosecutors must change the indictments again, as they play the most responsible roles
5.	No one supervises case brief that are not brought by the prosecutors to court, and the police may be subject to a pretrial.	No one can supervise the police if the brief that the prosecutor asks for correction is not returned to the prosecutor. There are thousands of other brief.
6.	If police capacity is indeed lacking, the police personnel need to improve, and the existing system should not change.	In order to compensate for their incompetence, the police must be supported by a system that provides fast and precise proceedings

In addition, the issue of the length of time for the resolution of a criminal case and the protracted resolution of a criminal act needs to be an entry point for pursuing the criminal justice process, the resolution immediately gets legal certainty for both the victim and the perpetrator of the crime. By using a dignified justice approach, the plea bargaining system may be utilized as a new mechanism in the criminal justice process in the country.

The system does not merely take over technical litigation from the country where the principle of the system was born, but what is important to be embedded in the criminal justice process in Indonesia is the principles of case resolution attached to the system, so that the perpetrators of criminal acts are given the opportunity to bargain for the form and duration of the sanctions that will be handed down against him. In the mechanism for applying the system within the criminal justice process as described by Atmasasmita, it is known that the stages of the process of resolving a criminal act are as follows:[29]

[29] Romli Atmasasmita, Sistem Peradilan Pidana Perspektif, *Op.Cit.*,P. 111

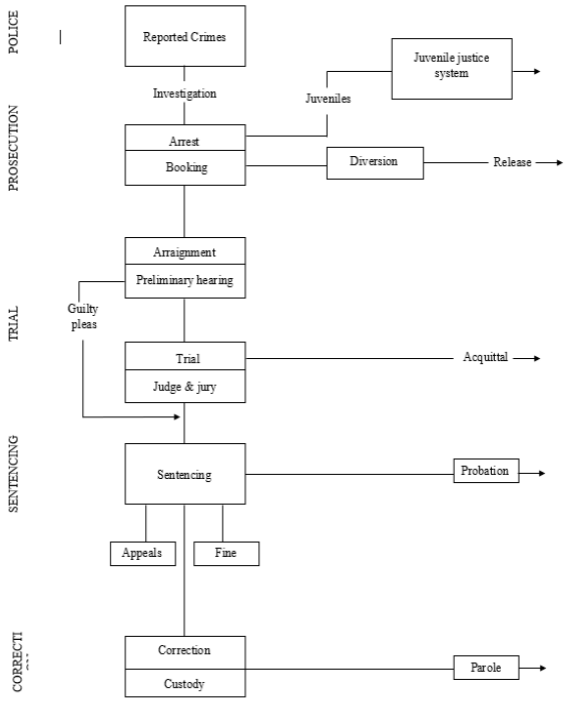

Figure 1 A General Vice of Criminal Justice System

Atmasasmita's explanation regarding the process of the above scheme is as follows: The process of the criminal case above goes through several stages, starting with the investigation of the arrest or detention, prosecution, determination of guilt, determination of sentence, and finally the execution of the sentence. If we review the criminal justice system currently in effect in the United States in general, it is clear that plea bargaining occurs during the arraignment and preliminary hearing period. If an accused declares himself to be guilty of a crime committed, (according to the scheme) the next process is the imposition of a sentence without going through a trial. This arraignment on information or sentence term is brief in order to achieve two goals: (1) to inform the accused about the charges against him, and (2) to give him the opportunity to answer the charges by stating not guilty, or guilty, or nolo contendere (or no contest). In this step, the court will pronounce the indictments made to the accused and then ask him questions and how he will respond to the indictments. If he declares not guilty, the case is prepared for further proceedings and then tried before the jury. If he declares either guilty or nolo contendere, the case is ready to be decided upon. In particular, the statement of *nolo contendere* essentially has the same implications as the statement of being guilty, and in this case, it is not required that the accused must admit his guilt, but it is sufficient if he states that he will not challenge the prosecutor's indictment before the jury later.[30]

In order to adapt to the national criminal justice process, it is necessary to absorb the principles inherent in the plea bargaining system by adopting them in criminal procedural law as plea bargaining based upon dignified justice with several adjustments and developments as follows:

[30] *Ibid*.,p.111-112

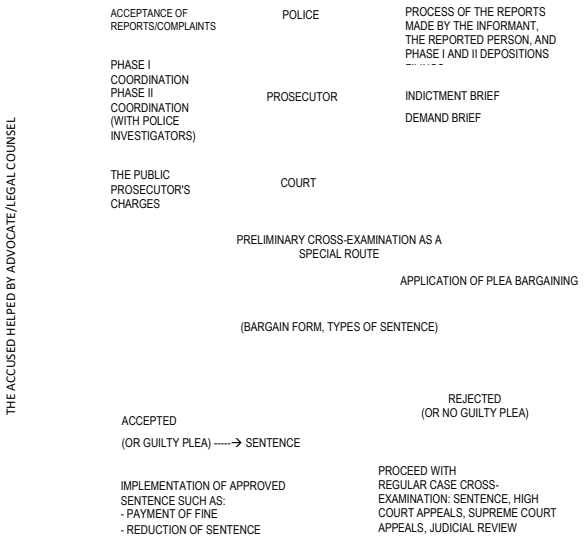

Figure 2 Plea Bargaining System in the Criminal Procedural Law

From the above scheme, we may describe that the stages of the application of the system under discussion are as follows:

First Stage: Process by the Police. The process by the police begins with the receipt of reports from the public or victims to the police, both reports on ordinary offenses and complaints. Then, an investigator is appointed to handle it. Furthermore, by the investigator, summons are given to the informant to take his statements, and the witnesses who see and witness the occurrence of the reported crime. After examining the complainant and witnesses, the investigator continues to summon and cross-examine the reported person. All information in the cross-examination is stated in the case cross-examination brief. After everything is complete, the case brief will be transferred to the public prosecutor ‘s office (for the handover of stage one (covering the brief only) and stage two (the brief and suspect).

Second Stage: Process by the prosecutor's office. After the public prosecutor receives the brief from the investigator, the public prosecutor prepares the indictment brief against the suspect to be transferred to the preliminary hearing (or special route).

Third Stage: Preliminary hearing Process. For court proceedings, two routes of hearing are available: Firstly, a special route, or preliminary case cross-examination, serving as a forum for the implementation of dignified justice-based plea bargaining. In the practice of the plea bargaining system, this stage serves to implement the arraignment. In this route, the public prosecutor brings charges against the accused. After his knowledge about the articles of the criminal offense charged and the threat of sentence, the accused, accompanied by his legal advisors, makes a draft bargain which will be presented at the next step of hearing. The draft bargain states the plea of guilt and the accused's plea of guilt of the crime charged. Then, the accused offers a form of sanctions or sentences against himself. Given the nature of bargaining, the sanctions threatened by the public prosecutor may be waived due to a new option in the form of new sanctions proposed by the accused such as reducing the length of the sentence accompanied by the payment of compensation or fines to the victim. If the accused's proposal is agreed to by the public prosecutor, this agreement is

stated in a decision by a sole judge. At this stage, the plea of guilt becomes the entrance to case resolution. However, if viewed from the law of evidence, in an ordinary case cross-examination, the public prosecutor plays an important role and duty to prove whether the accused is guilty or not. This task requires a special struggle for the prosecutor, as it is not easy to prove the accused is guilty. Notwithstanding, with the application of the principle of confession of guilt, the principles of dignified justice may be upheld, so that the implementation of the plea bargaining system under discussion may realize the principles of fast, simple criminal justice at low costs and accelerate the fulfillment of legal certainty for both the victims and perpetrators of a crime, as the victims will receive immediate compensation (if the loss is economic in nature) and assurance that the perpetrator will be immediately sentenced. For criminals, the application of the system will speed up the fulfillment of legal certainty on the grounds that if the case is processed based on an ordinary trial, the accused will experience longer detention, a lot of time is wasted and costs are high. Secondly, if the bargain by the accused and his legal counsel is rejected by the public prosecutor, based on the decision of the sole judge, the case cross-examination process will proceed in an ordinary trial by following the process and stages as in general case cross-examinations (known in the system as cross-examination by jury).

If compared with what is applied in the United States, the plea bargaining option for dignified justice purposes that may be applied in Indonesia is to combine the application of the authority of the commissioner judge, the principle of bargaining for a sentence in the plea bargaining system and the implementation of the principles of the special route under the Indonesian criminal procedural bill.

In the preliminary hearing or the special route, the evidence is not cross-examined, and the hearing proceeds with the pronouncement of the indictments. Seno Adji writes[31],

> "…in the Pretrial Conference process, the magistrate court does not conduct any cross-examination and investigation of evidence relating to indictments against suspects, as the control over the validity of obtaining evidence from law enforcers is aligned with the Exclusionary Rules during the cross-examination of indictments in subject matter hearing, namely, Court Trial , not at pre-trial."

The research author if of the opinion that the implementation of the pretrial conference (consisting of planning a court session, including litigation rights and evidence) as referred to by Indrianto Seno Adji, may be applied to the preliminary session in the implementation of the plea bargaining under discussion.

In the process of implementing the plea bargaining system in the United States as described by Romli Atmasasmita, the momentum for the system comes at the arraignment stage. Kerper writes[32],

> "Arraignment is one of the procedures for resolving criminal cases according to the adversary system where the suspect is present in court to submit his statement (wherein he may plead guilty or declare innocent on the charges of the public prosecutor) and, at the same time, the accused is allowed to choose at his own will which court he wants (a trial by a judge only or a jury trial)."

[31] Indriyanto Seno Adji, *Peradilan &KUHAP Catatan Mendatang*, (Jakarta: Diadit Media, 2015), p.11
[32] Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer*,(Jakarta: Kencana, 2013), p. 39

Churchill, as quoted by Loqman, writes[33],

> "Arraignment is a trial before a judge or his deputy that takes place a few days after a person is detained in which the charges against the suspect are pronounce and the suspect is asked whether he is guilty or not guilty.. It will be brought before trial by a jury; from the moment of this arraignment, the responsibility for supervising the implementation of the criminal process against the suspect rests with the court."

Arraignment does not stand alone as a form of case resolution but is part of the overall case resolution process consisting of arraignment, preliminary hearing and pretrial conference. Seno Adji and Seno Adji[34] explain these three processes as follows:

Firstly, arraignment is a trial before a judge or his deputy that takes place a few days after a person is detained, and the charges against him are pronounced, and he is asked whether he is guilty or not guilty, and only if he suspect declares to be not guilty, he will be brought before trial by a jury. From the moment of this arraignment, the responsibility for supervising the implementation of the criminal process against the suspect rests with the court, and if he has admitted guilt for his actions, a court trial process is sufficient.

Secondly, preliminary hearing which will bring the investigator before the judge to be able to determine whether there has been a probable cause that the suspect has committed a crime.

Thirdly, the pretrial conference which is aimed at planning court hearings, especially regarding evidence and the rights of the parties to the matter on hand to obtain evidence from other parties, called as discovery.

The difference from the application of plea bargaining for dignified justice purposes in the country is that in the preliminary cross-examination stage or special route, the case is only cross-examined by a sole judge. Cross-examination of cases through special routes is only really intended for an accused who pleads guilty and bargain for his sentence. If there is no confession of guilt, the case cannot be cross-examined through a special route. So, efforts to bid for the resolution of the case begins from the time at which the case is received by a public prosecutor, following which the accused may propose that his case be cross-examined in a preliminary session or a special route. So, he will then have prepared a proposal or offer for the form, type and severity of sentence which he will be capable of undergoing.

Latifah writes[35],

> "In the academic proposal for the criminal procedural bill, the arrangement of the special route is referred to as the introduction of plea bargaining. This is probably due to the fact that the concept set forth in the bill regarding special routes seems to have been adopted from the plea bargaining institution developed in the criminal justice system of countries that belong to the Anglo-Saxon law, especially in the United States. This institution offers an accused a less complicated route and the application of lighter criminal provisions if he pleads guilty and admits his actions. The regulation regarding the special route in the bill is an effort to accelerate the process of resolving cases and to reduce overcapacity in correctional institutions as well as the realization of the principle of carrying out criminal procedures in a simple, fast, and

[33] Loebby Loqman, *Op. Cit*.,p.50-51

[34] Oemar Seno Adji and Indriyanto Seno Adji, *Peradilan Bebas&Contempt of Court*, (Jakarta: Diadit Media, 2007), p.182

[35] Marfuatul Latifah, Pengaturan Jalur Khusus Dalam Rancangan Undang-Undang Tentang Hukum Acara Pidana, accesed on 11 Desember 2020

> low-cost manner. This is indicated by the permission of the accused to admit all things that he is accused of and to plead guilty of committing a criminal act which is indictable by a term of not in excess of seven (7) years, so that the public prosecutor may delegate the case to a brief session where the case will be cross-examined, tried, and decided upon by a sole judge, and will only be sentenced to two-thirds (2/3) of the maximum sentence."

The arrangement of the special route in the bill is a step to reform the criminal procedural law in the country. In setting forth the special route in Article 199 of the bill, the drafters do not seem to simply adopt the practices accepted in the US. This may be seen from several striking differences between the special routes in the bill and the plea bargaining mechanism in the Federal Rules of Criminal Procedure in the US.[36] In Rule 11 (e) of the Federal Rules, the public prosecutor and the accused may reach an agreement by which the accused admits his guilt and the public prosecutor offers whether his charge will be withdrawn, recommends a certain sentence to the court or agrees not to go against the accused's wishes for the sentence, what he expected.[37]

From the bill, it turns out that its conception was greatly influenced by the application of the plea bargaining system in the United States. As Ramadhan writes[38]:

> "The drafting team of the Criminal procedural bill has conducted comparative studies of criminal procedural laws from several countries such as Italy, Russia, the Netherlands, France and the United States. However, it is undeniable that the United States plea bargaining has inspired the team in formulating a special route in the bill. The drafting team explains the special route under the sub-title "plea bargaining" in the academic text of the bill. Robert Strang writes, "The plea bargaining arrangement in the bill was added after the drafting team conducted a comparative study in the United States".

In regulating the special route in the bill, the roles played by the actors involved in criminal justice system remain unchanged. The judge remains at the top of the hierarchy as he will later decide whether the case at hand may use an admission of guilt and then be transferred to a summary hearing, and he will also test whether the guilty statement is really issued voluntarily and whether the accused understands which rights he will waive by pleading guilty. In addition, the judge also remains the sole determinant of what sentence will be imposed on the accused, who pleads guilty in a brief trial. In addition, the roles played by the public prosecutor in the practice of the special route is not necessarily the same as those by the public prosecutor in the United States. In the special route, the public prosecutor is not given the authority to bargain with the accused or his legal advisor. The role of the public prosecutor in this case is to pronounce the indictments and present the case to a brief cross-examination session when the accused accepts the indictments, as the bill only stipulates that the accused pleads guilty of the indictments presented by the prosecutor. It seems that the drafters of the bill hope that with the provision of a special route, the accused will voluntarily plead guilty of the crime that is charged against him without any agreement with any party outside the court.[39]

[36] Ibid.
[37] *Ibid*
[38]Choky Risda Ramadhan, Media Hukum dan Keadilan, "Teropong", Volume 1 Agustus 2014,p.139
[39] *Ibid*

For the purpose of resolution of a case through the special route, there is at least has a place to carry out the initial cross-examination process before it is brought to court. This is in line with what Latifah writes[40],

> "...therefore, it is better for a resolution means to plead guilty before trial to be arranged as a series in the special route mechanism while this route is not a process of bargaining for sentence as is known in the plea bargaining mechanism adopted in the United States. It is preferable that in the trial each party already knows their respective positions, so that the trial session for reading out the indictments will only be used by the judge to test the guilty statement of the accused, so that no accused will declare a guilty plea without the prior knowledge of the public prosecutor acting as the representative of the state in the case. the. The arrangement is intended so that the efforts made by law enforcement officers will not come to no avail as they are not informed of whether the accused will plead guilty or otherwise."

The light sentence that will be received by the accused is one of the objectives of a special route in the process of resolving criminal cases. This leniency must be proportional to the benefits received by the victim, namely, the compensation for the losses suffered by the victim and the sentence served by the perpetrator or accused, even though the sentence is not as severe as what the accused has to undergo if he is brought to a case cross-examination process at an ordinary trial. Nelson writes[41],

> "The suspect in the Criminal Procedure Code is a subject, so that at each stage of cross-examination he must be treated in a humane manner and with value, dignity, and self-respect, and he is not seen as an object whose human rights and dignity are arbitrarily treated by the investigator on the grounds that he has been guilty of a criminal act. This is due to the principle of presumption of innocence adopted in the criminal justice process in the country as provided for in Article 8 of Act no. 4 of 2004 concerning judicial power, namely, "Anyone who is detained, suspected, arrested, prosecuted and/or brought to a court must be deemed innocent until a court declares him to be guilty, and the order has come into permanent legal force".

The main hope is that special routes in the resolution of criminal acts may be applied in the process of resolving EIT crimes in order to suppress the rate of increase in the number of inmates. As stated by President Jokowi, "The regulation regarding special routes in the criminal procedural bill represents an effort to speed up the process of resolving cases and to reduce overcapacity in correctional institutions as well as the realization of the principle of implementing simple, fast, and low-cost criminal procedures".[42]

The special route in the Draft CPC is only regulated in one article, namely, Article 199 of the Bill, which reads as follows[43]:

> "Part Six
> special routes
> Article 199
> 1. After the public prosecutor pronounces his indictments and the accused admits all the acts he has been accused of and pleads guilty of committing a criminal offense, the sentence for which the term of sentence is not in excess of seven (7) years, the public prosecutor may present the case to a trial for a summary hearing.

[40] Marfuatul Latifah, *Op.Cit*.
[41] Febby Mutiara Nelson, *Op.Cit*.,167
[42] President Jokowi's statement as quoted by Marfuatul Latifah, *Op.Cit.*
[43] Rancangan Undang-Undang Republik Indonesia Nomor ... Tahun ... Tentang Hukum Acara Pidana, https://antikorupsi.org/sites/default/files/dokumen/Rancangan-KUHAP.pdf, accessed October 22 2021

2. The guilty plea shall be stated in the official minutes of hearing signed by the accused and the public prosecutor.
3. The judge must:
4. notify the accused of the rights he has waived by pleading guilty, as referred to in paragraph 2 above;
5. notify the accused of the length of the sentence that may be imposed; and
6. ask whether the plea is voluntary.
7. The judge may reject the plea if he judge has doubts about its veracity.
8. Notwithstanding Article 198(5), the criminal sentence against the accused as referred to in paragraph 1 shall not exceed two-thirds (2/3) of the longest imprisonment term demanded."

Like plea bargaining, a special route is given to an accused who pleads guilty of the criminal charges. As a result, the accused will be tried using a summary hearing procedure." It is hoped that the change from an ordinary hearing session to a summary hearing will speed up the trial process.[44]

The researcher is of the opinion that the provisions of Article 199(1) of the Criminal procedural bill include an uncertainty, namely, the questions of at which hearing will the indictments be pronounce and the accused pleads his guilt?

After the completion of the plea stage, the case will be transferred to a summary hearing. Is the venue for the guilt plea is a kind of the dismissal process? The agenda for hearing cases through this special route should suffice with reading the sentence and the accused's response to the sentence in the form of an offer of the form and type of sentence in which if the prosecutor agrees to the offer then an official report is made which then the contents of this report are confirmed as a decision. Because according to the researcher, the preliminary hearing or the special route should be the one that should apply the summary hearing procedural law. Pangaribuan writes[45],

> "The new law (or Criminal procedural bill) will not facilitate the purpose of indicting everyone who is brought to it and with the maximum severity, so the purpose is purely sentence, which model in the legal literature is called as a crime control, or administrative, model, but it is more directed at every violation of the law in society, in order to ensure that there must be a fair, objective and accountable process without making the sentence the main goal, which is called in the same literature as the due process model. In other words, every use of power relating to fundamental matters must be subject to the principle of judicial security. It shall not be sufficient for decisions to be based solely on discretion such as determination of status as a suspect and detention. It shall not be sufficient to practice it only by notice but by a court order, for which propriety must also be considered. The notice model like this will potentially be a source of moral hazard for law enforcement officials, as this suggests a holy inquisition which occurred in the Middle Ages".

The application of the plea bargaining system in the resolution of criminal acts under the EIT Act is an effort to develop an integrated criminal justice system, especially in EIT crimes. The rapid development of technology has caused a big clash in the prevention and handling of such crimes. From the perspective of a new criminalization system in criminal law, EIT crimes target individuals who have above average abilities, as electronic media may only be used by individuals with such abilities. Therefore, it is certain that only people who are capable and have a high intellectual level may use and even abuse them.

[44] *Ibid*
[45] *Ibid*.,p.5-6

Incorporating the principles of the plea bargaining system into the Indonesian criminal justice system represents an enrichment of criminal procedural law from the time the accused is charged until he is prosecuted in court. This is in accordance with the opinion of Seno Adji who writes that "the criminal justice system and criminal justice administration are a procedural path of a criminal procedural law from the time of the indictments are filed until the sentence is pronounced against the accused. Criminal justice administration is only part of the sub-judicial system".[46]

Criminal acts which are regulated and prohibited in the articles of the EIT Act may ensnare anyone who takes advantage of EIT activities. Everyone suspected of committing an EIT crime will be prosecuted by referring to the criminal procedural law and the criminal process based on the length of the sentence or the sanctions regulated in the EIT Act. Everyone who commits an EIT crime is considered to have the intention and will to commit the crime. However, what cannot be ignored is the fact that the EIT Act was actually designed to cover trade transactions carried out by e-commerce. So, the EIT Act should not deviate from its original purpose as the legal umbrella for e- commerce transactions. Notwithstanding, the world of social media has become boisterous with criminal acts committed by its users, and, hence, the perpetrators have to deal with the police. Reporting about each other, defamation, SARA (Ethnic, Religion, Race-related) crimes, hatred and fake news have emerged in the world of social media. Of course, if this problem is solved by a normal criminal process mechanism, there will be an increase in the number of prisoners, which of course will burden the government with the costs.

The plea bargaining system may at least be used as a model for resolving criminal cases under the EIT Act based on respect for the dignity of the perpetrators, which act emphasizes the principles of spirituality and materiality-based justice enforcement. It is said to be spirituality-based as the resolution of the crime prioritizes respect for the dignity of the perpetrator by "re-humanizing" him, so that he returns to his original nature as stated in the Second Precept of Pancasila, namely, just and civilized humanity. The term 'materiality-based justice' means that the enforcement of justice shall not ignore the nature of the perpetrator's guilt. Every mistake must be rewarded with a commensurate sanction. This basic thinking represents a benchmark for entering into efforts to find an ideal model in resolving EIT crimes where the plea bargaining system model is one option. The reason being this system provides a spiritual justice-based resolution option where the perpetrator of a crime has the opportunity to negotiate the amount of his sentence with public prosecutor. In addition, the system continues to prioritize the enforcement of materiality justice by continuing to carry out a due process in court also in order to help provide the victims with justice.

The system is an option to be engineered as a procedural law model in criminal law as the system provides and opens options for the resolution of the criminal process that will be experienced by the perpetrator. On the one hand, the system continues to carry out the process of the criminal justice system, namely, the stages of the trial process, but there is also legal certainty for the criminal perpetrator to speed up the sentencing process by

[46] Rocky Marbun, *Sistem Peradilan Pidana Indonesia Suatu Pengantar*, (Malang: Setara Press, 2015), p.20

bargaining for criminal sanctions that will be prosecuted by the public prosecutor and decided upon by the bench.

Cole, Smith and De Jong, as quoted by Nelson, argues[47]:

> "…the defense attorney and the prosecutor reach an agreement; the accused agrees to plead guilty in exchange for a reduction of charges or a lighter sentence. As a result of this exchange, the prosecutor gains a quick, sure conviction; the offender receives a shorter sentence; and the defense attorney can move on to the next case. Thus, the cooperation underlying the exchange promotes the goals of each participant."

The mechanism proposed by Cole, Smith, and De Jong is carried out before a court process begins. When the negotiation is successful, an agreement will be made, called the plea agreement, which is to be brought before the judge. The judge will ask the accused questions regarding his understanding of the agreement he has made with the public prosecutor. This understanding includes whether he agrees to the sentence stated in the agreement, the waiver of his rights such as the right to be tried in court by a neutral jury and his right to appeal, and he is informed of the consequences that will befall him for his plea.[48]

Although the trial takes place in a simple manner, the judge still has to cross-examine the evidence in accordance with the formalities of the trial. Decisions made under the special procedure for trial are effectively final resolutions, which cannot be appealed through special procedures on the basis of defective evidence or procedural errors. From the explanation above, the research author assumes that the arrangement of the special route seems to be inclined more to the arrangement of the special procedure for trial used in criminal procedural law in Russia. With the maximum limit for imposing a criminal sentence, which is two-thirds (2/3) of the maximum sentence, the judge continues to cross-examine evidence in the same way as other criminal cases.[49]

In Reksodiputro's understanding, the plea bargaining system occurs when the accused (through his advocate) negotiates with the public prosecutor to obtain leniency in charges and sentences.[50] The system may be understood from the principle of prosecutorial discretion, which principle is (almost) unknown to the Indonesians (which is different from the principle/opportunity right which belongs (only) to the Indonesian Attorney General. In the United States, the prosecutor has broad discretion in carrying out their job. He may determine whether the completed minutes of investigation will be forwarded to the court. Of the cases that will be so forwarded, the majority are resolved by the system (whereby the accused bargains for the charges and decisions). The system is practiced by a guilty plea filed by the accused in exchange for a reduced charge and/or a reduced criminal charge. In this process, the judge no longer conducts hearings and may immediately impose a sentence. This is considered cost effective and reduces the burden on prosecutors and courts (or cheap and fast).[51]

[47] Febby Mutiara Nelson, *Op.Cit.,* p.167
[48] *Ibid.*
[49] *Ibid.*
[50] Mardjono Reksodiputro, "*Beberapa Catatan Tentang Justice Collaborator dan Bentuk Perlindungannya*", Paper presented during the Celebration of Peradi's 11th Birthday, Crown Hotel, Jakarta
[51] *Ibid*.,p.3

Factors that affect the system include[52]:

a. The evidence that the prosecutor feels is not strong enough;
b. The prosecutor's witness who is deemed less convincing; and
c. There is the possibility of diversion (also known as pretrial diversion).

Reksodiputro writes, "The plea bargaining system is not regulated in the United States constitution or laws, everything is based on customs in their criminal justice system. Criticisms raised against the system include, among others, that the accused has beaten the system and tarnished the CJS process".[53] Hamzah and Surachman writes that, through plea bargaining, the prosecutor offers a lighter charge if the suspect agrees and pleads guilty. Generally, pre-trial judges always agree to the prosecutor's proposal, as the judges like to offer the same.[54] From the system, we can see that any information or data will not be taken for granted, but still has to go through the cross-examination of evidence.[55]

Atmasasmita offers the following definitions for the system[56]:

a. Plea bargaining is essentially a negotiation between the public prosecutor and the accused and his defense lawyers.
b. The main motivation for the negotiation is to speed up the process of handling criminal cases.
c. The negotiation must be based on the volunteering of the accused to plead his guilt and the willingness of the public prosecutor to offer an sentence desired by the accused and his defense lawyers.
d. It shall not be permitted for the judge to participate in the negotiation. The judge shall not play a role. His role is not needed as it will create a bad image on the judiciary branch (which should be impartial).

Sprack as quoted by Mulyadi, writes[57]:

> "It can mean an agreement between the judge and the accused that if he pleads guilty to some or all of the offences charged against him the sentence will or will not take a certain form…Second, plea bargaining can mean and undertaking by the prosecution that if the accused will admint to certain charges they will refrain from putting more serious charge into the sentence or will ask the judge to impose relatively light sentence… Thirdly, plea bargaining may refer to the prosecution agreeing with the defence that if the accused pleads guilty to a lesser offence they accept the plea…Lastly, it may refer to the prosecution agreeing not to proceed on one or more counts in the sentence against the accused if he will plead guilty to the remainder"

The efforts made to employ the system so as to reduce penalties for the perpetrators of EIT crimes have been initiated by Seno Adji. The idea is described as follows[58]:

> "On one hand, the draft criminal procedure code (CPC) begins moving closer to towards such a prosecution system, which of course will change the prosecution system under the norms of legislation, and on the other, the pattern of criminal resolution through pre-adjudication such

[52] *Ibid.*
[53] *Ibid*.,p.4
[54] *Ibid.*
[55] *Ibid*.,p.12
[56] Febby Mutiara Nelson, *Op.Cit*., p.192
[57] *Ibid*.,p.82
[58] Indriyanto Seno Adji, *Hukum Pidana (KUHP&KUHAP) Perkembangan dan Permasalahan*, (Jakarta: Diadit Media, 2014), p.47-48

> as the alternative dispute resolution concept offered by Teguh Soedharsono, former head of the Legal Division of the National Police Headquarters, is relevant due to the firm determination of the characterization of the form and nature of the crime. Termination of prosecution by public prosecutors in the public interests and/or for certain reasons (conditionally or otherwise) through a concept such as (a) plea bargaining which is pre-adjudication is realized through Articles 42(2), (3) and (5) of the draft CPC, namely, the criminal acts committed are minor in nature, threatened with a maximum imprisonment of one year, or a fine, the suspect at the time of committing the crime is older than 70 years and/or the loss has been compensated for. Especially for the perpetrators who are over 70 years old and the loss has been compensated for, this only applies to criminal acts that are indictable by a maximum imprisonment of five years; and (b) the idea of plea bargaining for adjudication in accordance with Article 199 of the Draft CPC, namely, the existence of a special route. The public prosecutor pronounces the indictments and the accused admits all the acts that have been charged against him, and he pleads guilty, and the possible term of imprisonment is not more than 10 years.

Indriyanto Seno Adji writes, "One of the protections for those who cooperate with law enforcement is to provide immunity from prosecution and mitigating of sentence."[59]

Ramadhan writes that there are several patterns of plea bargaining in practice[60]:

a. Fact bargaining (or negotiation of legal facts) whereby the prosecutor will only reveal facts that relieve the accused; and
b. Sentence bargaining (or negotiation) whereby negotiations between the prosecutor and the accused regarding the sentence against the accused. The sentence is generally lighter. Such negotiations can take place by phone, at the prosecutor's office, or in the courtroom. However, the negotiations do not involve any a judge. The agreement between the two may be in the form of the prosecutor: 1) not accusing or accusing a lesser offense against the accused; 2) recommending to the judge the sentence to be handed down; 3) agreeing with the accused for the imposition of a certain sentence. However, the judge is not bound to make a decision in accordance with the agreement between the prosecutor and the accused or his lawyers.

In the United States, the plea bargaining system has been found to be able to solve more cases. The system encourages enforcement officers to resolve 97% of federal government crimes and 94% of state government crimes. The efficiency resulting from the system has inspired legal experts and parliamentarians in various countries. Civil law countries such as Italy, Russia, or countries in Asia such as Taiwan, have adopted regulations regarding the system in their criminal procedural law.[61]

The need for options for resolving criminal acts other than the existing system is as written by Sudarto[62]:

> "The negative aspects of criminal sanctions should only be applied if other efforts are actually not sufficient, so that criminal law should have a subsidiary function. In addition to the unpleasant nature felt by the indicted arising from the negative aspects, there are still other consequences that are felt in the form of stigmas even though they have finished serving a

[59] Indriyanto Seno Adji, *Humanisme dan Pembaharuan Penegakan Hukum*, (Jakarta: Kompas, 2009), p.157
[60] Choky Risda Ramadhan,Op.Cit.,p.142
[61] *Ibid.*
[62] Bambang Purnomo, *Pola Dasar Teori Asas Umum Hukum Acara Pidana dan Penegakan Hukum Pidana*, (Yogyakarta: Liberty, 1993), p.199

> sentence, and, therefore if it is not necessary, criminal sanctions should not be used other than as a last resort that is called as *ultimum remedium*."
>
> Purnomo writes[63]:
>
> "…it is possible that the criminal law in reality may be applied "*ius operatum*", or not fully in accordance with the "*ius constitutum*", as a requirement for legal practice. For example, the police should stop the investigation so as not to proceed with the case according to the law, the prosecutor should not carry out prosecutions as an effort to apply the principle of opportunity or close the case for the sake of the law, and the judge should follows the reasons for eliminating mistakes or justifying an illegality, and so on. This process of implementing criminal law may also be justified from the expansion of the pattern of criminal law in the administration of a criminal justice system in that all criminal law enforcement officers must hold equal positions."

4. CONCLUSION

By combining preliminary hearing, hearing of cases through a special route and the application of the principle of bargaining for sentences in the plea bargaining system, a new mechanism may be formulated in the criminal justice process employing a dignified justice approach, namely, the trial of cases in a preliminary hearing as a special route under a sole judge that is intended for an accused who pleads guilty and bargains for a certain sentence. In the absence of a guilty plea, the case cannot be heard through a special route. If the guilty plea and the bargain are accepted by the public prosecutor, the judge makes a decision. However, if the same are not accepted by the public prosecutor, the judge makes a determination, so that the case will be heard in an ordinary court under the Indonesian criminal procedural law, embodied in the Law Number 8 year of 1981.

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[63] *Ibid*.,p.199-200

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