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E-COMMERCE IS PARALYZING DISTRIBUTION COOPERATION IN INDONESIA

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Abstract

The rapid development of digital technology has boosted the growth of trading systems in the world through the internet (e-commerce). The proliferation of this technology is always faster than the availability of laws and regulations governing its implementation. Although a bit late, the Government of the Republic of Indonesia finally made regulations for the implementation of e-commerce through the issuance of Government Regulation 80 /2019 on Trading Through Electronic Systems dated November 25, 2019 **("GR 80/2019")**[1].This GR 80/2019 provides a wide space for individuals or companies desiring to become e-commerce players. However, the definition of the e-commerce business actor does not provide any limitation for a distribution business actor[2] selling its products directly to customers through e-commerce platform providers. The absence of restrictions for the distribution business actors to be the e-commerce players can create unfair competition for the Indonesian trade, particularly against the distribution channels in Indonesia. The writing of this journal aims to describe and analyze the great difficulties and challenges of the distribution of goods in Indonesia in the midst of the proliferation of e-commerce, and the disharmony of GR 80/2019 with the distribution regulations in Indonesia.

Keywords: *e-commerce, GR 80/2019, Distribution, conflicting regulations*

1. INTRODUCTION

Since the enactment of the GR 80/2019 on Trading Through Electronic System (**"GR 80/2019"**), customers in Indonesia may breathe the air of internet-based transactions more easily and securely. This regulation governs rules, rights, and obligations for contracting parties and administrative sanctions imposed for their infringements to which it is aimed at doing legal and fair-trading activities under the principle of fair business competition to respect and protect consumer rights.

E-commerce accelerates the sale and delivery of goods between seller and buyer to the most mutually acceptable extent. It puts cuts on long-route-order mechanisms and deliveries between the manufacturer (or supplier principal) with consumers as direct-transacting

[1] Press Conference of Public Relations of Ministry of Trade, "PP No.80 Tahun 2019: Pemerintah Lahirkan Peraturan Pemerintah tentang Perdagangan Melalui Sistem Elektronik", 10 of December 2019, officially published at https://kemendag.go.id>article_uploads.

[2] Distribution Business Actors defined in this journal are (i) foreign principals (principal producers or principal suppliers) having registered addresses in other countries or Direct Investment Companies in Indonesia (PMA); and (ii) distribution business channels in Indonesia in the form of distributors, sub-distributors, agents, and sub-agents, each of them is legally domiciled in Indonesia.

parties. In a short, the consumer is the most-benefiting party in terms of time, delivery cost, and mainly, price of the goods in e-commerce activities.

The COVID-19 pandemic has turned out to be a boon for e-commerce in Indonesia. The Indonesian e-commerce sector remains the star of the digital economy and is expected to record a growth in market value from US$ 21 billion in 2019 up to $ 83 billion by 2025 according to Bain & Temasek. In southeast Asia, Indonesia is set to become the largest digital economy with approximately 40% of the total regional market share[3].

The proliferation of e-commerce is boosted by the disruption of internet-based technology impacting multi-socio-economic in the countries. Thus conceived, this new regime of internet-based transactions is unlikely to be halted. While e-commerce issues already existed in Chapter VIII of Law 7/2014 concerning Trade, the Indonesian government needs to prepare a road map of e-commerce before the Issuance of GR 80/2019 which almost coincided with the first outbreak of COVID-19 in December 2019 in Wuhan, China. Since then, the enforcement of social distancing, lockdowns, and other measures in response to the COVID-19 pandemic has led consumers to ramp up online shopping, social media use, internet telephony and teleconferencing, and streaming of videos and films[4]. Indonesia is noted to have large-scale e-commerce with the potential to approach South Korea and China. According to the Technology-empowered Digital Trade in the Asia Pacific report from Deloitte, the total size of the e-commerce market in Indonesia was recorded at US$ 43.351 billion in 2021[5]. This figure has shown how the E-commerce trend is in great demand and influences the growth of the economy in Indonesia.

E-commerce is always connected with the distribution. Distribution is the movement of products from manufacturers to sales outlets to customers[6]. All e-commerce players do distribution of goods by conducting direct selling and instant delivery to their customers, but they are not included as ordinary distribution business actors. The method of distribution distinguishes e-commerce players and distribution business actors. E-commerce players may directly distribute products to customers as end users, while ordinary distribution business actors must deliver products through market intermediaries as their distribution channels. This happens because the e-commerce players may do direct selling and instant delivery to their sellers buying their products while ordinary distribution business actors are strictly prohibited by laws. In Indonesia, business actors who engage in distribution domestically and abroad are known as distributors, agents, exporters, importers, manufacturers, suppliers, sub-distributors, sub-agents, and retailers[7]. The picture below shows the difference in the method of distribution between E-commerce and ordinary distribution.

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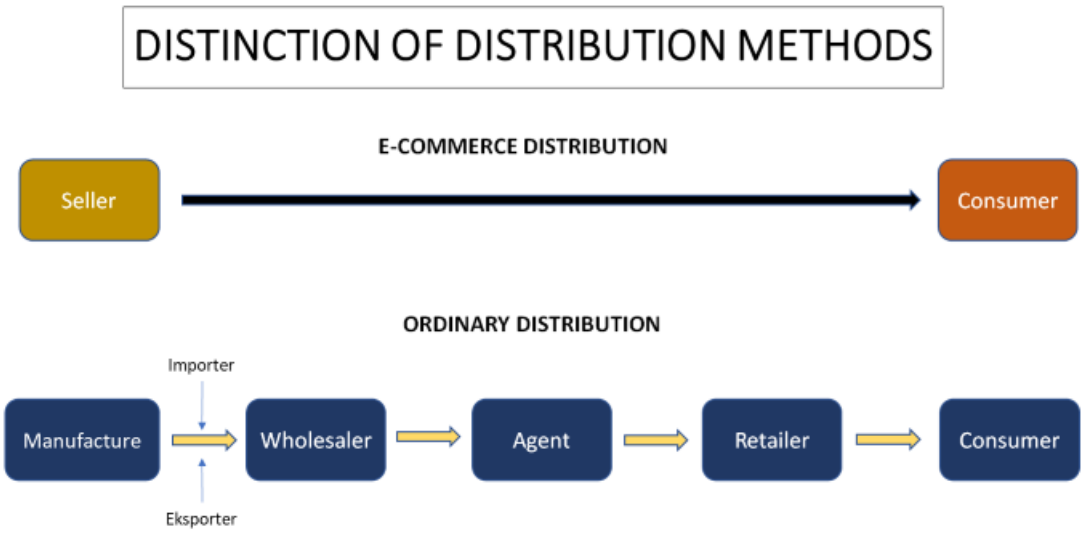
[3] Deutsche-Indonesische Industrie-Uns Handeiskammer, (Nov 2021), "Unlocking the Potential of Unlocking Indonesia E-commerce", accessed on 16 o Jan 2022 from Unlocking the potential of Indonesia's e-commerce (ahk.de)

[4] World Trade Center, (2020), "E-Commerce, Trade, and the COVID-19 Pandemic-Information Note", ecommerce_report_e.pdf (wto.org), P.1.

[5] CNBC news Online, "Market E-Commerce di RI tembus US$ 43,35 M di Indonesia", accessed on 30 of Jan 2022 from Market E-Commerce di RI Tembus US$ 43,35 M di 2021 (cnbcindonesia.com).

[6] Encyclopedia dictionary online.

[7] Elucidation section of Article 7 of Law 7/2004 on trade.



Picture 1
Distinction of Distribution Methods

Prior to the emerging e-commerce activities, there exist regulations governing the distribution of goods and services in Indonesia updated from time to time. This regulation was initially established as derivative rules of Law 1/1967 on Foreign Direct Investment. One of its provisions specified that foreign companies in Indonesia were allowed to sell their products to the Indonesian market through local companies as retailers[8]. Following the enactment of Law 11/2020 on Job Creation Law, the Indonesian Government has then promulgated 51 implementing regulations consisting of 47 government regulations and 4 presidential regulations. One of the 47 is Government Regulation 29/2021 concerning Implementation of Trade Sector ("GR 29/2021") having 28 provisions for the distribution of goods in Indonesia.

Further to the distribution, the government then issued the Minister of Trade Regulation 24/2021 on Agreement for Goods Distribution by Distributor or Agent ("MTR 24/2021") 2 months after the promulgation of GR 29/2021. This MTR 24/2021 is composed to implement provisions of Article 35 of GR 29/2021 declaring that further provisions about the Agreement for Distributor or Agent are Regulated by Ministerial Regulation. Up to this point, we see the Indonesian government takes a high attention to managing and regulating distribution issues in Indonesia.

2. RESEARCH METHODS

According to Soerjono Soekanto, Legal research is a scientific event, based on certain methods, systematics, and thoughts, which aims to study one or several certain legal

[8] Art.3 GR 36/1977 concerning Termination of Foreign Business Activities in Trade Sector in conjunction with Art.1 of GR 35/1996 concerning Amendment to GR No.36 of 1977.

symptoms. Legal research is conducted to gain a deeper comprehension of certain legal symptoms[9]. Meanwhile, Moris L. Cohen said, "legal research is the process of finding the law that governs activities in human society". Through research, lawyers found important resources required to predict what will be done by the court, and therefore, they may take specific measures[10]. The use of legal research is to give a clear understanding of how e-commerce may (gravely) paralyze distribution contracts in Indonesia since no restriction for merchants to be e-commerce players. The normative-empirical method (category of non-Judicial Case Study)[11] is used in this legal research with a descriptive analysis of the collected data and information

3. ANALYSIS AND DISCUSSION

3.1. Distribution Cooperation has long time been the Backbone of the Development of the Economy in Indonesia.

The Indonesian people have been so familiar with and engaged in the cooperation of goods distribution since ancient times. It is recorded that from the 7th century until 500 years later, the great kingdom in the archipelago that took part in the international trade was the Srivijaya Kingdom. At that time, the Srivijaya played an important role in Asian trade[12]. Furthermore, the 10th century to the 14th century was the golden age of Hindu-Buddhist kingdoms on the island of Java in which international trade was in demand[13.]

The Dutch colonial period did not directly begin when Dutch people set their foot in the archipelago in the 16th century. In contrast, the process of Dutch colonization was a slow and gradual process of political expansion that lasted for several centuries before reaching the boundaries of Indonesia as it is today. On 20 March 1602, the Dutch government established a union of trading enterprises called Vereenigde Oost-Indische Compagnie (VOC) which distributed natural resources from East-Indies and India to Europe.

Upon obtaining 20 years of independence, Indonesia commenced embracing international cooperation through Law No.1 of 1967 concerning Foreign Direct Investment. Under Law No.1of 1967, distribution Cooperation has started supporting the growth of the economy in Indonesia since 1977 when the government enacted a

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[9] Soerjono Soekanto, Pengantar Penelitian Hukum, cetakan 3, Universitas Indonesia, UI Pres, 2007, P.43.

[10] Morris L. Cohen & Kent. C. Olson, *Legal Research*, 1992, (West Publishing Company, St. Paul. Minn): P.1 as quoted by Peter Mahmud, Penelitian Hukum, Revised Edition, 2005, Prenata Media Group, Surabaya, P. 56.

[11] Normative-empirical method is a combination of normative legal research and empirical legal research. This research is carried out on the implementation of normative legal rules (in this case is the laws and regulations) in its action to each specific legal event occurring in society. Non-Judicial Case Study means the legal research was made on no conflict, thus, no court (decision) interference (see Soerjono Soekanto, Pengantar Penelitian Hukum, UI Press Publishing, Jakarta, 2005, P. 51).

[12] Wolters, O. W., 1967, *Early Indonesian Commerce: A Study of the Origins of Srivijaya*, Valley Offset, Inc., New York, hlm.15

[13] Wikipedia, https://id.wikipedia.org/wiki/Perdagangan_internasional_zaman_Jawa_Kuno accessed on 15th of April 2020 at 10:10 a.m. West Indonesian Time.

regulation on the termination of foreign business activities[14]. It was said that foreign companies were allowed to market and sell their products in Indonesia only if they appointed national companies as their distributors/agents. Since then, the distributors and other intermediaries become distribution channels for principal products to customers in Indonesia. The principal selling products in Indonesia is not allowed by laws and regulations without using distribution channels. In general, most of the commercial transactions are supported by distribution companies in providing raw and supporting materials, either or not technology-based products in the sector of building construction, banking digitalization technology devices, communication devices, transportation equipment, household appliances, modern educational equipment, oil and coal exploration tools, entertainment products, machinery, health equipment, chemicals, and many others are marketed and sold through distribution channels. Moreover, most of our day-to-day simple products are acquired from the retailers (the lowest distribution channel), who are legally entitled to distribute/sell the products to the end-users. In a nutshell, most of the products are supplied by using distribution channels.

Along with times, some products are excluded from the obligation to be governed by the distribution regulations. These products are considerably understandable i.e., government procurement of goods[15], health products, and medicines[16]. Each of the matters is governed by specific regulations to be complied with. Since the Establishment of Law No.11 of 2020 on Job Creation ("Omnibus Law"), the government has upgraded the regulation for the distribution of goods and services by issuing the GR 29/2021 and MTR 24/2021 as the implementing rules. These new regime regulations are issued amid the proliferation of e-commerce. The government looks at the importance of the distribution of goods to support and sustain commercial transactions in Indonesia either internationally or locally. Besides that, all companies engaging in distribution channels have been supporting the government in embodying social welfare and generating tax incomes for the country[17].

3.2. Disharmony of Regulations

Five years after the establishment of Law 7/2014 on Trade, Indonesia issued GR 80/2019 on Trading Through Electronic System (e-commerce). This GR 80/2019 provides a broad definition for e-commerce players i.e., every individual or business entity whether in the form of a legal entity or not, domestic business actors or foreign business actors, conducting business activities in the e-commerce sector[18] while PP

[14] Art.3 GR 36/1977 on Termination of Foreign Business Activities in Trade Sector.

[15] See Article 24 (a) of Minister of Trade Regulation 66/2019 concerning the Amendment to General Terms of Goods Distribution.

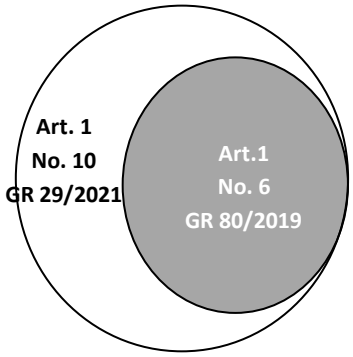
[16] Paragraph (2) Art.10 of MTR 24/2021

[17] See Article 27 Paragraph (2), Article 28 C, and Article 28 D of the 1945 Constitution of the Republic of Indonesia and Article 4, 5,6 of Law No.11 of 2019 concerning Social Welfare.

[18] See. Art.1 Number 6 of GR 80/2019 on Trading Through Electronic System

29/2021 defines distribution business actors as those carrying out goods distribution activities in the country[19].

In practice, every e-commerce activity leads to the distribution of the goods after the sale-purchase deal is achieved. Thus, there is a clear correlation in the understanding of business actors defined by GR 80/2021 and PP 29/2021 as described below:



Picture 2
Linkage of Business Actors' activities

Remarks:

- The shaded part of the picture above illustrates that all e-commerce players distribute goods or services but not all Distribution Business Actors carry out e-commerce activities.
- The non-shaded part of the picture illustrates some Distribution Business Actors do not conduct e-commerce but remain to carry out ordinary sale-purchase of the goods to their distribution channels.
- There is no e-commerce player who does not distribute goods and services in carrying out their activities.

Conclusion:
Every e-commerce player conducts distribution activities for goods and services. It means every Distribution Business Actor may act as an e-commerce player as long as the distribution of goods or services is carried out using electronic devices.

Given the understanding shown in the Picture 2 above, disharmony emerges conflicting legal issue in which everybody (including an entity) can be an e-commerce player, and consumers (end-user) become its direct-target sale. Conversely, the Distribution Business Actor is legally prohibited to do direct distribution (sale) of the goods to consumers without using its intermediaries in Indonesia.

[19] See Art. 1 Number 10 of GR 29/2021 on Agreements for Distribution Goods made by Distributor or Agent.

The disharmony of regulations governing e-commerce and distribution of goods is followed by 2 (two) critical issues as follows:

(i) No Certain Restrictions to be E-commerce Player

As introductorily explained above, the Indonesian e-commerce sector remains the star of the digital economy in the time of the pandemic COVID-19. The rapid and continuous growth of e-commerce may be supported by informal and official marketing officers offering products with various attractive strategies for sales. Especially in terms of generating profits, is very likely to encourage the Distribution Business Actor to take part in e-commerce activities by becoming the e-commerce player since GR 80/2019 provides no restriction for anybody conducting e-commerce business activities as long as he adheres to and complies with provisions contained in GR 80/2019. Moreover, there is no clear obligation to expressly comply with Indonesian laws and regulations governing the distribution of goods in Indonesia stated in GR 80/2019.

In the sale of goods carried out through the e-commerce platform providers, we can find some sellers have sold a certain type of goods until thousand times when the sales are unlikely to do by ordinary sellers instead of manufacturers or distributors (wholesalers). Thus, if it is proven, then foreign Distribution Business Actors either domiciling in Indonesia or abroad allegedly infringe the restriction according to the Indonesian laws and regulations related to the distribution of goods[20].

Article 1 Paragraph (6) and Article 4 of GR 80/201921 implicitly provide opportunities for any Distribution Business Actors to infringe the signed distribution agreement by selling products on e-commerce (direct selling to customers). Consequently, these provisions may create irregularities and disharmony in the regulation of goods and services in Indonesia. Moreover, it may encourage Distribution Business Actors to injure the implementation of the distribution contract through e-commerce as this cannot be categorized as a violation under GR 80/2019.

(ii). Representative of E-commerce Platform Providers Act as and on behalf of E-commerce Players

Overseas e-commerce platform providers who actively offer or conduct e-commerce to Indonesian consumers and they meet certain criteria (total transactions, value of transactions, deliveries, and/or traffics or accessors) are

[20] See. Art.3 Paragraph (2) of GR 36/1977 as duly amended by Art 1 of GR 19/88 as duly amended by Art.1 of GR 41/1977 as duly amended by Art.1 of GR 41 of 1997 and Art.19 Minister of Trade Regulation No.22/M-DAG/PER/3/2016 as duly amended by Art.1 Number 3 Minister of Trade Regulation No.66/2019 in conjunction with Art.33 and Art.35 Paragraph (1) of GR 29/2021 concerning Implementation of Trade Sector.

[21] Article 1 Paragraph (6) of GR 80/2019:

taken as having a physical presence in Indonesia and doing a permanent business in the legal territory of the Republic of Indonesia[22]. These overseas e-commerce platform providers are obliged to appoint representatives domiciling in the legal territory of the Republic of Indonesia to act for and on behalf of the E-commerce Players concerned[23].

If we observe to the Indonesian regulation, there are 4 models of representative offices permitted to operate di Indonesia as defined in the BKPM Regulation No.13 of 2017:

1. License for a Representative Office of Foreign Company (RO-FC or KPPA), office presided by an individual Indonesian citizen, or a foreign citizen appointed by a foreign company or a union of foreign companies abroad as its representative in Indonesia.
2. License for a Representative Office of Foreign Trading Company (RO-FTC or KP3A), office presided by an individual Indonesian citizen, or a foreign citizen appointed by a foreign trading company or a union of foreign trading companies aboard as its presentative in Indonesia.
3. License for a Representative Office of Foreign Constructions Company (RO-FCC or BUJKA), a business entity established under foreign laws and domiciled in abroad, having its representative office in Indonesia, and is equal to an Indonesian private limited company engaging in construction services.
4. License for ROFC of Oil and Natural Gas (RO-FCOG or KPPA Migas), office presided by an Individual Indonesian citizen, or a foreign citizen appointed by a foreign company or a union of foreign companies aboard as its representative in Indonesia in the subsector of oil and gas.

In mere view of the definitions above, only the models of RO-FC and RO-FTC are suited to be the representatives of Overseas E-Commerce Platform Providers. Models of RO-FCC and RO-FCOG are not able to do transactions presently through the e-commerce platform providers. However, if we observe the regulation deeper, the Model of RO-FTC is the most possible to apply because RO-FC's activities are limited to being a supervisor, liaison, coordinator, and handling the company's interest or the affiliates[24] whereas the model of RO-FTC is entitled to be a selling agent, manufactures agent and/or buying agent[25]. Unfortunately, this RO-FTC is prohibited to do trading activities and sales

[22] See Art 5 and Art.7 Paragraph (1) of GR 80/2019 concerning Trading Through Electronic System.

[23] See Paragraph (3) Art.7 of GR 80/2019

[24] See Art. 37 Paragraph (1) of BKPM Regulation No.13/2017 concerning Guidelines and Procedures for Investment Licensing and Facilities and Art.9 Paragraph 10 in conjunction with Art.16 Paragraph (3) of BKPM Regulation No.4 of 2021 concerning Guidelines and Procedures for Risk-Based Business Licensing and Investment.

[25] See Art.38 Paragraph (1) of BKPM Regulation No.13/2017 concerning Guidelines and Procedures for Licensing and Investment Facilities.

transactions, either started from the initial stage to completion such as tender submission, contract signing, claim settlement, and the like.

An E-commerce platform provider is not a direct-selling party but provides an e-commerce platform for trading then the meaning of the "representative domiciling in the legal territory of the Republic of Indonesia" is emphasized by the wording" who can act as and on behalf of the business actor concerned". This means the e-commerce platform provider is identical to the Representative Office of Foreign Trading Company (KP3A) because the providers cannot do the selling, yet it acts as if the sales agent of e-commerce players.

In an effort to harmonize the use of the term "agent" defined for the representative of e-commerce platform providers, then the definition of the agent is made after the issuance of GR 29/2021:

> Agent is a Distribution Business Actor who acts as an intermediary for and on behalf of the party who appointed him under an agreement in exchange for a commission to do marketing activities for the goods without having ownership or control of the marketed goods[26].

This new definition changed the Indonesian old-fashioned terminology of an agent. Prior to the new definition, the agent was limited to:[27]

(a) national trading company
(b) acted for and on behalf of the principal
(c) under an agreement for marketing without transferring rights
(d) goods and/or services owned/controlled by principal appointing it.

This old definition is very limited and does not support the disruption of e-commerce, consequently, the new terminology of the agent is no longer defined as a national trading company but a distribution business actor, and he may act for and on behalf of any party, not just the principal. The agreement is no longer limited to marketing contracts but any agreement which gives the commission to do marketing activities. This new definition is also stressed down onto the intermediary as the one who does not own or control the goods or services in e-commerce. It is more reasonably acceptable instead of limiting the principal as a party who owns or controls it because an agent can represent any merchant in e-commerce (not just a principal/manufacturer). In a nutshell, the new definition of Agent is being prepared to support the representatives of e-commerce platform providers who act as an agent of selling should the government use the RO-FTC (KP3A) model.

[26] See Article 1 Number 6 of MTR 24/2021 concerning Agreement for Distribution of Goods by Distributor or Agent.

[27] See Article 1 Number 6 of Minister of Trade Regulation 11/M-DAG/PER/3/2006 on Terms and Procedures for Issuance of Registration of Agent or Distributor of Goods or Services.

Let us take a look into the terminology of Distribution Business Actor defined in the Elucidation section of Article 7 of Law No.7 of 2014 concerning Trade:

> Distribution Business Actor who carries out goods distribution activities domestically and abroad, including distributors, agents, exporters, importers, manufacturers, suppliers, sub-distributors, sub-agents, and retailers.

Meanwhile, Art.1 Number 10 of GR 29/2021 concerning Implementation of Trade Sector says;

> Distribution Business Actor who carries out goods distribution activities domestically.

Law 11/ 2020 concerning Job Creation as this omnibus law mandating the issuance of GR 20/2021 does not change the definition of Distribution Business Actors set out in Law 7/2014. Accordingly, this terminology may raise confusion in the Indonesian trade since the formulation in GR 29/2021 has squeezed the understanding of distribution activities domestically.

This conflicting terminology continues to parties confusingly categorized as the Distribution Business Actors as mentioned below:

a) Article 2 Paragraph (2) of MTR 24/2021;
the Distribution Business Actors are distributor, sole distributor, agent, sole agent.

b) Article 33 Paragraph (1), (2), and (3) of GR 29/2021;
   - indirect distribution (distributor and its channels, agent, and its channels), and franchise,
   - direct distribution (single-level direct selling and multi-level direct selling)

c) Elucidation section of Article 7 of Law 7/2014;
distributor, agent, exporter, importer, principal supplier, sub-distributor, sub-agent, and retailer.

The government needs to stipulate which terminology of the Distribution Business Actor applies to all distribution business sectors either in traditional trade or e-commerce throughout the territory of the Republic of Indonesia.

Following all the discussions about being representative of e-commerce players above, the government must also emphasize the enforcement of the same legal treatments for agents associated with product liability issues if the overseas merchants refuse their responsibilities for the losses suffered by consumers attributable to merchants' violations. These violations are, among others, the goods do not match the descriptions, late deliveries, lower quality of goods, broken goods, loss of goods, etc.

According to Article 1 Paragraph (3) of Law 8/1999 on Consumer Protection clearly states that the business actor is any individual or business entity whether or not in the form of a legal entity established and domiciled or carries out activities in the territory of the Republic of Indonesia severally or jointly through agreement to carry out business activities in various economic sectors. This means the agent includes a business actor who is obliged to give compensation and/or replacement for damage as a result of the use, and utilization of the traded goods and/or services or the goods and/or services received or utilized not conform to the agreement[28]. In conclusion, a business actor must be liable to compensate for damage, pollution, and/or customer losses because of consuming the traded goods and/or services[29].

As far as the researcher is concerned, each problem associated with goods or services traded through e-commerce platform providers is mostly resolved prior to the e-commerce platform providers forwarding the customer's payment to the merchant (after the customer has confirmed receiving the goods or services completely). However, if it is received after a few days, the customer will have great difficulty in demanding the merchant's responsibility. The problem escalates when the merchant refused to accept liability, and neither do the e-commerce platform providers. It is indeed formidable to the customer especially when the goods were bought at an expensive price from an overseas merchant. Again, the implication of the merchant's responsibilities as defined in Law 8/1999 has not yet been implemented properly as it is carried out in traditional trading (on-site). However, this treatment for this case is different if the transaction is carried out through the Distribution Business Actors, then they should be liable to take responsibility under Indonesian law.

3.3. Loss of competitive advantages in Distribution Cooperation.

The legal relationship between principal[30] and distributor arises from the establishment of a contractual deal to distribute goods and/or services containing terms and conditions for the principal and the distributor. After doing the research, at least 7 (seven) benefits the distributor expects from the principal under distribution cooperation:

1) The principal sells and distributes goods at a certain price which is relatively much cheaper than the market price, so the distributor receives a margin of profit.

[28] Point f and g of Article 7 of Law No.8 of 1999 concerning Consumer Protection

[29] Paragraph (1) Article 19 of Law No. 8 of 1999 concerning Consumer Protection

[30] Principal is defined as an entity (manufacturer or supplier) having shares wholly or partially owned by at least 1 foreign citizen and/or 1 foreign corporation, domiciling in the Republic of Indonesia or overseas.

2) The Distributor reserves the right for a guarantee of obtaining the latest principal's goods earlier or since the goods are marketed.
3) The Distributor provides more confidence to customers since the sale of goods is under well-support of the principal.
4) After-sales guarantee support in the form of repair services to the original condition of the goods if found damaged after purchase within a certain period or replacement if the goods have a factory defect.
5) Principal's guarantee of the authenticity of the goods and legal support for intellectual rights attached to the goods:
6) Principal's guarantee for the sustainable procurement of spare parts excludes goods sold in discontinued condition (no further development)
7) Minimum total expenditures related to goods because the distributor does not need research and development (R&D) program on renewal of the goods, costs of capital goods for production, especially purchase/lease of land, factory construction, and its installation as well skillful labors.

The strengths of the distribution cooperation as explained above should have been competitive advantages under a distribution contract. Unfortunately, since the rapid e-commerce activities, the legal relationship arising from the distribution contract seems to no avail causing all the strengths to become gravely paralyzed, except the distributor's obligation to satisfy the minimum purchase and sales target. Presently, there is almost no benefit obtained from the principal due to the proliferation of E-Commerce activities may lead to the following:

a) The sale price of goods offered by merchants is relatively lower than the basic price given by the principal when the goods were bought by the distributor at the very first time. This sale price is devastatingly unable to be completed by the distributor, albeit no margin added to it.

b) Lots of similar goods having identical forms, shapes, logos, and materials to the original goods legally distributed by the principal are sold at low prices in the electronic market[31]. Due to the swift flow of supply and demand through e-commerce, it is difficult for the distributor to request the principal to take legal action over the alleged infringements of intellectual property rights. These alleged infringements tend to be ignored by the principal because the number is many, and litigation costs, as well as lengthy legal processes, may drain mind and energy.

[31] Public Relation Report of Directorate of Intellectual Property, "Pemerintah Gelar Rapat Bersama *E-Commerce* untuk Meminimalisir Pembajakan dan Penjualan Barang Palsu di Marketplace", accessed from https://www.dgip.go.id/artikel/detail-artikel/pemerintah-gelar-rapat-bersama-ecommerce-untuk-meminimalisir-pembajakan-dan-penjualan-barang-palsu-di-marketplace Liputan Humas (dgip.go.id).

c) E-commerce makes the offer of the distribution goods competes with the same goods marketed by other merchants to Indonesian customers. This competition is considered commercially fair in the ordinary course of business. Tellingly, those same goods are produced by the same principals but originally intended for sale in other countries where the goods have a lower price than the basic price specified by the principal to the authorized distributor in the territory of the Republic of Indonesia. The distributor must sell the products not under the basic price otherwise, it will lead to a category of (material) breach of contract.

d) E-commerce which is carried out through electronic system services in Indonesia (called as e-commerce platform providers for instance: Tokopedia, Shopee, Lazada, JD, Bukalapak, etc) provides some merchants as "official stores". These stores offer and sell original products only (presently limited to principals and distributors)[32]. Consequently, these official stores can be suspected of potentially infringing the distribution regulations in Indonesia in which Distributors Business Actors are strictly prohibited to do direct sale to end-user (consumers), and if so allowed, then principal and distributor (including sub-distributor, agent, sub-agent) become direct competitors each other. Unsurprisingly, the distributor is not in demand by consumers because commercial dealing with the principal is more advantageous (instead of going to the distributor) in terms of product novelty, price, guarantee of authenticity, guarantee for repairs, and level of public trust. Legally, all Distribution Business Actors are not allowed to sell or distribute goods to customers as end-users. However, this prohibition does not apply to (i) micro and small-scale enterprises[33]; (ii) importers who also engage as distributors[34]; (iii) manufacturers producing raw materials, supporting materials, or capital goods to other manufacturers[35]; (iv) goods for government procurement[36]; and (v) corporation distributing medicines and health products[37].

e) Distributors are constantly obliged to comply with minimum purchase and sales targets of which amounts are increased from time to time

[32] Definition of Official Store as accessed on 1st of February 2022 at (i) https://www.tokopedia.com/help/article/bagaimana-cara-menjadi-official-store, (ii)https://www.lazada.co.id/helpcenter/apakah-maksud-dari-lambang-official-store.html. (iii) https://seller.shopee.co.id/edu/article/6875 (Mengenai Shopee Mall | Pusat Edukasi Penjual Shopee Indonesia),

[33] See Art.23 of Minister of Trade Regulation No.22/M-DAG/PER/3/2016 concerning General Terms of Distribution of Goods.

[34] See Art.1 Number 3 of Minister of Trade Regulation No.66 of 2019 concerning Amendment to Minister of Trade Regulation.

[35] See Ibid., Art. 1 Number 5

[36] See Ibid, Art. 1 Number 6

[37] See Art.10 of MTR No.24 of 2021.

amidst higher competition over sale price for similar goods in the electronic market. Globally, the goods produced by the principals indicate customers' great demand. This condition drives the principals to specify the higher minimum purchase of the goods and sales targets to be reasonably achievable by distributors. In the electronic market supported by e-commerce platform providers, as we know, an individual or entity (principal, distributor, sub-distributor, agent, sub-agent, merchant) is possible to be a seller or reseller. Consequently, there are many sellers (or resellers) who market/offer the same goods in e-commerce. Most of the sellers are not bound by specific requirements under distribution agreements, yet they are ready to market and sell the goods and then hand over all the arising problems to the principals. It is likely the customers' great demand is caused by the external massive unofficial marketing efforts, not distributors' sales performance.

3.4. Electronic Contract is an Absolute Adhesion Contract having disadvantageous clauses yet barely rejected in e-commerce.

An electronic contract is an underlying binding agreement to an e-commerce transaction. As we know, electronic contracts are provided "one-sided protection" merely for the seller's importance instead of the buyer (customer). This type of contract is generally known as take-it-or-leave-it contracts or Adhesion Contracts. This electronic contract is not entirely subject to change and agreeable by the seller with only a 1-clicking button "I agree", then the contract is valid and enforceable. Up to this point, the customer is bound by the whole clauses stated therein, including the alien matters for a layman such as choice of law and choice of a forum solely determined by Sellers, mostly beyond sufficient consumer's knowledge. This "take-it-or-leave-it condition is also felt by distributors, yet some minor clauses are likely to be negotiable, but the choice of law and the choice of jurisdiction remain vested in the seller's sole decision. An electronic contract is an adhesion contract containing standardized clauses; therefore, it must comply with the Indonesian regulation governing the standardized clauses[38], specifically, Art. 18 of Law 8/1999 on Consumer Protection Law as described below:

PROVISIONS OF INCLUSION OF THE STANDARDIZED CLAUSES

Article 18

(1) Business actors who offer goods and/or services for trade are prohibited from making or inserting standardized clauses to each document and/or contract if:
   a. Declaring the transfer of business actor's responsibility;
   b. Declaring that the business actor has the right to reject the return of the goods bought by the consumer;

[38] See Article 47 Paragraph (2) of GR 71/2019 on Organizations of Electronic System dan Transactions in conjunction with Art.53 Paragraph (2) of GR 80/2021 on Trading Through Electronic System.

c. Declaring that the business actor has the right to refuse the return of money paid on the goods and/or services bought by the consumer;
d. Declaring the granting of power from the consumer to the business actor either directly or indirectly to do one-sided actions associated with the goods bought by the consumer in installments;
e. Regulating matters of proving on the loss of the use of goods or services bought by the consumer.
f. Giving rights to the business actor reduces benefits of services or assets of the consumer which are the object of the service sale-purchase.
g. Declaring that the consumer is subject to regulations in the form of new, additional, continuation, and/or revised continuation made unilaterally by the business actors while the customer is using the services he pays.
h. Declaring that the consumer authorizes the business actor to impose mortgage, lien, or security rights over the goods paid by the consumer in installments.

(2) The business actor is prohibited from incorporating the standardized clauses whose positions or forms are hardly seen or non-clearly readable or the meaning is difficult to understand.

(3) Every standardized clause specified by the Business Actor to the document or contract meets provisions as meant in the Paragraph (1) and Paragraph (2), is declared null and void,

(4) The Business Actor must adjust the standardized clauses contradicting this Law (consumer protection).

The most dangerous is, the low price highly drives e-commerce customers to accept a non-changeable electronic contract. Thus, they completely bind themselves to all risked-clauses for e-commerce without prior-matured consideration. Virtually all of the ill-fitting clauses in the electronic contracts (e-commerce) are disadvantageous to the Indonesian customers but easily understandable and acceptable to them holding the principle of buying "pay first, think later". This fact is non-avoidable and not subject to business competition for the Distribution Business Actors due to the regulations strictly prohibiting them and the lowest price (below the basic price determined by principal) is at the priority to buying for e-commerce consumers.

4. CONCLUSION

The rapid advancement of digital technology in business competition has been very well realized by the Distribution Business Actors. The strength and competitive advantage of the business actors to survive in the midst of digital technology globalization is the readiness of business actors to constantly innovate, become creative with distinguishing characteristics and utilize the technology of digital marketing as a forum to promote the business internationally. The customer is becoming non-compromising with his/her preferences. It has become imperative for the business to cater to individual customers' preferences. The technology today and its evolution facilitate customer preference-centric commerce. Catering to the individual customer's preferences would be a critical survival factor for the enterprises.

The government's efforts to prepare legal institutions and regulations to support the proliferation of e-commerce in Indonesia are paces we should appreciate. However, if we observe it deeper, there is a conflict of regulations occurring between GR 80/2019

concerning Transactions Through Electronic Systems and Chapter IV Articles 32-59 - GR 29/2021 concerning the Implementation of the Trade Sector.

The definition of the e-commerce players in GR 80/2019 provides opportunities for all parties, including not limiting parties who have been bound in a distribution contract between foreign principal and distributor. Therefore, it is reasonable to assume that the implementation of e-commerce can drive the Distribution Business Actors to infringe the distribution contracts and regulations by participating in direct sales (e-commerce), causing unfair competition among Distribution Business Actors themselves, even with resellers. A reseller is a party legally entitled to make direct sales to consumers as the lowest distribution channel. Slowly but surely, the implementation of the provisions of GR 80/2019 will extremely erode distribution businesses protected by GR 29/2021 provided that, the government stays silent on this issue (of distributorship). Likewise, legal protection in the distribution business does not effectively protect any Distribution Business Factors who carry out its business in good faith from the dominating principals under the Indonesian laws and regulations (Principal-supplied contract entirely). Correspondingly, in terms of e-commerce proliferation, the government is expected to issue amendments or other legal instruments lest the implementation of GR 80/2019 is not (gravely) paralyzing the distribution contracts between foreign principals and distributors in Indonesia.

The disharmony that occurs between regulations on e-commerce and regulations for the distribution of goods should be immediately addressed and mitigated by the government. It is good to show the government attempts to create a friendly and orderly business ecosystem as well as provide sustainable welfare for every business actor in Indonesia by making mutually supportive regulations in their implementations.

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CRIMINAL RESPONSIBILITY OF PUBLIC ACCOUNTANT TO TAX CRIME

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Abstract

Criminal Responsibility of Public Accountant regarding to the Law Number 5 of 2011 based on malicious to benefiting own self or specific party unlawfully. Meanwhile regarding to General Provisions and Tax Procedures (KUP) criminal responsibility of Public Accountant based on subjective fault in form of negligence or deliberately which cause losses to the revenues of the state. The difference base of criminal responsibility rise conflict against law enforcement of tax crime resulting Public Accountant become free or burdened with criminal responsibility. Through normative law research, the problem assessed to discover the ideal regulation for criminal responsibility of Public Accountant on tax crime with taking attention aspects of justice, benefit, and legal certainty. The research which performed with regulations approach conclude that objective fault is become ideal base of criminal responsibility for Public Accountant which having own characteristic profession. Objective fault is not determined by inner connection between the man with his act, but have firm and clear measurement. Beside that, jointly responsibility also can be combination factor for criminal responsibility base of Public Accountant on tax crime. With jointly responsibility make Public Accountant have opportunity to participate in recover losses to revenues of the state caused by tax crime. Thus, the revenues of the states which become main objectives will more guaranteed.

Keywords: ***Criminal Responsibility, Normative Fault, Public Accountant***

1. INTRODUCTION

In a legal state all activities of statehood must be carried out based on a rule of law, including in the case of tax collection. Similarly, the state of Indonesia, where tax collection activities are based on a law. Article 23A of 1945 Constitution Law of the Republic Indonesia (UUD 1945) is the constitutional foundation of tax collection activities in Indonesia. Taxes are mandatory constributions that are coercive and used for the benefit of the state. Therefore, paying taxes becomes a state obligation that must be carried out by every citizen who has met certain requirements so that against him is designated as a taxpayer.[1]

The amount of tax to be paid is determined based on the additional economic capabilities received or obtained by each taxpayer. So as to calculate the amount of additional economic capabilities, then to the taxpayer of private persons who do business activities or free work and corporate taxpayers are required to carry out bookkeeping.[2] Through bookkeeping organized by taxpayers must be able to calculate the amount of taxes owed. Therefore, bookkeeping should be held with good faith in mind and reflect the actual circumstances or activities of the business.

[1] Article 2(1) Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.
[2] Article 28(1) Law No.36 2008 Concerning Fourth Revision of Law No.7 1983 Concerning Income Tax.

The tax self-assessment system implemented in Indonesia requires the independence of taxpayers in carrying out their obligations, ranging from calculating taxes owed, depositing to state funds, and reporting them through a tax returns. Thus, the level of taxpayer compliance with the applicable provisions will greatly determine the success of the tax collection carried out. For the purpose of ensuring taxpayer compliance in carrying out their obligations in accordance with applicable provisions, fiscus conducts supervision through tax returns submitted by taxpayers.

Tax returns is a form of taxpayer responsibility for the implementation of their tax obligations so that it must be filled properly, fully, clearly, and signed.[3] One form of completeness in SPT reporting is to attach financial statements. Through the attached financial statements, it can be traced back to the calculation of the amount of taxes owed that have been done by the tax payer. Therefore, financial statements should reflect the actual circumstances or activities of the business. Given the importance of the quality of financial statement information in order to determine the level of compliance of taxpayers, the falsification of financial statements or the presentation of information that does not describe the actual circumstances is regulated as a form of action that can be threatened with criminal sanctions.[4]

Public accountant as the only profession that can provide assurance services have a role in improving the quality and credibility of financial information that has been compiled by an entity.[5] Similarly, in the field of taxation that recognizes the important role of Public Accountant in the implementation of tax collection with a self-assessment system, which requires that audit reports from public accountants be attached at the time of submission of tax returns. Violation of the obligation in question will cause the tax return that has been submitted by the taxpayer will be considered incomplete so that it becomes considered not delivered.[6]

The position of Public Accountant who carries public trust, in order to get reliable financial information for economic decision making, is required to have a professional and independent attitude as part of the characteristics of his profession. To provide legal certainty in protecting the public interest and the interests of the Public Accountant profession itself, it is also regulated regarding criminal provisions against the public accountant profession.[7] According to the Law on Public Accountants (UU AP) the criminal provisions are formulated as the act of committing or assisting in the manipulation or falsification of data related to the services provided, which is based on malicious intentions to seek profit for himself or others unlawfully based on sufficient preliminary evidence.[8]

[3] Article 4(1) Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.
[4] Article 39 Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.
[5] Article 3 Law No.5 2011 Concerning Public Accountant.
[6] Article 4(4b) Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.
[7] Article 55 Law No.5 2011 Concerning Public Accountant.
[8] Decision of Constitusional Court of Republic Indonesia No.84/PUU-IX/2011.

In contrast to the Law on Public Accountants, the criminal acts of Public Accountants according to the General Provisions and Procedures of Taxation (UU KUP) are formulated as an act that tells, participates, advocates, or helps show faked or falsified bookkeeping as if it is true or does not describe the actual circumstances so as to cause harm to state revenues.[9] Therefore, the element of the onset of losses on state revenues is a substantial difference between the UU AP and the UU KUP in determining whether an act is threatened with criminal sanctions or not.

The difference in the regulation of criminal provisions between the UU AP and the UU KUP carries consequences for the criminal liability of Public Accountant in the field of taxation. Criminal tax liability can be requested to the Public Accountant who conducts or assists in data manipulation even if it is not based on malicious intent to seek profit for himself or others unlawfully as long as his actions cause harm to state revenues.

According to the publication on the Performance of Investigations in 2019 as many as 102 case files from a total of 144 case files that have been declared complete by the Prosecutor's Office (P-21) have a modus operandi in the form of issuance of tax invoices not based on actual transactions, taxes are levied but not deposited, do not submit tax returns, and misuse of taxpayer Identification Number (NPWP) or Tax Entreprenuer Identification Number (NPPKP).[10] The 2019 Investigation Performance Data reflects that criminal liability for tax crimes still focuses only on taxpayers, administrators, or other parties who are not as Public Accountant.

Departing from the existing problems, the formulation of the problems in this article consists of: (1) How to regulate the responsibility of Public Accountant for tax crimes in Indonesia (*ius constitutum*)?; (2) How is the implementation of Public Accountant's liability for tax crimes since the enactment of Law No. 28 of 2007 on changes to the General Provisions and Procedures of Taxation?; and (3) What is the ideal legal arrangement for the responsibiity of Public Accountant for tax crimes (*ius constituendum*)?.

2. RESEARCH METHODS

To find answers to problems that have been built before, legal research activities are carried out in the type of normative legal research. Normative legal research is understood as scientific research to find the truth based on the logic of legal science from its normative side. Normative law research sees law as a separate system that is separate from various other systems that exist in society so as to provide a boundary between the legal system and other systems.[11] Therefore, the study of normative legal research views law in an internal perspective where it is a closed system and separate from other systems such as political systems, economic systems, social systems, and other existing systems. In this normative legal research conducted, the focus of its exploration is directed to legal norms about

[9] Article 38, Article 39, and Article 43 Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.

[10] Annual Report 2019 Directorate General of Taxes. *Peningkatan Kapasitas Secara Berkesinambungan Melalui Penguatan Tata Kelola Data dan Teknologi Informasi Perpajakan*. 76-77.

[11] Johnny Ibrahim. *Teori dan Metodologi Penelitian Hukum Normatif Edisi Revisi*. (Malang: Bayumedia Publishing. 2007). 57.

criminal liability in the field of taxation against perpetrators with professional characteristics, especially the profession of Public Accountant.

The scientific value of discussion and problem solving in a study will depend on how the approach is used. Approach is the perspective of researchers in choosing the spectrum of language space that is expected to be able to provide clarity of description of a scientific work substance.[12] A legal study may incorporate several alternative approaches available, so that there are two or more appropriate approaches in the study. However, the statute approach is an approach that is definitely used in a normative legal research. Similarly, this legal research uses a statute approach as main approach, which examines legal norms on criminal liability in the field of taxation by Public Accountant contained in the laws and regulations.

This legal research activity uses research materials in the form of (1) legal materials consisting of primary legal materials as well as secondary legal materials, and (2) non-legal materials. Primary legal material is an authoritarian legal material, consisting of legislation, official records or treatises in the making of legislation, and judge's decisions. While secondary legal material includes all publications about the law that are not official documents such as legal books, legal journals, or comments on court rulings. Non-legal materials are materials beyond the topic of law, which is intended to enrich the insights of researchers. Legal materials and non-legal materials used have been adjusted or relevant to the formulation of existing problems, namely regarding criminal responsibility of taxation against Public Accountant.

Previous legal research related to the topic of criminal responsibility of taxation directs the focus of its research to the taxpayer, especially corporations as corporate taxpayers. In addition, according to the current UU KUP, the basis of criminal tax liability is placed on the element of fault that is subjective in the form of ignorance or intentionality. The criminal provisions are considered not in accordance with the characteristics and role of Public Accountant in the self assessment system applied in Indonesia. So this legal research seeks to find a new form of legal arrangement regarding criminal liability of Public Accountant in the field of taxation, which is in line with the values of justice, expediency, and legal certainty. Thus, this study has a newness and originility that can be accounted for academically.

3. ANALYSIS AND DISCUSSION

3.1. Specificity of Tax Law in Tax Crimes

Taxes are a very strategic source of state finances, and there is not even a single country in the world that does not collect taxes. As a state tax obligation is levied under the law. According to Rochmat Soemitro, taxes are people's dues to state coffers under the law, which can be imposed by not getting direct lead (counterpressive) services, and which are used to pay for general expenditures.[13] While in the UU KUP defines taxes as mandatory contributions to the state owed by private persons or entities that are coercive under the law by not getting directly rewarded and used for state purposes for

[12] I Made Pasek Diantha. *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*. (Jakarta: Prenadamedia Group. 2019). 156.

[13] R. Santoso Brotodihardjo. *Pengantar Ilmu Hukum Pajak*. (Bandung: PT Eresco. 1993). 2.

the maximum prosperity of the people.[14] Romli Atmasasmita considers that taxes are very important in the welfare state, where taxes as one of the incomes to improve the social welfare of the people in the country concerned.[15]

Apart from various reasons, motivations, and all the problems that occur that tax collection has been carried out by various countries in various places and times. In the course of its history taxes experienced the dynamics of development over time, ranging from the development of the significance of the role of taxes for a country to the complexity of the challenges faced in collecting taxes.

In the microeconomic point of view, taxes are understood as the transition of wealth from the private sector to government that can be imposed without obtaining direct rewards. Thus taxes are considered a burden, reducing income, reducing purchasing power, and ultimately reducing individual well-being. So that there is resistance to the implementation of tax collection in the form of tax evasion which is a tax criminal act. Tax crimes can be classified as: (1) neglectfully of delivering tax return that is not true, (2) intentionality for certain actions, (3) intentionality for issuing tax invoice, tax withholding slip, or tax deposit slip, (4) neglectfully or intentionality in perform certain position, (5) intentionality does not provide evidence or provide evidence but that is not true in order to carry out the provisions of the tax regulations, (6) intentionally obstructing tax investigations, and (7) intentionally does not provide evidence or provide evidence but that is not true in the framework of supervision of taxpayer compliance.[16]

The position of tax law in the national legal system has specificities indicated through (1) the subject and object of tax law does not fully follow the principles of law that applies in general, (2) the existence of civil nature in the form of compromises that can change criminal sanctions with administrative penalties, and (3) do not fully follow the general legal adagium.[17] The specificity of tax law is also reflected through the establishment of its own judicial authority that is authorized to conduct the judiciary to enforce tax law. A tax court is a judicial body that exercises judicial power for taxpayers or tax insurers seeking justice to tax disputes.[18] The existence of the Tax Court as the institution of the holder of judicial power has been regulated in Article 24 paragraph (3) of UUD 1945. Thus, judicial power relates to all types of taxes levied by the central government, including import duties and excise duties, and taxes levied by local governments, carried out by the Tax Court.

[14] Article 1 Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.

[15] Romli Atmasasmita. *Sekitar Masalah Korupsi: Aspek Nasional dan Aspek Internasional*. (Bandung: Mandar Maju. 2004). 39.

[16] Timbo Mangaranap Sirait. *Hukum Pidana Pajak Indonesia Materiil dan Formil*. (Sleman: Penerbit Deepublish. 2019). 19.

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[18] Article 2 Law No.14 2002 Concerning Tax Court.

The presence of law in society is to integrate and coordinate the interests that can collide with each other, so that by law those interests are integrated in such a way that they can be suppressed in the least amount.[19] Simply put, tax law is understood as a set of regulations governing rights and obligations, as well as the relationship between the taxpayer and the government as a tax collector. Tax law also contains criminal provisions related to the implementation of rights and obligations in the field of taxation. Given that tax law is special (*lex specialis*) then liability for a criminal act of taxation must be subject to tax laws and regulations, even though the perpetrators of tax crimes are also the legal subject of a particular legislation.

3.2. Normative Fault as An Element of Criminal Responsibility of Taxation Against Public Accountant

In criminal law liability applies the principle of no criminal without fault or *geen straf zonder sculd* or *actus reus mean rea*. The principle is the basis of criminal liability and is not found in the law.[20] Moeljatno argues that a person cannot be held accountable if he does not commit a criminal act, but even though he commits a criminal act, he cannot always be convicted.[21] Thus, the person who commits a criminal act is not necessarily punishable by the criminal law because it depends on whether the person can be held accountable or not. In essence, criminal liability is a form of mechanism that was created, in reaction to violations of what has been agreed upon.[22] So it becomes unfair to impose a criminal on someone who violates the actual criminal provisions of the person has no fault.[23]

Criminal provisions that apply to taxpayers also apply to representatives of taxpayers, power of attorneys, taxpayer employees, or other parties such as Public Accountant and Tax Consultant who order, participate, advocate, or help commit criminal acts in the field of taxation.[24] The act of participating (*medeplegen*) has a different characteristic because it requires a joint act (*meedoet*) between the material actor (*pleger*) and the perpetrator participates in doing (*medepleger*), so that criminal acts will not be realized without such cooperation. The act of participating is seen as an extension of the criminal delik formulation. According to Langemeijer that participating in doing does not require the culprit to have the same qualities as the maker and is not

[19] Satjipto Rahardjo. *Ilmu Hukum*. (Bandung: PT Citra Aditya Bakti. 2014). 53.
[20] Eddy O.S. Hiariej. *Prinsip-Prinsip Hukum Pidana Edisi Revisi*. (Yogyakarta: Cahaya Atma Pustaka. 2016). 153.
[21] Moeljatno. *Asas-asas Hukum Pidana*. (Jakarta: PT Rineka Cipta. 2008). 155.
[22] Chairul Huda. *Dari Tindak Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggung jawab Pidana Tanpa Kesalahan: Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana dan Pertanggunggjawaban Pidana*. (Jakarta: Prenadamedia Group. 2006). 68.
[23] Hanafi Amrani dan Mahrus Ali. *Sistem Pertanggungjawaban Pidana Perkembangan dan Penerapan*. (Jakarta: Rajawali Press. 2015). 250.
[24] Article 43 Law No.28 2007 Concerning Thrid Revision of Law No.6 1983 Concerning General Provisions and Tax Procedures.

required to fulfill the entire formulation of the decal, because it aims to net people who do not meet the decal formula in order to be considered like the maker.[25]

The act of participating substantively does not have to be followed by a procedural process in determining the people involved in participating as suspects, defendants, even convicts, although it must be proven to be participating. The main problem in participating is the existence of a legal event and the extent of the person's involvement.In the criminal act of taxation the involvement of Public Accountant is indicated by the act of falsifying audit opinions to reduce or even avoid tax payments that should be carried out by the audited party. Therefore, falsification of audit opinion is a form of Public Accountant involvement that can be the basis of criminal tax liability to Public Accountant.

Criminal responsibility of taxation places fault in the form of intentionality or accident as the basis or accident to hold criminal responsibility from the perpetrator. Intentionality is a psychological fault, where intentionality is an inner relationship between the perpetrator and the deeds he does. In the event that the perpetrator wants or wishes his actions, then the mistake is a deliberate. Conversely, if the perpetrator does not suspect his actions then the mistake occurs because of the fault. Fault in the form of intentionality explicitly regulated in the UU KUP cause the mixing of elements of the psychological state of the perpetrator with elements of the deeds he did (objective elements) as a single delik in determining a tax criminal act. So that if there can be no evidence of fault of a psychological nature, then the perpetrator must be given a free verdict (*vrijspraak*).[26]

In contrast to psychological fault, normative fault are considered to use normative measures to then determine whether an action can be done to the perpetrator and whether the act can be avoided or not by the perpetrator.[27] The perpetrator will be judged to have the ability to be responsible for his actions if it has general qualities and special qualities. Awareness of the mind and free will are general qualities of responsible ability, while certain skills become special qualities.

To be able to work as a Public Accountant is required to meet a number of requirements, including being physically and spiritually healthy, having the ability to speak Indonesian, having knowledge of Taxation and Indonesian trade law, and having practical experience in the field of assurance service assignments.[28] Public Accountant are required to be professional, independent, and have integrity in mind and in appearance. Therefore, it can be concluded that a Public Accountant has the ability to be responsible for the implementation of his work. Thus, the criminal liability of Public Accountant in the field of taxation can be based on normative fault elements that can be

[25] Muhammad Ainul Syamsu. *Pergeseran Turut Serta Melakukan Dalam AjaranPenyertaan Telaah Kritis berdasarkan Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana*. (Jakarta: Prenadamedia Group. 2018). 65.

[26] Agus Rusianto. *Tindak Pidana & Pertanggungjawaban Pidana Tinjauan Kritis Melalui Konsistensi antara Asas, Teori, dan Penerapannya*. (Jakarta: Prenadamedia Group. 2016). 131.

[27] Eddy O.S. Hiariej. *Prinsip-Prinsip Hukum Pidana Edisi Revisi*. (Yogyakarta: Cahaya Atma Pustaka. 2016). 159.

[28] Article 7 Law No.5 2011 Concerning Public Accountant.

assessed by objective measures in the form of violations of professional obligations that should be adhered to so as to ensure the achievement of justice and legal certainty.

3.3. Concept of *Ultimum Remedium* in Prosecution of Public Accountant

Criminal sanctions threatened to criminal offenders are characteristic of the difference between criminal law and other types of law. Criminal is a reaction to criminal acts (punishment) and the form of a suffering deliberately inflicted by the state or state institutions against the creator of the decal. Suffering is only a nearby goal, not the last goal that is aspired in accordance with the efforts of coaching (treatment).[29] The purpose of criminal law, in conjunction with criminal liability, is as deterrance or appropriate or balanced with retribution in a comprehensive criminal system.[30]

Criminal law must be based on 2 (two) main principles, namely the principle of proposionality and the principle of subsidiarity. The principle of proposionality prioritizes a balance between means and purposes in the sense that a company does not have to burn down a house to catch a mouse. The principle of proposionality is the foundation of law enforcement's work to always question how far behavioral irregularities are needed to impose criminal sanctions. While the principle of subsidiarity is a guide to law enforcement in finding a solution to a legal problem where it is desirable to be sought or used in the most at least risk of loss. Suffering for the perpetrator will depend on how the form of criminal sanctions will be imposed for the criminal act, which, among other things, can be the loss of freedom, loss of property, and even up to the loss of life. Therefore, criminal law becomes not easy to use and the state does not easily impose criminal sanctions on its citizens. Criminal law should be used if there is really no other way to overcome problems in society.[31]

Remmelink argues that from the beginning the establishment of criminal law should be based on 2 (two) main principles, namely the principle of proposionality and the principle of subsidiarity.[32] The principle of proposionality prioritizes a balance between means and purposes in the sense that a company does not have to burn down a house to catch a mouse. The principle of proposionality is the foundation of law enforcement's work to always question how far behavioral irregularities are needed to impose criminal sanctions. While the principle of subsidiarity is a guide to law enforcement in finding a solution to a legal problem where it is desirable to be sought or used in the most at least risk of loss.

Barda Nawawi Arief stated that criminal law has limitations in tackling crime because: (1) the occurrence of crime is very complex and is beyond the reach of criminal law, (2) criminal law is only a small part of social control facilities so it is not able to

[29] Aruan Sakidjo dan Bambang Poernomo. *Hukum Pidana: Dasar Aturan Umum Hukum Pidana Kodifikasi*. (Jakarta: Ghalia Indonesia. 1990). 69.

[30] Agus Rusianto. *Tindak Pidana & Pertanggungjawaban Pidana Tinjauan Kritis Melalui Konsistensi antara Asas, Teori, dan Penerapannya*. (Jakarta: Prenadamedia Group. 2016). 145.

[31] Topo Santoso. *Hukum Pidana Suatu Pengantar*. (Depok: PT RajaGrafindo Persada. 2020). 123.

[32] Jan Remmelink. *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*. (Jakarta: PT Gramedia Pustama Utama. 2003). 46.

overcome the problem of very complex crimes, (3) criminal law is only symptomatic treatment and is not a causative treatment, (4) Criminal law sanctions are remedium that contain contradictory properties and negative side effects, (5) fragmentair and individualized treatment systems that are not structural/functional, (6) limitations of the type of criminal sanctions and their rigid and imperative formulation system, and (7) the functioning of criminal law requires more varied means of support and demands high costs.[33]

In the field of taxation justice is legality that is in accordance with the provisions of applicable law. So any act that is not in accordance with the provisions of the applicable law is a crime, regardless of how the applicable law (*ius constituendum*). Anshari Ritonga argues that in the interests of state acceptance, against any act that violates the applicable provisions used the principle of *praesumptio iustea causa* and not the principle of *presumption of innocence*.[34] Criminal sanctions in taxation are basically intended as deterrence effect and coaching so as not to commit criminal acts so that it will eventually be able to encourage the level of compliance of other taxpayers. Nevertheless, criminal sanctions in taxation are highly counterproductive and not in line with the tax function as state revenue.

Romli Atmasasmita wrote of the need to open up new alternatives by making fundamental changes to the principle of criminal law "*no criminal without fault*" to "*no criminal without fault, no fault without expediency*".[35] But based on the economic model of criminal behavior approached by Montesquieu, Beccaria, and Bentham states that a person will commit a crime if the profit of the crime exceeds the risk, so the imposition of criminal sanctions is still needed to ensure the risk of a criminal tax crime will still be greater than the profit he will get.[36]

The concept of *ultimum remedium* according to the current UU KUP is only addressed to taxpayers as the main perpetrators in tax crimes. Public Accountant, who are also taxed for their involvement, are not covered by the concept of ultimum remedium as directed to the taxpayer. But consider that criminal sanctions are counterproductive to state revenues that are the main objective in the field of taxation, so criminal sanctions are seen as compensation in the public interest as a result of the loss of tax revenues. The imposition of criminal sanctions in the form of fines, confiscation of property, and up to prison confinement will be imposed gradually to pay attention to the return of the loss of state revenue. The concept of *ultimum remedium* in the field of taxation supports the achievement of legal expediency as one of the objectives of law as expressed by Gustav Radburch. Therefore, the prosecution of Public

[33] Barda Nawawi Arief. *Kapita Selekta Hukum Pidana*. (Bandung: Citra Aditya Bakti. 2003). 88

[34] Anshari A. Ritonga. *Tinjauan Hukum Pajak Sebagai Ilmu Hukum Bersifat Khusus*. (Jakarta: Pustaka El Manar. 2017). 49.

[35] Romli Atmasasmita. *Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan Geen Straf Zonder Schuld*. (Jakarta: PT Gramedia Pustaka Utama. 2017). 199.

[36] Romli Atmasasmita dan Kodrat Wibowo. *Analisis Ekonomi Mikro Tentang Hukum Pidana Indonesia*. (Jakarta: Prenadamedia Group. 2016). 28.

Accountant must be able to provide the widest benefit to the community through the recovery of state revenue losses due to tax crimes.

4. CONCLUSION

Tax crimes are included in the special type of criminal that regulates criminal matters for certain acts related to tax collection. Criminal taxes are regulated separately outside of the general criminal provisions, which are regulated in the UU KUP. According to the current UU KUP (*ius constitutum*) that criminal tax liability against Public Accountant is based on 2 (two) elements. First, the element of fault for participating in the delivery of tax returns whose contents are incorrect by attaching false bookkeeping that has been audited. The element of fault will be judged based on the inner relationship between the perpetrator and his actions or psychological, which is intentional or accidental. Second, the element of loss on state revenues as a result of criminal acts committed.

Since the enactment of Law No. 28 of 2007, tax criminal liability by Public Accountant has been regulated in Article 43. Public Accountant can be punished if they order, participate, recommend, or help show falsified bookkeeping as if it were true or did not describe the actual situation. However, in law enforcement efforts only to taxpayers, taxpayer representatives, or others not as Public Accountant who are held criminally accountable. While the Public accountant's liability for involvement in cases of manipulation of financial statements, which included as criminal acts in the field of taxation, is only limited to administrative sanctions such as written reprimands, freezing, or revocation of permits. The non-running of criminal tax liability against Public Accountant is caused by: (1) difficulty in proving the existence of an element of psychological fault where administrative examination procedures carried out by the competent authorities through tracing document evidence are unable to reach the basis of proof, and (2) disharmony of formal criminal provisions regarding the release of criminal prosecution between the UU KUP and the UU AP which ultimately hinders law enforcement efforts. against the Public Accountant for a criminal tax.

The regulation of legal provisions regarding ideal tax criminal liability against Public Accountant (*ius constituendum*) is done by: (1) replacing psychological fault as the basis of criminal liability with normative fault that are judged on a clear and objective basis so as to better ensure legal certainty, and (2) also make jointly responsibility as the basis of criminal liability for Public Accountant, thus providing an opportunity to participate in the efforts to recover losses on state revenues resulting from tax crimes.

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THE MISUNDERSTANDING IN RESTRICTING JEMAAT AHMADIYAH INDONESIA'S RIGHT TO FREEDOM OF RELIGION

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Abstract

Jemaat Ahmadiyah Indonesia ("JAI") in Sintang became the victim of an intolerant action by several members of the Muslim Alliance. They attacked and destroyed the Miftahul Huda mosque belonging to the JAI. The root of the problem is not anchored in intolerant actions by certain religious groups, instead it lies in government policies, namely SKB Sintang which source from the JAI's Joint Decree, that tend to restrict JAI's right to freedom of religion. This paper discusses the suitability of restrictions on freedom of religion in the JAI's Joint Decree from a human rights perspective. The restrictions in JAI's Joint Decree are in violation of the ICCPR and the principles of the right to freedom of religion. First, the government has intervened JAI's forum internum by determining that JAI's interpretation deviates from Islamic teachings, which is prohibited due to any reason. Second, the government has erroneously imposed forum externum's restriction by prohibiting JAI to spread its interpretation. This restriction is also prohibited because the JAI's forum externum has no direct relation with the disturbance of public safety, order, health, morals, or the fundamental rights and freedoms of others. This paper clarifies the misunderstanding in restricting JAI, which has implications for ensuring JAI's right to freedom of religion.

Keywords: *The Right to Freedom of Religion, Jemaat Ahmadiyah Indonesia (JAI), Forum Internum and Forum Externum.*

1. INTRODUCTION

Jemaat Ahmadiyah Indonesia ("**JAI**") in Sintang experienced the discrimination on the right to freedom of religion. The discrimination they feel occurs in the form of implementing the beliefs they hold. Recently, the intolerant action carried out by 200 people from the Islamic Ummah Alliance was to attack and damage the Miftahul Huda mosque belonging to the JAI which resulted in the destruction of the mosque and the burning of a building behind it.[1] The background of the attack is that the Miftahul Huda mosque, which was established in Harapan Jaya Hamlet, Balai Harapan Village, Tempunak District, Sintang Regency in 2007 deemed for reconstuction.[2] However, several community groups have strongly opposed to the new building's construction since November 2020, so the Sintang District Muslim Alliance sent a letter to the Sintang Regency Government with an ultimatum demanding that authorities take action against JAI in Sintang within 3x24 hours, threatening to act alone if the ultimatum was not met.[3] In reaction to the threat, the Sintang Police Chief

[1] Adi Briantika, "SKB 3 Menteri Dinilai Biang Masalah Intoleransi ke Jemaat Ahmadiyah," *Tirto.id*, September 13, 2021, https://tirto.id/skb-3-menteri-dinilai-biang-masalah-intoleransi-ke-jemaat-ahmadiyah-gjsG.

[2] KontraS, "Penyegelan Masjid JAI di Kabupaten Sintang memperparah kondisi Kebebasan Beragama dan Berkeyakinan di Indonesia," *Kontras.org*, August 20, 2021, https://kontras.org/2021/08/20/penyegelan-masjid-jai-di-kabupaten-sintang-memperparah-kondisi-kebebasan-beragama-dan-berkeyakinan-di-indonesia/

[3] *Ibid.*

received a letter from the local JAI management demanding legal protection. Instead, Sintang's Acting Regent On August 13, the district government forcibly closed and sealed the Miftahul Huda Mosque after sending a notice to the Sintang District JAI management to discontinue prayer activities.[4] The Sintang incident demonstrates that the government has failed to prevent acts of intolerance against JAI and has even participated in limiting JAI's right to religious freedom.

Restrictions on the right to freedom of religion as well as various discriminatory actions against JAI in Sintang are based on Surat Keputusan Bersama Bupati Sintang, Kepala Kejaksaan Negeri Sintang, Kepala Kepolisian Resor Sintang, Komandan Komando Distrik Militer 1205 Sintang, dan Kepala Kantor Kementerian Agama Kabupaten Sintang Nomor: 450/10/KESBANGPOL/2021 Nomor: B-803/0.1.12/Dsb.2/4/2021 Nomor: KEP/12/iv/2021 Nomor: B-1299/KK.14.10.1/BA.01.2/04/2021 Nomor: Keb/02/IV/2021 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat di Kabupaten Sintang ("**JAI Sintang's Joint Decree**").[56] Notwithstanding, Komisi Nasional untuk Hak Asasi Manusia ("Komnas HAM"), Indonesia's national human rights institution, stated that the signing of JAI Sintang's Joint Decree by stakeholders in Sintang Regency resulted in the demolition of mosque and buildings belonging to members of the JAI.[7] Not only was it a catalyst for other people's hostility toward JAI, but Komnas HAM, through its commissioner, Beka Ulung Hapsara, also stated the JAI Sintang's Joint Decree contained restrictions on JAI religious activity. The Sintang SKB essentially stated that JAI in Sintang Regency were not permitted to spread their interpretation or religious affiliation.[8] Moreover, what should be emphasized from the issue is that JAI's Sintang Joint Decree contains the same restrictions on right to freedom of religion in Indonesia as the Surat Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat ("**JAI's Joint Decree")**.

According to research conducted by the SETARA Institute in 2007-2020, JAI was a minority group that experienced the most frequent violations of religious freedom, with 570 cases.[9] After the JAI's Joint Decree was enacted, there was an increase in the number of

[4] *Ibid.*

[5] The JAI's Sintang's Joint Decree was enacted on April 29, 2021 by the Regent of Sintang, the Head of the Sintang District Attorney's Office, and the Head of the Office of the Ministry of Religion of the Sintang Regency.

[6] Friski Riana, "Pemerintah Sintang Segel Masjid Ahmadiyah, Setara Desak Pusat Turun Tangan," *Tempo.co*, August 14, 2021, https://nasional.tempo.co/amp/1494523/pemerintah-sintang-segel-masjid-ahmadiyah-setara-desak-pusat-turun-tangan

[7] Achmad Nasrudin Yahya, "Komnas HAM Sebut SKB Jadi Pemicu Perusakan Rumah Ibadah Ahmadiyah di Sintang," *Kompas.com*, September 6, 2021, https://nasional.kompas.com/read/2021/09/06/18595441/komnas-ham-sebut-skb-jadi-pemicu-perusakan-rumah-ibadah-ahmadiyah-di-sintang?page=all

[8] KontraS, "Penyegelan Masjid JAI di Kabupaten Sintang memperparah kondisi Kebebasan Beragama dan Berkeyakinan di Indonesia," *Kontras.org,* August 20, 2021, https://kontras.org/2021/08/20/penyegelan-masjid-jai-di-kabupaten-sintang-memperparah-kondisi-kebebasan-beragama-dan-berkeyakinan-di-indonesia/

[9] Ikhsan Yosarie, *et al., Inklusi Jemaat Ahmadiyah Indonesia Dalam Keindonesiaan* (Jakarta: Pustaka Masyarakat Setara, 2021), pg. 11.

regulations limiting JAI's right to freedom of religion in various regions. According to the ELSA report, there were only 18 rules related to the limitation of JAI, while after the issuance of the JAI's Joint Decree, until 2021 there were at least 65 rules spread from the provincial to sub-district levels.[10] This means that after the issuance of the JAI's Joint Decree, there are at least 45 legal instruments issued to restrict JAI's right to freedom of religion. Several provinces that make similar regulations include South Sulawesi, East Java, Banten, West Java, West Sumatra, Bengkulu, South Kalimantan, Jambi, and South Sumatra.[11]

The JAI's Joint Decree can also be cited as one of the roots of discrimination and intolerance towards JAI. According to research from the SETARA Institute, the JAI's Joint Decree has been the trigger for hundreds of incidents of violations of the rights of the Ahmadiyya community and has been used as a justification for the practice of intolerance, discrimination, exclusion, restriction, persecution, and even violence against JAI.[12] Even though the fourth dictum of the JAI's Joint Decree has stated that the public should not take unlawful actions against JAI,[13] the other dictums tend to foster intolerance and discrimination.

The second and third dictums have implicitly stated that the Ahmadiyya teachings deviate from Islam which then provoke intolerant actions such as attacks and destruction of property belonging to JAI, as happened in Sintang, Garut, and Cikeusik.[14] In addition, the sixth dictum stipulates that the government and local governments must take steps to develop in the context of securing and supervising the implementation of this JAI's Joint Decree,[15] which later became the basis for the issuance of regulations in various regions, many of which then exceeded the restrictions on the right to freedom of religion in this JAI's Joint Decree. For example, West Java Governor Regulation No. 12 Year 2011 which prohibits the Ahmadiyya congregation from spreading teachings orally, in writing, or through electronic media; put up the nameplate of the Indonesian Ahmadiyya congregation organization in public places; and use the attributes of the Indonesian Ahmadiyya Congregation in any form,[16] which is similar to that in East Java through the Decree of the Governor of East Java No.

[10] M. Sidik Purnomo, Rusda Khoiruz Zaman, and Tedi Khoiludin, *ELSA Report on Religious Freedom* (Semarang: Yayasan Pemberdayaan Komunitas ELSA, 2021), 8, https://drive.google.com/file/d/18_zHAYxask8ivUcZHVhGN_4bU2KQvjPs/view.

[11] *Ibid.*, Pg. 9.

[12] "Penyegelan Masjid Ahmadiyah Di Kabupaten Sintang: Pemerintah Kabupaten Inkonstitusional, Pemerintah Pusat Jangan Cuci Tangan." SETARA Institute, accesed January 21, 2022, https://setara-institute.org/penyegelan-masjid-ahmadiyah-di-kabupaten-sintang-pemerintah-kabupaten-inkonstitusional-pemerintah-pusat-jangan-cuci-tangan/.

[13] Indonesia, Minister of Religion, Attorney General, and Minister of Home Affairs, *Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat*, Fourth Dictum.

[14] Purnomo, Zaman, and Khoiludin, *ELSA Report on Religious Freedom*, 4

[15] Indonesia, Minister of Religion, Attorney General, and Minister of Home Affairs, *Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat*, Sixth Dictum.

[16] Indonesia, Governor of West Java, *Peraturan Gubernur Jawa Barat tentang Larangan Kegiatan Jemaat Ahmadiyah Indonesia Di Jawa Barat*, Number 12 Year 2011, Art. 3 paragraph (2).

199/94/KTPS/013/2011 concerning the Prohibition of Indonesian Ahmadiyya in East Java.[17] These prohibitions have exceeded the restriction in the JAI's Joint Decree. Apart from being in the form of regulations, the JAI's Joint Decree is also used as the basis for various measures to limit JAI's religious freedom rights, such as the sealing of the mosque in Depok since 2012,[18] the disbandment of book review discussions in Bandung in 2019,[19] and the ban on the construction of mosques in Garut in 2021.[20]

Based on this background, the issue to be discussed is whether the restriction of JAI's right to freedom of religion through the JAI's Joint Decree is suitable when examined from the legal instruments and principles related to the right to freedom of religion. Given the fact that the JAI's Joint Decree has a huge influence and correlation on increasing restrictions on JAI's rights to freedom of religion until these days, whether in the form of regulations, government actions, or community actions, this issue is urgent to be solved.

This paper is intended to determine the suitability of restrictions on freedom of religion in the JAI's Joint Decree from a human rights perspective. The analysis and discussion will be divided into two parts, the first part will discuss the role of the state in limiting the right to freedom of religion based on various human rights instruments and principles, such as Undang-Undang Dasar 1945, International Covenant on Civil and Political Rights ("**ICCPR**") which has been ratified in Law No. 12 Year 2005, The Siracusa Principle, harm principle, and the concept of forum externum and forum internum. Then, the second part will analyze the suitability of restrictions on the right to freedom of religion in the JAI's Joint Decree.

2. RESEARCH METHODS

This research uses juridical-normative methods, which examine regulations, books, legal theories, and principles of restricting the right to freedom of religion. This method interprets secondary data for the sources using secondary data. The secondary data are including but not limited to the Undang-Undang Dasar Negara Republik Indonesia 1945, Universal Declaration of Human Rights, Law No. 39 Year 1999 on Human Rights, Law No. 12 Year 2005 on Ratification of International Covenant on Civil and Political Rights, Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat ("**JAI's Joint Decree**") and other

[17] Purnomo, Zaman, and Khoiludin, *ELSA Report on Religious Freedom*, 9.
[18] Admin, "Masjid disegel, jemaah Ahmadiyah Depok salat Jumat di pelataran," *BBC News Indonesia*, February 24, 2017, https://www.bbc.com/indonesia/indonesia-39076611.
[19] Ign. L. Adhi Bhaskara, "Yang Terjadi di Balik Pembubaran Diskusi Buku Ahmadiyah Bandung," *Tirto.id*, January 13, 2019, https://tirto.id/yang-terjadi-di-balik-pembubaran-diskusi-buku-ahmadiyah-bandung-dd9e.
[20] Purnomo, Zaman, and Khoiludin, *ELSA Report on Religious Freedom*, 15.

implemented regulations. Through this research method, the authors seek to analyze the suitability of restrictions on the right to freedom of religion in the JAI's Joint Decree based on the human rights perspective.

3. THEORETICAL FRAMEWORK

3.1. The Right to Freedom of Religion

3.1.1. The Right to Freedom of Religion in Indonesia

The right to freedom of religion is a fundamental right that has been regulated in several positive legal instruments in Indonesia. Some protection of this right is established in The 1945 Constitution of the Republic of Indonesia and Law No. 39 Year 1999 on Human Rights. Article 28E of The 1945 Constitution of the Republic of Indonesia expressly stated that:

> "*(1) Setiap orang bebas memeluk agama dan beribadat menurut agamanya, memilih pendidikan dan pengajaran, memilih pekerjaan, memilih kewarganegaraan, memilih tempat tinggal diwilayah negara dan meninggalkannya, serta berhak kembali.*
> *(2) Setiap orang atas kebebasan meyakini kepercayaan, menyatakan pikiran dan sikap, sesuai dengan hati nuraninya.*"[21]

Being translated into English, the meaning would be as follows: Everyone is free to embrace a religion and worship according to his religion, choose education and teaching, choose a job, choose a nationality, choose a place to live in the territory of the country and leave it, and has the right to return. and everyone has the freedom to believe in beliefs, to express thoughts and attitudes, according to his conscience. Also, Article 22 of Law No. 39 Year 1999 on Human Rights stated that:

> "*(1) Setiap orang bebas memeluk agamanya masing-masing dan untuk beribadah menurut agamanya dan kepercayaannya itu.*
> *(2) Negara menjamin kemerdekaan setiap orang memeluk agamanya masing-masing dan untuk beribadat menurut agamanya dan kepercayaannya itu.*"[22]

In English translation, it reads as follows: Everyone is free to embrace his own religion and to worship according to his religion and belief. The state guarantees the freedom of everyone to embrace their own religion and to worship according to their religion and beliefs.

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[21] Indonesia, *Undang-undang Dasar (UUD) Tahun 1945 dan Amandemen tentang UUD 1945 dan Amandemen*, Art. 28E.

[22] Indonesia, *Undang-undang tentang Hak Asasi Manusia*, Law No. 39 Year 1999, LN.No. 165 Year 1999, TLN No. 3886, Art. 22

Based on the above provisions, it is definite that Indonesia, in its positive law, is committed to protecting the right to freedom of religion and its implementation through the country's policies. Furthermore, Indonesia also ratified the International Covenant on Civil and Political Rights ("**ICCPR**") through Undang-Undang Republik Indonesia Nomor 12 Tahun 2005 Tentang Pengesahan International Covenant On Civil And Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil dan Politik). The ICCPR expressly states that the right to freedom of religion is a non-derogable right that cannot be reduced under any circumstances. The statement is explicitly stated in Article 4 of the ICCPR, which narrates that no derogation from articles 6, 7, 8 (Paragraphs I and 2), 11, 15, 16, and 18 of the ICCPR may be made under this provision. Article 18 (1) and 18 (2) of the ICCPR asserted that:

> "1. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[23]

According to the statement of that article, everyone should have the freedom to have or adopt a religion or belief of their choice and the freedom to manifest their religion or belief. Not only that, the government also must protect its citizen from being subject to coercion regarding their choice of religion or belief.

3.1.2 Classification on The Right to Freedom of Religion

The right to freedom of religion as regulated in Article 18 of the Universal Declaration of Human Rights states:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[24]

The statement of that article indicates that the right to freedom of religion is classified into an forum internum and an forum externum. Forum internum is an aspect of one's spiritual dimension, so forum internum's freedom includes freedom of thought, conscience, and religion, as well as freedom to change

[23] Indonesia, *Undang-Undang Pengesahan International Covenant On Civil and Political Rights*, Law No. 12 Year 2005, LN No. 119 Year 2005, TLN No. 4558, Art 18 paragraf (1) and (2).
[24] United Nations, General Assembly, *Universal Declaration of Human Rights*, General Assembly resolution 217 A (10 December 1948), Art. 18.

religion or belief.[25] Meanwhile, forum externum is a dimension of a person's existence in implementing and defending his spiritual existence in public.[26] As a result, freedom over the forum externum includes the freedom to express one's religion or belief through teaching, practice, worship, and observation.[27] The distinction between forum internum and forum externum in the right to religious freedom is also recognized in the ICCPR, which is clarified in Paragraf 3 General Comment Adopted by The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights ("**General Comment No. 22**"), that freedom of thought, conscience, religion, or belief is distinguish from freedom to manifest religion or belief.[28]

The freedom of forum internum is also emphasized in General Comment No. 22, which states that any restrictions on the freedom of thought and conscience, as well as the freedom to adopt or adhere to a religion or belief of one's own choosing, are not permissible.[29] So, the freedom of forum internum is unconditionally protected, as is everyone's right to hold opinions without interference. Therefore, the internum forum is widely regarded as absolute freedom.[30] As a result, states can't interfere with the forum internum through religious or ideological indoctrination, "brainwashing," or other forms of manipulation.[31] The distinction between forum internum and forum externum in the right to freedom of religion is essential to determine which aspects the state may restrict and which areas the state may not restrict.[32]

3.1.3 Restriction on The Right to Freedom of Religion

As previously stated, the different aspects of the right to freedom of religion, namely the forum internum and the forum externum, are important in determining the extent to which the state can limit its citizens rights to religious freedom. In fact, the implementation of the right to freedom of religion in a country is not completely non-derogable. There may be inter-religious or intra-religious conflicts that require the state to intervene and control the situation.[33] As a result, it is important to emphasize that in the case of the right to freedom of

[25] Komisi Nasional Hak Asasi Manusia, *Pemaksaan Terselubung Hak Atas Kebebasan Beragama dan Berkeyakinan* (Jakarta Pusat: Komisi Nasional Hak Asasi Manusia, 2009), 5.
[26] *Ibid*, 6.
[27] *Ibid*, 6.
[28] Office Of The High Commissioner For Human Rights, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience, or Religion*, para 3.
[29] *Ibid.*
[30] Manfred Nowak and Tanja Vospernik, "Permissible Restrictions On Freedomn Of Religion Or Belief." *In Facilitating Freedom of Religion or Belief: A Deskbook*, edited by Tore Lindhlolm, et. al. eds. (Leiden : Martinus Nijhoff Publishers, 2004), 148.
[31] *Ibid*, 149.
[32] Komisi Nasional Hak Asasi Manusia, *Pemaksaan*, 6.
[33] Manfred Nowak and Tanja Vospernik, "Permissible Restrictions On Freedom Of Religion Or Belief," In *Facilitating Freedom of Religion or Belief: A Deskbook*, edited by Tore Lindhlolm, *et. al. eds.* (Leiden : Martinus Nijhoff Publishers, 2004), 147.

religion, the state has the authority to intervene or limit the implementation of the right to freedom of religion.[34] The limitation of the freedom to manifest one's religion is also stated in Article 18 (3) ICCPR:

> "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect **public safety**, **order**, **health**, or **morals** or the **fundamental rights and freedoms of others**."[35]

Based on the article's statement, it is definite that the area of 'exercise' or the manifestation of the rights and freedoms of religion and belief (forum externum) that can be restricted.[36] Moreover, the government's restrictions on the right to freedom of religion should not be arbitrary. These restrictions, however, must also meet the criteria established in various derivative provisions of the ICCPR itself. The limitations of the right to religious established in Siracusa Principle and General Comment No. 22**.**

According to the Saracusa principle, the limitation of rights must not harm the essence of the rights themselves, so the clauses of limitation of rights must be interpreted expressly and are intended to support rights.[37] Besides that, Paragraf 3 of General Comment No. 22 also stated:

> "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19 (1). In accordance with articles 18 (2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief."[38]

According to that statement, Article 18 (3) of the ICCPR freedom of religion or belief is permitted to be limited only to the extent required by law and necessary to public safety, security, health or morals, or basic rights and the freedom of others. However, the article also continues to emphasize that freedom from coercion to embrace or adhere to a religion or belief and freedom of parents and guardians to guarantee religion and moral education cannot be limited. Consequently, the restrictions imposed must be established by law and may not be applied in a manner that would undermine the rights guaranteed in Article 18

[34] *Ibid.*

[35] Indonesia, *Undang-Undang Pengesahan International Covenant On Civil and Political Rights*, Law No. 12 Year 2005, LN No. 119 Year 2005, TLN No. 4558, Art 18 paragraf (3).

[36] Komisi Nasional Hak Asasi Manusia, *Pemaksaan*, 6.

[37] American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.

[38] Office Of The High Commissioner For Human Rights, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience, or Religion*, para 3.

ICCPR and the limitation can only be applied to defined goals and must be directly related and proportionate to the specific needs on which they are based.[39]

According to the elucidation of Article 18 (3) ICCPR, General Comments No. 22, and the Siracusa Principle, restrictions on the right to freedom of religion can be executed out under the conditions of public safety, public order, health, or morals, or the fundamental rights and freedoms of others. However, the discussion in this paper will only discuss the arguments of public safety and public order. According to Article 22 of the Siracusa Principle, public order (ordre public) is defined as the set of fundamental principles on which society is founded or the sum of rules that ensure the functioning of society. Furthermore, the article states that respect for human rights is an essential component of public order (ordre public). Nowak and Vospemik, on the other hand, revealed that the term "public order" should be interpreted narrowly to mean the prevention of public disorder.[40]

Further explanation about public safety as the reasosn for limitation of the freedom of religion stated by Nowak in United Nation Covenant on Civil, that the main purpose of the "public safety" clause is to allow restrictions on the public manifestation of religion, for example religious assembly, procession, burial ceremony, etc., if a specific danger arises threatening the safety of persons, such as their life, integrity, or health.[41] This sort of issue usually occurs when two or more hostile religious groups clash, or when religion is used to further political motives.[42] As a result, if the implementation of religion displays a direct threat to the safety of people or property, the state has the authority to take absolutely necessary and proportionate measures to protect public safety, such as prohibiting or dissolving religious assemblies.[43] In fact, in extreme cases, the state takes action against very dangerous religious groups, namely groups that incite religious hatred or war propaganda that violates Article 20 of the ICCPR, as well as criminal acts against the perpetrators.[44] An example of a restriction on the implementation of religion based on the public safety argument.[45]

[39] *Ibid*, para 8.
[40] Nowak and Vospemik, "Permissible Restrictions On Freedomn Of Religion Or Belief," 147.
[41] *Ibid*, 152.
[42] *Ibid*, 151.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

4. ANALYSIS AND DISCUSSION

4.1. Restrictions on The Right to Freedom of Religion in The JAI's Joint Decree

The government, even though, through JAI's Joint Decree, has restricted JAI's right to freedom of religion in both forum internum and forum externum, denies the fact that it has intervened on the beliefs of the citizens or the forum internum by arguing that JAI's Joint Decree is just a government's effort to maintain the security and public order of the citizens which are disturbed due to the spread of deviant religious interpretation.[46] This argument is in line with the purpose of JAI's Joint Decree, which is to maintain and foster religious peace and public order.[47] However, all of these arguments and purpose are unjustifiable. The restrictions of JAI's right to freedom of religion in the JAI's Joint Decree are not in accordance with the ICCPR and the principles of the right to freedom of religion because at least two things, namely the forum internum's intervention and misunderstanding of forum externum's restriction.

4.1.1. The Forum Internum's Intervention

The intervention of forum internum in JAI's Joint Decree can be seen on its first dictum, which states:

> *"Memberi peringatan dan memerintahkan kepada warga masyarakat untuk tidak menceritakan, menganjurkan atau mengusahakan dukungan umum melakukan* ***penafsiran*** *tentang suatu agama yang dianut di Indonesia atau melakukan kegiatan keagamaan yang menyerupai kegiatan keagamaan dari agama itu* ***yang menyimpang dari pokok-pokok ajaran agama itu"***[48]

This dictum prohibits Indonesian citizens to support any religion's interpretation that has deviated from the main teaching of the religion itself. Furthermore, the deviated interpretation from the religion in the first dictum is specifically explained in the second dictum as the JAI's interpretation about the existence of a prophet after the Prophet Muhammad SAW. If we combine these two dictums, the government, through the first and second dictums, has determined that the JAI interpretation, which recognizes the existence of a prophet after the Prophet Muhammad SAW, deviates from the main teachings of Islam. That is exactly what can be called a forum internum's intervention.

The government is not permitted to intervene or limit the forum internum for any reason because the limitation clauses in the ICCPR, as stated in Article 18 (3), only apply to the freedom to manifest one's religion or beliefs, which is forum externum, and cannot be applied to the internal dimension of thought, conscience,

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[46] Kementerian Agama RI, *Buku Sosialisasi Surat Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat* (Jakarta: Direktorat Jenderal Bimbingan Masyarakat Islam), 74-75.

[47] Indonesia, Minister of Religion, Attorney General, and Minister of Home Affairs, *Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat,* Consideration (f).

[48] *Ibid.*, First Dictum.

religion, or belief, which is forum internum.[49] In this context, the government shall not determine whether the JAI's interpretation has deviated from Islamic teachings. Furthermore, the government has the responsibility to prevent any parties from interfering with the forum internum, as explained by Manfred Nowak and Tanja Vospernik:

> "In any event, the freedoms of the forum internum are, therefore, widely regarded as absolute freedoms. States are under an absolute obligation to refrain from interfering with the forum internum by means of religious or ideological indoctrination, "brainwashing," or other forms of manipulation. At the same time, they have responsibility to prevent private parties, including religious groups, from engaging in coercive, manipulative, or fraudulent forms of indoctrination. This obligation is underscored by the right of everybody in Article 18(2) ICCPR."[50]

In this case, the government has engaged in religious indoctrination and brainwashing by determining that Ahmadiyya's interpretation deviates from Islamic teachings. It has not only failed to prevent any parties from interfering with the JAI's forum internum, but it has also failed to comply with its absolute obligation not to intervene in the JAI's forum internum. In short, through the intervention of forum internum in JAI's Joint Decree, the government has violated JAI's right to freedom of religion, especially the one stated in Article 18(2) of the ICCPR.

4.1.2. The Misunderstanding of Forum Externum's Restriction

The restrictions of forum externum in JAI's Joint Decree can be seen on its second dictum, which states:

> *"Memberi peringatan dan memerintahkan kepada penganut, anggota, dan/atau anggota pengurus Jemaat Ahmadiyah Indonesia (JAI), sepanjang mengaku beragama Islam, untuk menghentikan penyebaran penafsiran dan kegiatan yang menyimpang dari pokok-pokok ajaran Agama Islam yaitu penyebaran faham yang mengakui adanya nabi dengan segala ajarannya setelah Nabi Muhammad SAW."*[51]

The second dictum prohobits JAI to spread the interpretation and carry out activities that deviate from Islamic teachings, which refers to the notion that there is a prophet after the Prophet Muhammad SAW. Furthermore, the government linked the interpretation which it determines as deviant interpretation with the disturbance of public safety and order:

> *"Perlu ditegaskan bahwa SKB itu bukanlah bentuk intervensi Pemerintah terhadap keyakinan warga masyarakat, melainkan upaya Pemerintah untuk*

[49] Nowak and Vospernik, "Permissible Restrictions On Freedom Of Religion Or Belief," 148.

[50] *Ibid.*, 148-149.

[51] Indonesia, Minister of Religion, Attorney General, and Minister of Home Affairs, *Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat*, Second Dictum.

> *memelihara keamanan dan ketertiban masyarakat yang terganggu karena adanya pertentangan dalam masyarakat yang terjadi akibat penyebaran paham keagamaan menyimpang. Bagi Pemerintah, masalah Jemaat Ahmadiyah Indonesia mempunyai dua sisi. Pertama, Ahmadiyah adalah penyebab lahirnya pertentangan dalam masyarakat yang berakibat terganggunya keamanan dan ketertiban masyarakat. Sisi kedua, warga JAI adalah korban tindakan kekerasan sebagian masyarakat. Kedua sisi ini harus ditangani Pemerintah."*[52]

The government has roughly explained that JAI's Joint Decree is just a government's effort to maintain the security and public order of the citizens which are disturbed due to the spread of deviant religious interpretation by Ahmadiyya. However, this explanation shows that there is a misunderstanding in forum externum's restriction by the government.

Spreading religious interpretations is indeed a manifestation of a religion that can be restricted by the government if it causes the consequences mentioned in Article 18 (3) of the ICCPR. However, it should be noted that restrictions may only be imposed if the spread of religious teachings has a direct effect of causing the forbidden consequences and these restrictions shall not be imposed for discriminatory purposes or applied in a discriminatory manner, as stated in the General Comment No. 22:

> "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."[53]

Restricting JAI's forum externum is a misunderstanding because spreading the interpretation that there is a prophet after Prophet Muhammad SAW does not have a direct relation with the disturbance of public safety, order, health, morals, or the fundamental rights and freedoms of others. The government shall not simply link the spreading of the interpretation and the disturbance of public safety and order because the disturbance of these things occurs when there are intolerant actions against JAI, which are failed to be prevented by the government, such as the attack and destruction of the Ahmadiyya mosque in Cikeusik in 2011 which resulted in six deaths, properties damage, such as mosques, houses, and cars[54] and the destruction of the Ahmadiyya mosque in Sintang in 2021 which resulted in the destruction of the mosque and the warehouse building behind it.[55]

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[52] Kementerian Agama RI, *Buku Sosialisasi Surat Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia*, 74-75.

[53] Office Of The High Commissioner For Human Rights, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, para. 8.

[54] Rzr, "Deretan Penyerangan terhadap Ahmadiyah, Cikeusik hingga NTB," *CNN Indonesia*, September 8, 2021, https://www.cnnindonesia.com/nasional/20210908142815-20-691467/deretan-penyerangan-terhadap-ahmadiyah-cikeusik-hingga-ntb.

[55] Yoa, "Kronologi Perusakan Masjid Ahmadiyah di Sintang," *CNN Indonesia*, September 3, 2021, https://www.cnnindonesia.com/nasional/20210903225102-20-689598/kronologi-perusakan-masjid-ahmadiyah-di-sintang.

Besides that, the restrictions of the JAI's forum externum in JAI's Joint Decree are applied in a discriminatory manner because they do not have a basis justified by Article 18 (3) of the ICCPR and the restrictions are just based on differences in the interpretations between Ahmadiyya and the majority group in Indonesia, which is a classic pattern for the government, as explained by Manfred Nowak and Tanja Vospernik:

> "Governments may be key actors in such discriminatory policies by clearly siding with one (usually the majority) religion and by assisting or exploiting this religion in its policy of restricting and discriminating against other religions, beliefs, or philosophies."[56]

In this case, the government is an actor who sided with the majority group and produced a discriminatory policy in the form of a JAI's Joint Decree. Apart form that, JAI's Joint Decree also becomes discriminative because to achieve its noble purposes, which are to maintain and foster religious peace and public order,[57] the government sacrifices the right of the innocent and the minority of JAI. Before JAI's Joint Decree was enacted, there were rejections of JAI from intolerant groups, one of which was the attack by Laskar Islam against the National Alliance for Freedom of Religion and Belief (AKKBB) who supported JAI.[58] Unfortunately, rather than suppressing intolerant acts by intolerant groups, the government chose to restrict JAI's right to freedom of religion as a minority group in Indonesia.

The restrictions have contradicted the principle of the restriction of public order itself in Siracusa Principles which stated that respect for human rights is part of public order.[59] In this context, the government has violated the public order by not respecting the JAI's right to freedom of religion. Besides that, this government action also contradicts the Harm Principle by John Stuart Mill, which roughly stated that the state may coerce a person only if it can thereby prevent harm to others.[60] The government was supposed to prevent the intolerant actions because they had harmed others, instead of restricting JAI's rights.

5. CONCLUSION

The JAI's Joint Decree's restrictions on JAI's right to freedom of religion are in violation of the ICCPR and the principles of the right to freedom of religion because of two reasons, encompass the forum internum's intervention and misunderstanding of forum externum's

[56] Nowak and Vospernik, "Permissible Restrictions On Freedom Of Religion Or Belief," 147.

[57] Indonesia, Minister of Religion, Attorney General, and Minister of Home Affairs, *Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia Nomor: 3 Tahun 2008, Nomor: KEP-033/AIJA/6/2008 Nomor: 199 Tahun 2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat*, Considerations (f).

[58] Purnomo, Zaman, and Khoiludin, *ELSA Report on Religious Freedom*, 2.

[59] American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, Article 22.

[60] Nils Holtug, "The Harm Principle," *Ethical Theory and Moral Practice* 5, no. 4 (2002): 357. https://doi.org/10.1023/A:1021328520077.

restriction. In fact, the government has intervened in JAI's forum internum by determining that JAI's interpretation deviates from Islamic teachings, which is prohibited due to any reason. In addition, the government has erroneously imposed forum externum's restriction by prohibiting JAI to spread its interpretation, which is also prohibited because the JAI's forum externum has no direct relation with the disturbance of public safety, order, health, morals, or the fundamental rights and freedoms of others.

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INDONESIA'S APPROACH ON CYBERATTACK ATTRIBUTION THROUGH ITS FOREIGN POLICY

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Abstract

It is clear that cybersecurity has now become a matter of increasing concern for Indonesian citizens, the private sector and the Indonesian government. Indonesia is ranked among the top countries from which cyberattacks are launched, while at the same time is itself very vulnerable to cyberattack. Indeed, Indonesia is currently in the early stages of developing a national cybersecurity strategy. The legal framework for cybersecurity in Indonesia is still weak that there is no clear classified security law or policy, and security practices are spread across different legislation while there are no specific cybersecurity provisions in place. Indonesia also lacks of national policy and strategy when it seeks to defend itself against cyberattack, particularly those hacking activities from foreign actors or state-sponsored groups. While majority of states in the world have two different approaches on cyberattack attribution from the context of sovereignty in international law, those applied sovereignty as a rule and as a principle, Indonesia has never stated clearly its position. Therefore, based on the analysis on how Indonesia's approach on sovereignty through its foreign policy, from the perspectives of diplomacy practices and national policies, relevant sovereignty-violation cases, and its international framework and cooperation on cybersecurity, we may conclusively view that Indonesia appears to endorse the sovereignty-as-a-rule position, where it upholds the principle of respect for state sovereignty on cyberspace.

Keywords: *Cyberattack, Cybersecurity, Cyber-attribution, Cyberspace, Sovereignty, Foreign Policy*

1. INTRODUCTION

As the world's fourth most populous nation in the world, Indonesia has experienced significant growth in the number of people connected to the internet. At the same time, this increasing base of consumers of internet and internet-enabled services surely has made Indonesia the largest and the fastest-growing digital economy in South East Asia.[1]

[1] The World Bank, "Ensuring a More Inclusive Future for Indonesia through Digital Technologies." Accessed October 5, 2021. https://www.worldbank.org/en/news/press-release/2021/07/28/ensuring-a-more-inclusive-future-for-indonesia-through-digital-technologies.lusive Future."

Consequently, Indonesia is currently home to many of the sub-region's most prominent digital platforms that are not only attracting a large volume of investments into the country but are also providing new and innovative solutions that are increasingly transforming the economic and social lives of Indonesians.[2] However, all those startups, digital economy platforms, and other related online activities with their customers and the whole citizen, on the other hand, definitely establish and develop their own cyber risks.

Meanwhile, Indonesia is currently in the early stages of developing a national cybersecurity strategy. The legal framework for cybersecurity in Indonesia is still very weak. Furthermore, there is no clear classified security law or policy, and security practices are spread across different legislation while there are no specific cybersecurity provisions in place. This all situation and condition make cybersecurity in Indonesia truly at risk. The Indonesian National Cyber and Crypto Agency (Badan Siber dan Sandi Negara or BSSN), for example, reported 290.3 million cases of cyberattacks in 2019.[3] Likewise, the Criminal Investigation Agency of the Indonesian National Police (Bareskrim) saw an increase in police reports of cybercrimes, as 4,586 police reports were filed on "Patrolisiber," a Bareskim website for reporting cybercrime, in 2019. [4]

While lacking data protection regulation and any related cybersecurity provisions, Indonesia also lack of national policy and strategy when it seeks to defend itself against cyberattack, particularly those hacking activities from foreign actors or state-sponsored groups. Kristen Eichensehr in one of her papers said that "When a state seeks to defend itself against a cyberattack, must it first identify the perpetrator responsible."[5] It is because, basically, the international law on state responsibility permits a state that has suffered an internationally wrongful act, in this case a severe cyberattack, to take countermeasure, but only against the state responsible. Therefore, this restriction implies that attribution is a compulsory prerequisite to countermeasures.

In the article, it is briefly explained that majority of countries have two different approaches on cyberattack attribution from the context of sovereignty in international law, those applied sovereignty as a rule and as a principle, to the extent whether international law prohibits violations of sovereignty that do not amount to a prohibited intervention or use of force.[6] Countries that have definitively taken the position that sovereignty is a principle view sort of small-scale cyberattacks those would not constitute use of force as actions that do not violate international law and therefore no need to invoke countermeasures or engage in attribution.[7] While countries those endorse sovereignty as a rule position, tend to have a rigid

[2] *Id.*

[3] "Cyberattack Data (January – April 2020)," The Indonesian National Cyber and Crypto Agency, accessed October 1, 2021, https://bssn.go.id/rekap- serangan-siber-januari-april-2020.

[4] *Id.*

[5] Kristen E. Eichensehr, "Cyberattack Attribution as Empowerment and Constraint," Hoover Working Group on National Security, Technology, and Law, *Aegis Series Paper*, No. 2101 (January 15, 2021): 1-2, https://www.lawfareblog.com/cyberattack-attribution-empowerment-and-constraint.

[6] *Id.*

[7] *Id.*

foreign policy that no matter how small the cyberattack is, it still constitutes a breach of sovereignty in international law.[8]

In fact, there are only a few states have declared their position on this sovereignty question, while the rest of the states remain silent about their position, including Indonesia. Indonesia has never stated clearly its position on this sovereignty approach whether it endorses sovereignty-as-a-rule view or sovereignty-as-a-principle view. Therefore, this paper will examine and demonstrate Indonesia's approach on cyberattack attribution from the context of sovereignty in international law through its foreign policies, from the perspectives of diplomacy practices and national policies, relevant previous related cases, and international framework and cooperation, whether it is positioning sovereignty as a rule or as a principle, and how it will be implemented through its foreign policy.

2. RESEARCH METHODS

The fact that the Indonesia is still left behind in this cyberattack attribution practices from the context of sovereignty in international law, raises the question of the condition of the implementation of whether it endorses sovereignty-as-a-rule view or sovereignty-as-a-principle view. Therefore, this research seeks to discuss this problem. The object of this research is to study Indonesia's approach on cyberattack attribution from the context of sovereignty in international law through its foreign policy. The aspects of this discussion include international law, cybersecurity law, national policies, and international relations perspectives.

This research belongs to an analytical legal research where it examines and demonstrates the use of existing available data, facts, and information to critically study the present situation. This research also analyzes the whole range of facts and information critically where it relies upon the existing concepts and theories to either re-interpret it into a new concept or formulate from it.

3. ANALYSIS AND DISCUSSION

This part is intended to examine Indonesia's approach on cyberattack attribution from the context of sovereignty through its current foreign policy priorities, based on its diplomacy practices and national policies, several related sovereignty-violation cases, and its international framework and cooperation on cybersecurity to finally view its approach on cyberattack attribution from the perspective of sovereignty.

3.1. Approach on Sovereignty based on Diplomacy Practices and National Policies

Diplomacy is understood as "the attempt to adjust conflicting interests by negotiation and compromise."[9] Another scholar, Hedley Bull, stated that diplomacy is "a custodian of the idea of international society, with a stake in preserving and strengthening

[8] *Id.*
[9] Wight M., *System of States* (Leicester: Leicester University Press, 1979), 176.

it."[10] According to him, there are five main functions to the diplomatic practice: to facilitate communication in world politics, to negotiate agreements, together intelligence and information from other countries, to avoid or minimize "friction in an international relations" and, finally, to symbolize the existence of a society of states.[11] It is not even just about relations between states. It now has to take into account "wider relationships and dialogues, involving such entities as regional and international organizations–be they intergovernmental (IGOs) or non-governmental (NGOs)–multinational firms, sub-national actors, advocacy networks, and influential individuals."[12]

Now, diplomacy has also progressively extended to new policy areas over the years, entering uncharted political territories such as climate negotiations or, lately, cyber issues. Cyber-diplomacy can be defined as diplomacy in the cyber domain or, in other words, the use of diplomatic resources and the performance of diplomatic functions to secure national interests with regard to the cyberspace.[13] Such interests are generally identified in national cyberspace or cybersecurity strategies, which often include references to the diplomatic agenda.[14] Predominant issues on the cyber-diplomacy agenda include cybersecurity, cybercrime, confidence-building, internet freedom and internet governance.[15] Cyber-diplomacy is therefore conducted in all or in part by diplomats, meeting in bilateral formats (such as the US-China dialogue) or in multilateral fora (such as in the UN).[16] Beyond the traditional remit of diplomacy, diplomats also interact with various non-state actors, such as leaders of internet companies (such as Facebook or Google), technology entrepreneurs or civil society organizations.[17] In other simple words, cyber-diplomacy is the use of diplomatic tools and diplomatic mindset to resolve issues arising in cyberspace.

Cyber-diplomacy, indeed, as defined in this paper, is relatively a new concept, especially for Indonesia. As mentioned earlier, Indonesia is currently in the initial stages of developing a national cybersecurity strategy, including those cyber-diplomacy related policies. There is not yet any printed document or official white paper on Indonesia's cyber-diplomacy, those like the US DoD "defend forward" cyber strategy policy or a US CYBERCOM "Command Vision" document. Therefore, when considering the emergence of Indonesia's cyber-diplomacy, it is important to first understand the priority of Indonesia's foreign policy for the next 5 years (2019-2024) as the continuity of the

[10] *Id.*

[11] Bull H., *The Anarchical Society: A Study of Order In World Politics* (3rd ed) (Basingstoke: Palgrave, 1977/2002), 171.

[12] Bull, *The Anarchical Societ*, 165.

[13] Jönsson C. and Langhorne R., *Diplomacy: Volume III. Problems And Issues In Contemporary Diplomacy* (London: Sage Publications, 2004), 7-8.

[14] *Id.*

[15] *Id.*

[16] Barrinha A. and Renard T., *Cyber-Diplomacy: The Making of An International Society In The Digital Age Global Affairs*, 2017.

[17] *Id.*

implementation of foreign policy for the past 5 years (2014-2019). It is a certain that Indonesia's foreign policy is a derivative of the 4th paragraph of Preamble to the 1945 Constitution, and the Presidential/Vice President's Vision and Mission for 2019-2024.

Indonesia's foreign policy priorities will rest on *4+1 Formula*; improving the economic diplomacy, protection diplomacy, sovereignty and nationality diplomacy, as well as Indonesia's role in the region and globally.[18] The 'plus' is the improvement of diplomacy infrastructure. In relation with the cyber-diplomacy and security issues, it's important to highlight the current Indonesian Foreign Minister statement that "In order to strengthen the diplomacy of sovereignty and nationality, the integrity of the Republic of Indonesia is non-negotiable."[19] Therefore, from this clear statement, it's obvious that Indonesia has never been compromised with its sovereignty.

Furthermore, in several occasions, Indonesia's current Foreign Minister, Retno Marsudi, has repeatedly reiterated that Indonesian diplomacy will be done to protect the sovereignty of the Republic of Indonesia.[20] She emphasized that international relations should be based on the principle of respect for territorial integrity of each country and "Indonesia will not allow these principles are violated by anyone else."[21]

In addition, even though Indonesia has not yet issued any official national cybersecurity strategy, the 2020 BSSN's NCSS draft has stated explicitly the Indonesian government main responsibility to protect its sovereignty and all Indonesian nationals as stipulated under the 4th paragraph of Preamble to the 1945 Constitution. As explained previously in the second part, this draft also further enlightens one of the main purposes of the NCSS is to establish Indonesia a state which shall be independent, united, sovereign, just, and prosperous.[22] Thus, from the Indonesia current foreign policy priorities and the NCSS draft we may recognize how the Indonesian government seems to lean in the direction that sovereignty as a rule, not a principle.

Besides putting sovereignty as one of Indonesia's main foreign policy priorities and stated in the national cybersecurity strategy draft, we can also analyze how the country place the concept of sovereignty in the realm of cybersecurity from the one and only legal basis for regulating cybersecurity, privacy, and security, the EIT Law. Article 2 of the EIT Law states that "This Law shall apply to any person to take legal acts as governed by this Law, both within jurisdiction of Indonesia and outside jurisdiction of Indonesia,

[18] "Indonesian FM Presents the Diplomacy Priorities 2019-2024 to the House of Representatives," Ministry of Foreign Affairs of The Republic of Indonesia, accessed November 14, 2021, https://kemlu.go.id/portal/en/read/786/berita/indonesian-fm-presents-the-diplomacy-priorities-2019-2024-to-the-house-of-representatives

[19] *Id.*

[20] "Indonesia's Foreign Policy Priorities in 5 Years Ahead," Cabinet Secretariat of The Republic of Indonesia, accessed November 9, 2021, https://setkab.go.id/en/indonesias-foreign-policy-priorities-in-5-years-ahead/

[21] *Id.*

[22] The Indonesian National Cyber and Crypto Agency, *Indonesia National Cyber Security Strategy* (Jakarta: BSSN, 2020), 5.

which has legal effect within jurisdiction of Indonesia and/or outside jurisdiction of Indonesia and detrimental to the interest of Indonesia."[23]

In the Part of Explanation of this law, the explanation of Article 2 further describes that this law has a range of jurisdiction for all legal acts those not only apply in Indonesia and/or carried out by Indonesian nationals, but also apply to all legal acts committed outside the jurisdiction of Indonesia, both by Indonesian nationals or Indonesian legal entities and by foreign nationals or foreign legal entities, that have legal consequences in Indonesia.[24] It further explains that what is meant by "detrimental to the interest of Indonesia" includes but not limited to harming the interests of the national economy, protection of strategic data, national dignity, defense and security of the state, *state sovereignty*, citizens, and Indonesian legal entities.[25]

A more or less similar sound is also stipulated in Article 37 which states that " Any Person who knowingly commits prohibited acts as intended by Article 27 through Article 36 outside the territory of Indonesia towards Electronic Systems residing within jurisdiction of Indonesia."[26] By reading the two articles, it can be concluded that the scope of jurisdiction of the EIT Law does not only apply to Indonesia's sovereign territory, but also outside Indonesia. In other words, Article 2 and Article 37 of the EIT Law have exceeded the (extra) principle of territorial jurisdiction.

Therefore, Article 2 of the EIT Law even visibly encompasses the principle of extraterritorial jurisdiction. It is plainly written that the legal construction of the EIT Law does not only apply to Indonesian citizens, but also foreign nationals, both within and outside the territory of Indonesia. The juridical argument that underlies the application of this article is only if the legal action taken "has legal consequences within the jurisdiction of Indonesia and/or outside the jurisdiction of Indonesia and is detrimental to the interests of Indonesia". Thus, it is clear that legal consequences within and/or outside the territory of Indonesia are not sufficient, but these legal actions must also harm Indonesia's interests. From all the articles and explanations, we can see how Indonesia positions significantly the concept of sovereignty in cyberspace. Even for the EIT Law, for instance, it can extend its jurisdiction outside the territory of Indonesia for any legal actions raising any consequences which detriment to the sovereignty of Indonesia.

3.2. Approach on Sovereignty based on Related Legal Cases

We can further observe Indonesia's approach on cyberattack attribution from the context of sovereignty through several related sovereignty-violation cases as an integral part of its foreign policy. Most of these cases were related to Indonesia's responses to foreign vessels conducting illegal fishing over the country's Exclusive Economic Zone (EEZ) around the Indonesia's Natuna Islands and the famous South China Sea issues, and

[23] Indonesia Electronic Information and Transactions Law No. 11/2008, Art. 2.
[24] *Id.*
[25] *Id.*
[26] *Id.,* Art. 37.

also a few cases over Indonesia's air-sovereignty violation. Meanwhile, other major cases related to Indonesia's cyberspace when dealing with foreign cyberattacks will be examined in the next part.

For the EEZ regime, we may realize that under the international law of the sea, particularly as regulated in the United National Convention on the Law of the Sea (UNCLOS), the territorial sea extends 12 nautical miles from the coastline, while the additional (contiguous) zone extends a further 12 nautical miles. The EEZ, meanwhile, extends a further 176 nautical miles from the edge of the contiguous zone – or 200 nautical miles from the coastline. In this case, around the Natuna Islands, Indonesia has a territorial sea, a contiguous zone, and an EEZ in accordance with the UNCLOS. According to the convention, Indonesia only has sovereignty over the waters of the territorial sea and the inland sea that exists between the islands.

These three sea regimes, furthermore, grant Indonesia different rights. In the territorial sea, Indonesia enjoys the same sovereignty as it does on the islands, with a few exceptions. In the EEZ, meanwhile, Indonesia enjoys so-called "sovereign rights," which grant it the exclusive right to utilize the natural resources that lie within it. No other countries have this right, but foreign ships are free to sail through EEZs without utilizing natural resources. If foreign ships want to take advantage of natural resources and carry out survey activities, they must get permission from Indonesia.

In relation with these three sea regimes concept, Indonesian patrol ships have also repeatedly attempted to detain Chinese fishing boats those were fishing illegally in the Natuna Sea or at least drove away those vessels from North Natuna waters, which is part of the Indonesia's EEZ. When the Natuna incident escalated in 2019, for instance, the Indonesian Coast Guard approached the Chinese Coast Guard and requested the vessels to order the Chinese fishing vessels to cease the illegal fishing activities and promptly leave the Indonesia's EEZ. This major incident has also led the Indonesian Government through its Foreign Ministry to summon the Chinese ambassador in Jakarta, and to issue a protest through a diplomatic note ad-dressed to the Chinese government via its embassy in Jakarta. The diplomatic note dated 30 December 2019, for example, utilized the "hardest" diplomatic terminologies those may be used in diplomatic correspondence to show the Indonesian Government's utmost displeasure.[27] Indonesia would also never recognize the Nine-Dash Line claimed by China since it does not have a legal basis recognized by international law, including the UNCLOS.[28]

From this case, we can learn how Indonesia has responded to Chinese vessel's illegal activities firmly, consistently, and persistently, even over such a "sovereign rights" regime. We may view how the country keeps showing its current position to remain firm on the matter of sovereignty as a rule, that is Indonesia's sovereign rights guaranteed by

[27] Damos Dumoli Agusman and Citra Yuda Nur Fatihah, "Celebrating The 25th Anniversary of Unclos Legal Perspective: The Natuna Case," *Indonesian Journal of International Law* (2020), Vol. 17 No. 4: 558-559, https://doi.org/10.17304/ijil.vol17.4.799

[28] *Id.,* 560-561.

the UNCLOS, as the Indonesia's EEZ had been acknowledged as Indonesia's territorial waters through the UNCLOS, and therefore there is no room for any negotiation. Even the Indonesian President Joko Widodo declared that "there is no bargaining when it comes to our sovereignty, our country's territorial," following the incident.[29] Therefore, the government of Indonesia has shown its standpoint to never negotiate for any questions on sovereignty.

Furthermore, in several other illegal fishing cases over Indonesia's EEZ conducted by other states, the Indonesian coast guard authorities have also continually blown up those foreign vessels after charging them with fishing illegally in the country's waters, bringing the number of vessels destroyed by the Government under the policy to more than hundreds up to now.[30] Even though this ship-sinking-policy is still debatable under the international law, here, the government of Indonesia tries to figure out that the idea of the ship-sinking policy against violators is legitimate because Indonesia has full authority as a sovereign country. Furthermore, all illegal activities done within the jurisdiction of Indonesia have been regulated in a certain way because Indonesia is a sovereign country and obliged to protect all territories judicially.[31]

Moreover, in several occasions, the related authorities have also clearly stated that the Indonesian government must protect all its citizens and territories as mandated under the Constitution. This responsibility, particularly, includes a commitment to maintain its sovereignty, where these authorities enlightened that sovereignty is not just covering territories but also on how people can be sovereign and standing for themselves.[32] In this case, the economic sovereignty as a maritime country is essential because many people depend on the fisheries and maritime sectors.[33] Therefore. presence of a constitutional platform as the supreme law confirms that Indonesia has everything needed to handle and maintain its sovereignty.

In the air-sovereignty regime, meanwhile, Indonesia has also shown its intention in endorsing sovereignty-as-a-rule. In a most recent case, in January 2019, two Indonesian F-16 fighter jets forced an Ethiopian Airlines cargo plane to land at an airport on Batam island, Indonesia, after it had flown into Indonesian airspace without permission.[34] The

[29] M Risyal Hidayat, "Indonesia Adds Patrols after Detecting Ships in South China Sea," *Al Jazeera*, September 17, 2021, https://www.aljazeera.com/news/2021/9/17/indonesia-increases-sea-patrols#:~:text=%E2%80%9CThere%20is%20no%20bargaining%20when,Widodo%20declared%20following%20the%20incident.&text=Maritime%20and%20Fisheries%20Minister%20Susi,fishing%20illegally%20in%20Indonesian%20waters.

[30] "Indonesian Government Destroys over 20 Foreign Vessels Due to Illegal Fishing," Stop Illegal Fishing, accessed November 1, 2021, https://stopillegalfishing.com/press-links/indonesian-government-destroys-20-foreign-vessels-due-illegal-fishing/

[31] Joko Setiyono, Muhamad Azhar, Solechan, Nanik Trihastuti, and Arief R. Hakim, "Justification of the Ship-Sinking Policy in the Territorial Jurisdiction of Indonesia," *AACL Bioflux* Volume 13, Issue 5 (2020): 2611.

[32] *Id.,* 2612.

[33] *Id.*

[34] Agustinus Beo Da Costa and Aaron Maasho, "Indonesian Jets Force Ethiopian Cargo Plane to Land over Airspace Breach," *Reuters*, January 14, 2019, https://www.reuters.com/article/us-indonesia-airlines-ethiopia/indonesian-jets-force-ethiopian-cargo-plane-to-land-over-airspace-breach-idUSKCN1P815S

cargo flight ETH 3728 had been flying from the Ethiopian capital Addis Ababa to Hong Kong in which the plane had made an urgent unscheduled flight to drop an aircraft engine in Singapore for maintenance.[35] In responding to this incident, Indonesian Air Force First Marshal Novyan Samyoga said in a statement that "the plane was crossing the Indonesian airspace in accordance with the ICAO Chicago Convention Article 5, by which a non-scheduled flight can overfly the airspace of a friendly country without prior permission."[36]

Even though again that policy was still debatable at that time and the political row between Indonesia and Singapore might have complicated the matter, we can conclude from the Indonesian Air Force claim that the Ethiopian Cargo was overflying Indonesia's sovereign skies without a permit. Here, the Indonesian authorities just want to show that the rules they enforce were clear: if anyone is overflying any Indonesian sovereign-territory, they must get an overflight permit, regardless of the flight level.[37] In this case, once more, the government of Indonesia seems appear to support the sovereignty-as-a-rule position.

3.3. Approach on Sovereignty based on Framework and Cooperation on Cybersecurity

Another important aspect of Indonesia's foreign policy is the international framework and cooperation among states, and therefore it is important to first understand the underlying logic of international cooperation in this policy domain. Indeed, cyberspace cumulates a number of characteristics that frame diplomatic engagement among stakeholders.[38] To begin with, it is a global domain connecting nations and citizens worldwide in a variety of manners, generating interactions and frictions between them. Furthermore, cyberspace is usually considered as a "global commons", defined as a "resource domain to which all nations have legal access."[39] In other words, various actors, both state and non-state, have the potential threat to disrupt the network because of the difficulty of identifying actors in cyberspace for certain actions and actions in a place that has an effect or impact in all parts of the world.[40] At the same time, both state and non-state actors, as well, have the main responsibility to secure and protect the cyberspace.

In relation to this international framework and cooperation on cybersecurity, we may also further analyze the Indonesia's approach on sovereignty. We can further develop those analysists based on Indonesia's cyber-diplomacy strategy and policy from the level of bilateral, regional, and multilateral. On international cyberspace policy, it participates actively in the Internet Governance Forum, the UN Group of Governmental Expert (UN

[35] *Id.*

[36] David Mumford, "Indonesia is Intercepting Aircraft – Outside Their Airspace," *OPS Group*, January 15, 2019, https://ops.group/blog/indonesia-is-intercepting-aircraft-outside-their-airspace/

[37] *Id.*

[38] A. Fathan Taufik, "Indonesia's Cyber Diplomacy Strategy as A Deterrence Means yo Face the Threat in the Indo-Pacific Region," *Journal of Physics: Conference Series*, The International Conference on Defence Technology (Autumn Edition, 2020): 5, https://doi:10.1088/1742-6596/1721/1/012048

[39] Buck S., *The Global Commons: An Introduction* (Washington, DC: Island Press, 1998), 8.

[40] A. Fathan Taufik, "Indonesia's Cyber Diplomacy Strategy," 6.

GGE), World Summit on the Information Society (WSIS), G20, the Asia-Pacific Economic Cooperation, the Association of Southeast Asian Nations (ASEAN), and the Organization of Islamic Cooperation.

In fact, Indonesia has some cyber-surveillance and cyber-espionage capabilities, but there is little evidence of it planning for, or having conducted, offensive cyber operations. Overall, Indonesia is a third-tier cyber power. Given that it is expected to become the fourth-largest economy in the world by around 2030, it could be well placed to rise to the second tier if the government decides that strategic circumstances demand greater investment in the cyber domain.

3.3.1. Bilateral Framework and Cooperation

At the bilateral level, Indonesia currently has Memorandum of Understanding (MoU) or Letter of Intent (LoI) on the cybersecurity or cyberspace cooperation with 10 countries: The United States, United Kingdom, Russia, China, Australia, Saudi Arabia, Poland, Turkey, Qatar, and the Czech Republic. The LoI between Indonesia and the United States, for example, has the purpose to provide a framework to promote cooperation and capacity building in cyber space between the two countries.[41] It has the scope of cooperation in some areas, including discussion on national cyber strategy development, national incident management capabilities, cybercrime capacity and cooperation, multi-stakeholder partnership, promotion of cyber security awareness, and cooperation in other relevant regional venues as appropriate.[42]

Furthermore, besides the LoI between Indonesia and the U.S. on cyber-cooperation, there is also one MoU between Indonesia and the United Kingdom on cybersecurity cooperation which also has the similar purpose to provide a framework for cooperation between the two states on cybersecurity.[43] Here, the two states will undertake to cooperate in the following areas of cybersecurity: National Cybersecurity Strategy Development and Implementation, Incident Management; Cybercrime; Promote Cybersecurity Awareness and Training; and Capacity Building.[44]

Meanwhile, the MoU between the Indonesia's BSSN and the China's Cyberspace Administration will provide a framework for cooperation in developing cyber security capacity and technology between the participants. In this Indonesia-

[41] "Letter of Intent Between the Government of the Republic of Indonesia and the Government of the United States of America on Promoting Strong Cyber Space Cooperation," Indonesia's Foreign Ministry, accessed November 3, 2021, https://treaty.kemlu.go.id/apisearch/pdf?filename=USA-2018-0367.pdf

[42] *Id.*

[43] "Memorandum of Understanding Between the Government of The Republic of Indonesia And the Government of the United Kingdom of Great Britain and Northern Ireland on Cyber Security Cooperation," Indonesia's Foreign Ministry, accessed November 3, 2021, https://treaty.kemlu.go.id/apisearch/pdf?filename=GBR-2018-0068.pdf

[44] *Id.*

China MoU, most importantly, the two states agreed to uphold *the principle of respect for state sovereignty on cyberspace* and work together to promote the establishment of a multilateral, democratic and transparent international internet governance system, data security, and the building of a peaceful, secure, open, cooperative, responsible, and orderly cyberspace as well as information and communication technology development.[45] The MoU also highlighted that the participants should respect each other's jurisdiction and governance of data and shall not obtain data located in the other participant through companies or individuals without the other participant's permission. Moreover, the participants should require domestic information and communication technology products and services providers not to install backdoors in their products and services to illegally obtain users' data, control or manipulate users' systems and devices.[46]

We can obviously see from these three MoUs and LoI the significant differences on the sovereignty approach endorsed by those states. In the MoU between Indonesia and the U.S., and between Indonesia and the U.K., for example, the two states did not specifically mention about sovereignty and even any other issues related to sovereignty. Here, we may conclude explicitly that both the U.S. and the U.K. endorse sovereignty-as-a-principle. In contrast, the LoI between Indonesia and China clearly highlighted the importance for the two countries to respect each other's sovereignty on cyberspace and jurisdiction. From this LoI we may view China's approach on sovereignty that appear to endorse the sovereignty-as-a-rule position. Indonesia, similarly, tends to endorse the sovereignty-as-a-rule position where it upholds the principle of respect for state sovereignty on cyberspace, as stipulated in the MoU or LoI on cybersecurity cooperation between Indonesia and other states outside the U.S. and the U.K.

3.3.2. Regional Framework and Cooperation

The ASEAN region indeed presents an excellent strategic and commercial opportunity which is already a core part of the world's economy. ASEAN economies are fast growing and the region's population is growing rapidly as well: the region is set to become the equivalent of the world's fourth-largest economy by 2030, with a current population of around 637 million people.[47] Digital disruption across the region has been rapid, and the demand for digital goods and services is accelerating.

[45] "Memorandum of Understanding Between the National Cyber And Crypto Agency of The Republic of Indonesia And the Cyberspace Administration of The People's Republic of China On Cooperation In Developing Cyber Security Capacity And Technology," Indonesia's Foreign Ministry, accessed November 3, 2021, https://treaty.kemlu.go.id/apisearch/pdf?filename=CHN-2021-0228.pdf

[46] *Id.*

[47] "ASEAN Remains Prime Target for Cyberattacs," *Nikkei Asian Review*, 8 February, 2018, asia.nikkei.com/Business/Business-trends/ASEAN-remains-prime-target-for-cyberattacks

As ASEAN economies thrive, their digital threat landscape has expanded. This has triggered demand for all types of cyber security and across all types of organisations – from government agencies to app developers. According to A.T. Kearney, countries within ASEAN are being used as a launch pad for malicious cyber activities. Vietnam, Indonesia and Malaysia are global hotspots for malware attacks.[48] Therefore, the need to protect fast-evolving digital economies creates a vast, addressable market for cyber specialists. The US-based Asia Pacific Risk Centre projects that the global cost of data breaches to businesses in the region will be approximately $2.8 trillion by 2020.[49]

As a consequence, particularly within the ASEAN framework, the cybersecurity issues have been one of the most priorities issues in three main ASEAN mechanisms. They are the *ASEAN Defence Ministers' Meeting Plus (*ADMM-Plus**)** where the cybersecurity issues are discussed through the *ADMM-Plus Experts' Working Group on Cyber Security* (EWG on CT), the *ASEAN Ministerial Meeting on Transnational Crime* (AMMTC) where the cybercrime issues are examined through the ASEAN Senior Officials' Meeting on Transnational Crime Working Group on Cybercrime (ASEAN SOMTC), and the *ASEAN Regional Forum* (ARF), where the cybersecurity cooperation are arranged under the framework of *Security of and in the Use of Information and Communication Technologies* (ICTs).

Indeed, one of the Indonesia's strategic alliances in cybersecurity policy is by cooperating with the ASEAN as it is also one of the Indonesia's commitments to realize ASEAN's three pillars, the ASEAN Economic Community, the ASEAN Socio-Cultural Community, and the ASEAN Political-Security Community. Another commitment is to have a stronger cooperation with ARF to support the three pillars. Indonesia was also one of the countries that initiated the Treaty of Amity and Cooperation (TAC). Substantially, the fellow member states do not attack each other and resolve conflicts in a peaceful manner[50]

Indonesia has also been consistently partnering with ASEAN in cyber security sector, because of the prominence of Malaysia's and Singapore's cybersecurity development.[51] Malaysia, for example, has prepared cyber security supporting policies, institutions, infrastructures, and programs and the effort has been discussed in international cooperation forums. The institution in-charge that runs cyber security functions in Malaysia is called "Siberoc," which coordinates with Malaysia's information security institutions such as Malaysian Computer

[48] Cyber Security in ASEAN: An Urgent Call to Action (2017), A.T. Kearney, 10.

[49]"Southeast Asia Cybersecurity Emerging Concern," *The ASEAN Post*, 20 May, 2018, theaseanpost.com/article/southeast-asias-cybersecurity-emerging-concern

[50] Muhamad Rizal and Yanyan M. Yani, "Cybersecurity Policy and Its Implementation in Indonesia," *Journal of ASEAN Studies* 4, No. 1 (2016): 73.

[51] *Id.*

Emergency Response Team (MyCERT).[52] Meanwhile, Singapore excels in its human resources, having the highest number of information security experts in ASEAN.[53]

Indonesia and ASEAN have been consistently partnering in security sector because ASEAN has given some contribution to Indonesia to deal with cyber threats. In ASEAN Regional Forum (ARF), Indonesia and ASEAN work together in tackling cybercrime by improving the security level in states' cyber-sector. Consequently, along with other ASEAN countries, Indonesia was committed to develop its cyber security and would consistently do so until the beginning of ASEAN Community in 2015.

One of the most recent and relevant documents related to cybersecurity cooperation among ASEAN member states would be the ASEAN Leader's Statement on Cybersecurity Cooperation that was established by all 10 member's heads of state/government during the 32nd ASEAN Summit in 2018. In the document, all member states clearly state that they acknowledge the *state sovereignty* and international norms and principles that flow from sovereignty apply to the conduct by states of ICT-related activities and to their jurisdiction over ICT infrastructure within their territory. Here, we can obviously observe how all the member states highlighted the significance of the concept of the state sovereignty, as well as the international norms and principle derived from that concept to be applied by the member states in any ICT-related activities. Therefore, ASEAN as a regional organization with 10-member states, including Indonesia with its similar position as well, appear to endorse the sovereignty-as-a-rule position.

In other words, South East Asia remains a region where strong nationalism prevails and ASEAN has always favored a strong commitment to preserving and respecting national sovereignty. In this context, the elaboration of cyber norms, which would define proper state behavior in cyberspace in conformity with a set of collective expectations, will obviously depend on the member states' true political will to engage in this work.

3.3.3. Multilateral Framework and Cooperation

At the multilateral level, Indonesia participates actively in the UNGGE and so far has become a member in 2012, 2014, and 2019-2021. In any multilateral forums and meetings, particularly during the Indonesia's presidency of the United Nations Security Council (UNSC) for the period 2019-2020, Indonesia has been consistently emphasizing the need for all states to adhere to the principles of the

[52] The Ministry of Defense of the Republic of Indonesia, *A Road Map to Cyber Defense National Strategy*, (Jakarta: The Ministry of Defense of the Republic of Indonesia, 2013), 42.

[53] *Id*, 58.

UN Charter and international law in maintaining peace and stability in cyberspace. Furthermore, the country also underlined that all states and entities share common responsibilities to ensure the use of ICTs for peaceful purposes. Indeed, controlling the behavior of malicious non-state actors in the ICTs environment, in this regard, poses special difficulties. This makes international cooperation and collaboration all the more critical.

Furthermore, on May 22, 2020, Estonia, supported by other co-sponsors including Belgium, Indonesia, Kenya, and the Dominican Republic, held a virtual *Arria Formula* entitled "Cyber Stability, Conflict Prevention, and Capacity Building". The meeting discussed the global efforts in strengthening the stability and preventing the conflicts related to various threats in the cyber realm, as well as the global, regional, and national norms and mechanisms in overcoming those cyber threats as efforts to promote international cooperation and collaboration. Moreover, on August 26, 2020, Indonesia initiated another virtual *Arria Formula* entitled "Cyber Attacks Against Critical Infrastructure" which was attended by 40 speakers with three briefers (ICRC President, UNOCHA Deputy, and UNIDIR Director), 14 UNSC member countries and 23 non-UNSC member countries, with the participation from 20 delegates at the Ambassadorial level. The meeting discussed the issue of critical infrastructure vulnerabilities and the humanitarian consequences of cyberattacks, as well as the global efforts in protecting that critical infrastructure from cyberattacks and the aspects of international legal protection and norms related to state behavior in cyberspace to protect such a critical infrastructure from the context of maintaining international peace and security.[54]

In this regard, with the ever-increasing cyber connectivity, critical infrastructure is exposed to an array of threats and vulnerabilities, which raise new security concerns, where Such challenges are faced by an ever-growing number of countries, Indonesia is therefore of the view that protection of critical infrastructure against cyberattacks will become even more important in the future. Indonesia then underlined three points.[55] First, Indonesia encourages all states to acknowledge that cyber-attacks on critical infrastructure can have widespread consequences, including humanitarian and therefore more attention needs to be paid on cyberattacks against critical infrastructure by both state and non-state actors, including proxies. Cyberattacks also pose risks towards instability in international peace and security with consequences becoming uncontrollable, even potentially claim human lives. Second, the protection of critical infrastructures requires strengthening of norms, international law as well as national legislation and therefore the principles of international law and the UN Charter provide the

[54] Perutusan Tetap Republik Indonesia untuk PBB di New York, Kompilasi Statement Indonesia di Dewan Keamanan PBB 2019-2020 (Kementerian Luar Negeri Republik Indonesia: Jakarta, 2001), 877-879.

[55] *Id.*

fundamental framework in guiding states on their use of ICT. Consequently, Indonesia supports the norms of responsible state behavior outlined in the UNGA Resolution 70/237, as there must not be any intentional damage or impairment in the use and operation of critical infrastructure. The norms also underline the importance of appropriate measures by states to protect their critical infrastructure from the ICT threats with due regard to their applicable national laws. To that end, Indonesia supports the ongoing processes in the General Assembly, particularly through the current meaningful works of the GGE and the OEWG.

There is also a need to widen understanding and deepen engagement among countries and regions, including to address divergent views on some of the major concepts in international law that apply in cyberspace since there is no universal concept of critical infrastructure, the determination of critical infrastructure lies in domestic domain. Therefore, it is necessary to address gaps in cyber resilience among countries in not only ICT infrastructure, and to build capacity for the implementation of international law and cyberspace norms, within the national policy frameworks.

And third, the country again highlighted that bilateral, regional and global efforts are necessary and mutually reinforcing in the advancement of common understanding on cyber security issues, where more capacity and confidence building measures (CBMs) are required to bolster stability of cyberspace. This process should involve private sector, technical community and civil society. In this regard, Indonesia restated that regional organizations play an indispensable role in peacemaking on the ground. There is considerable potential yet in stepping up their presence in cyberspace, both regionally and globally, to innovatively advance the sustaining peace agenda.

As mentioned earlier in previous part, Indonesia has emphasized that regional organizations play an indispensable role in peacemaking on the ground. There is considerable potential yet in stepping up their presence in cyberspace, both regionally and globally, to innovatively advance the sustaining peace agenda. For instance, Indonesia, bilaterally, and through various ASEAN mechanisms is working actively to bolster ASEAN peacemaking initiatives via the cyber front. In that context, ASEAN CBMs through the establishment of Points of Contact, regular information exchanges, dialogues and sharing of best practices are already resulting in more meaningful collaboration with important benefits for Southeast Asia and beyond. In this regard, Indonesia also sees the potential ways forward in linking CBMs across the region with a view to promote exchanges of regional best practices to be taken into the global scale.

It is indeed necessary to address gaps in cyber resilience among countries and regions in not only ICT infrastructure, but also in the implementation of international law and cyberspace norms. Some of the challenges are the lack of

awareness, varying understanding and interpretation, as well as technical capacity and financial constraints for the implementation of existing voluntary and non-binding norms. Overall, Indonesia underlines a holistic approach for capacity building, which covers technical, policy, and legal aspects along with adequate interaction and support from multi-stakeholder entities.

Finally, we may imply that on various multilateral forums and meetings, Indonesia always underscore all the states to respect the principles of the UN Charter and international law is essential in maintaining peace and stability in cyberspace, including the principle to respect the state sovereignty. Meanwhile, during its UNSC chairmanship, it stressed the importance of responsible behavior in cyberspace, the role of regional organizations in conflict prevention, and the essentials of capacity building for cyber resilience.

4. CONCLUSION

From the analysis through all parts of this paper we may conclude that Indonesia is currently in the early stages of developing a national cybersecurity strategy where the legal framework for cybersecurity in is still weak. At the same time, Indonesia has been recently become one of the most cyber-attack targeted country in the world due to this lack of cyber capacities and capabilities. While lacking data protection regulation and any related cybersecurity provisions, Indonesia also lack of national policy and strategy when it seeks to defend itself against cyberattack, particularly those hacking activities from foreign actors or state-sponsored groups. In this regard, majority of states in the world have two different approaches on cyberattack attribution from the context of sovereignty, those applied sovereignty as a rule and as a principle. Meanwhile, Indonesia has never stated clearly its position Indonesia belongs to those countries that has never stated clearly its position whether it endorses sovereignty-as-a-rule view or sovereignty-as-a-principle view. However, based on the analysis on the previous part, we may conclude that Indonesia appears to endorse the sovereignty-as-a-rule position, where it upholds the principle of respect for state sovereignty on cyberspace.

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MEDICAL SUPPLIES EXPORT CONTROLS AND BANS DURING THE EARLY COVID-19 PANDEMIC IN SOUTHEAST ASIAN COUNTRIES COMPLIANCE WITH THE WTO

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Abstract

The global markets for crucial COVID-19 products (medical supplies) are highly concentrated. Most of developing countries are highly dependent on imports for these products. However, majority of countries implemented the export controls and bans on medical supplies due to the limitation of resources they have. This research examines the Southeast Asian policy on medical supplies export controls and bans in response to the COVID-19 Pandemic and its justification for export restrictions based on Article XI paragraph (2), Article XX, and Article XXI GATT 1994. The research methods are based on qualitative methods and normative juridical research methods. This research uses secondary data from journals, books, official documents, and websites related to the Southeast Asian Government policy on export. The results show that the justification for the export ban and restriction on medical equipment can be exempted by referring to Article XX regarding general exceptions and regarding security exceptions in Article XXI (b) (iii). Most of the Southeast Asian countries tried to follow the provisions of GATT 1994 and its reflection to be a good international citizen by compliance the international law.
Keywords: *Trade Policy, Southeast Asian, Medical Supplies Export, WTO*

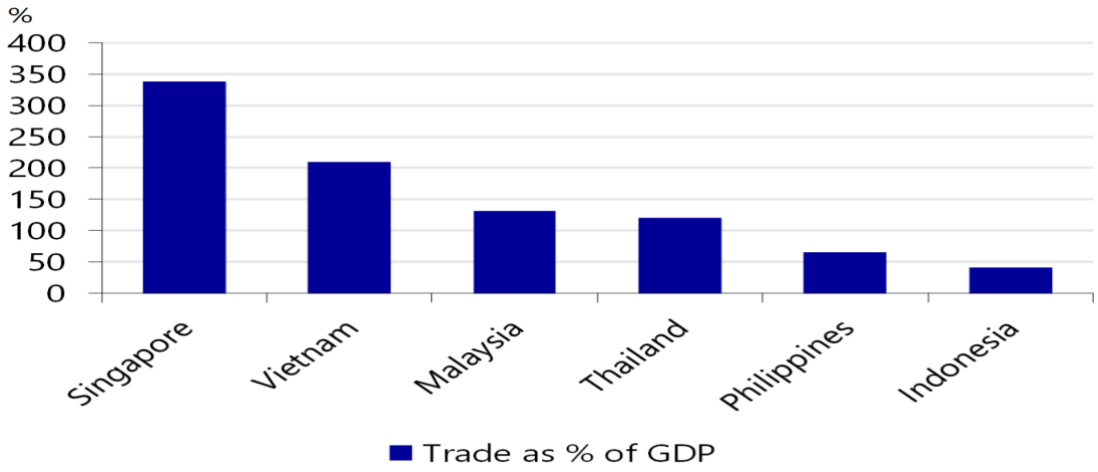
1. INTRODUCTION

The new cases of pneumonia of unknown cause detected in Wuhan City, Hubei Province of China confirmed by the World Health Organization (WHO) China Country Office (WHO, 2020) on 31 December 2019. On 5 January 2020, WHO published the first Disease Outbreak News on the new virus and declared the new virus known as Coronavirus (COVID-19) a pandemic, pointing to the over 118,000 cases of the coronavirus illness in over 110 countries and territories around the world on March 11, 2020 (Ducharme, 2020). Until 30 June 2020, the total number of coronavirus cases in Southeast Asian countries has reached 150,571 with most cases reported in Indonesia and the Philippines. Meanwhile, Thailand confirmed the total number of infections in the country to 3,171. In Vietnam, the total number of confirmed cases stood at 355, while 335 of them have recovered (Hospita, 2020). While the region's tally is still far off the hundreds of thousands compare to the U.S. and some European nations (Lee, 2020).

The world economy is reeling from the COVID-19 pandemic and most of the countries have no choice but to lock down social and economic activity. The decision that comes at the cost of a global recession, estimated to contract by at least 3 percent, with up to half the global workforce at the risk of losing their jobs and billions of people, especially in the South, pushed back into poverty and hunger (ILO, 2020; IMF, 2020; UNCTAD, 2020). According to Raphie Hayat, Researcher at RaboResearch, the economic impact of COVID-

19 on ASEAN economies will predominantly be felt through three channels: i) exports, ii) tourism and iii) domestic demand (Hayat, 2020). The data expect global the gross domestic product (GDP) to decline by almost 3% in 2020 and since tourism has ground to a halt (Erken, 2020), the result expect Singapore and Vietnam to be hit hardest in terms of exports (See Figure 1).

Figure 1. Southeast Asian Countries that Depend Most on Trade



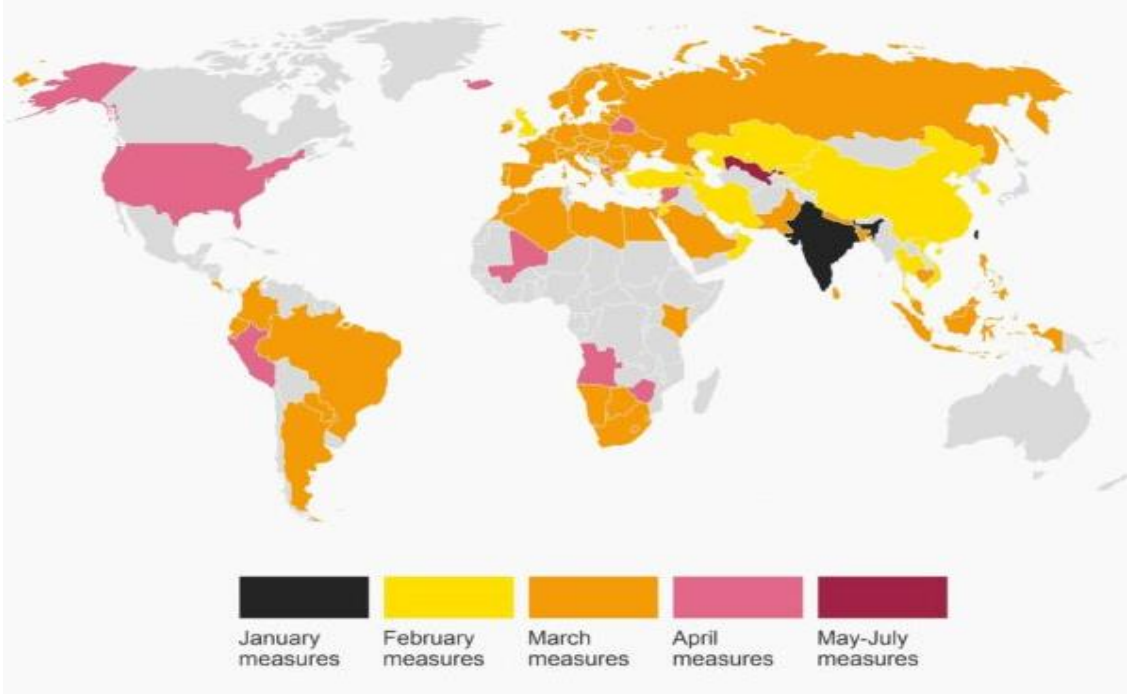
Source: Hayat, 2020

Meanwhile, The Philippines and Thailand to be hit most in terms of tourism (See Figure 2), even assuming the optimistic case, the slow recovery in tourism will hold back their economic recovery in 2021 (Erken, 2020). The impact of COVID-19 has led the global economy to shrink. According to The World Health Organization Covid-19 Disease Community Package (DCP), there are 17 products considered key to deal with the COVID-19 Pandemic. They consist of essential items for diagnosis and treatment processes such as enzymes; hygiene products such as liquid soap and hand sanitizers; personal protection equipment including gloves and medical masks; and case management products such as oxygen concentrators and respirators (Espitia, Rocha, & Ruta, 2020a). The global markets for these crucial COVID-19 products are highly concentrated. Most of developing countries are highly dependent on imports for these products. However, majority of countries implemented the export controls and bans on medical supplies due to the limitation of resources they have.

On the lasted updated (July 30, 2020) by Global Trade Alert, as an research institution that cooperate with European University and the World Bank, there are 90 jurisdictions (including most of southeast Asian countries) reported executed a total of 191 export controls on medical supplies and medicines since the beginning of 2020 (Global Governance Programme, 2020). In 2020, between January until August 15, at least 67 countries took at least 152 actions imposing export restrictions on medical goods, a category that includes general medical supplies (such as personal protective equipment (PPE)), medical equipment, pharmaceuticals, chemicals, sanitation products, and other medical goods. While some countries have removed some restrictions, at least 88 remain in force (Baldwin & Evenett,

2020). As a result, global PPE markets are in chaos, with reports of piracy, defective products, hoarding, and price gouging, in addition to the shortages. Many poor and vulnerable countries face uncertainty over their current and future access to imported PPE (Bown, 2020).

Figure 2. Countries Export Controls on Medical Supplies (Updated on 31 July 2020)



Source: Global Governance Programme, 2020

In general, WTO agreements are allowing the use of emergency trade restrictions related to national security or health that might otherwise contravene WTO obligations, however, that such restrictions should be targeted, temporary, and transparent. There are several examples of the related article: First, in case of prohibits export bans and restrictions, other than duties, taxes, or other charges on Article XI of the 1994 General Agreement on Tariffs and Trade (GATT). It only allows members to apply restrictions temporarily in order to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting country. Second, In the case of foodstuffs, the WTO Agreement on Agriculture requires members to give "due consideration to the effects on food security" of importing countries. In addition, general exceptions (e.g., GATT Article XI, XX) within WTO rules provide for policy flexibility for its member states, including to protect the health, provided restrictions do not "constitute a means of arbitrary or unjustifiable discrimination," or a "disguised restriction on international trade," among other conditions (CRS Report, 2020).

In response to the pandemic, dialogue and coordination between the ASEAN Member States will remain key to effectively tackle the crisis and sustain the momentum of integration. On February 15, Vietnam, the ASEAN 2020 Chair, issued a statement on the response that ASEAN would carry out collectively to mitigate the threat of COVID-19 in the region and highlighted the importance of a coordinated response. Five days later, ASEAN

health representatives held video conferences regularly with Chinese health experts to learn from China's experience on February 20 (Hai Ly, 2020). But the most important meetings were the Special ASEAN Summit (ASEAN, 2020a), which brought together heads of states from the 10 member countries, and the ASEAN+3 Summit, which included leaders from China, Japan, and South Korea (ASEAN, 2020b).

Despite ASEAN's haste and determination, the numerous meetings and summits did not yield a cohesive and collective response to COVID-19, due to specific domestic issues among some of its member states. Examples include Cambodia's erosion of freedoms and power grabbing through the controversial state of emergency law (Touch, 2020), Indonesia's tardy response (Rodriguez, 2020), Singapore's upended containment success (Asia Pacific Foundation of Canada, 2020), Thailand's Pro-Democracy Activists protests including a new constitution, new elections, and an end to repressive laws (Vejpongsa, 2020), Malaysia's political instability due to shifting coalition politics (IISS, 2020), and the Philippines's failed to meet the challenges of COVID-19 and the responsibilities during the crisis because of limited resources, lack of good management skills, the dominance of patronage politics, corruption, and other problems (Atienza, Arugay, Franco, Go, & Panao, 2020).

So far, most of the literatures portray early indications and estimates of the likely economic implications of COVID-19 outbreak, mostly addressing isolated dimensions, such as, general macro economy including production, supply chain, and policy response (Barua, 2020; Baldwin & Weder, 2020; Baldwin & Tomiura, 2020; Cochrane, 2020; Fornaro & Wolf, 2020; Mann, 2020), borders and oil market (Arezki & Nguyen, 2020; Meninno & Wolff, 2020; Fornaro & Wolf, 2020), global GDP growth (Boone, Haugh, Pain, & Salins, 2020; McKibbin & Fernando, 2020; Fernandes, 2020; Wren-Lewis, 2020) and financial stability and risk (Beck, 2020; Cecchetti & Schoenholtz, 2020). While trade implications are enormous, scholarly research on this issue remains limited yet emerging. The purpose of this paper is to explore on Southeast Asian policy on medical supplies export controls and bans in response to the COVID-19 Pandemic and its justification for export restrictions based on Article XI paragraph (2), Article XX, and Article XXI GATT 1994.

2. RESEARCH METHOD

This study is using qualitative study and normative juridical research methods. In qualitative research, researchers interpret what they see, hear, and understand without sacrificing background, history, context, and previous understanding (Creswell, 2009). This study uses data collection techniques, both primary and secondary data. Researchers through official reports obtained primary data from the Government or official institution. Meanwhile, secondary data is obtained through a literature study, which refers to text or written sources, both visually and spoken in communication media. Secondary data were obtained from written sources, such as books, literature, academic journals, news, and online media that are relevant to this study. The process of data processing and analysis involves reviewing and interpreting the data collected, organizing, and categorizing these data, and examining their relationship with variables from predetermined theories (Creswell, 2009, p.

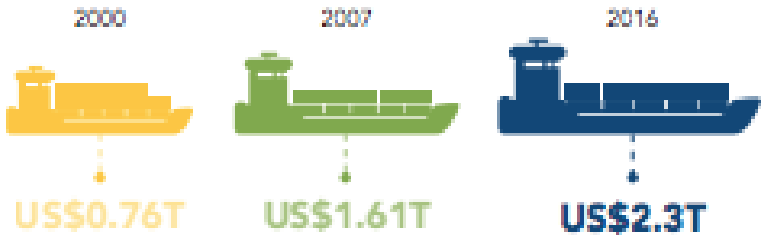
164). It used an analytical technique consisting of the framework introduced by Miles and Huberman (1994) which described the stages of the qualitative data analysis process consist of data reduction, data presentation, and drawing conclusions and verification (Berkowitz, 1997). Thus, the analysis technique is carried out by gathering data in the form of words and letters taken from documents and transcripts of the government report, official website, and research publications. Data analysis is conducted by extracting themes or generalizations from evidence and organizing data to present a coherent and consistent picture to prove the basic assumptions of the theoretical foundation.

Another method that uses in this article is normative or doctrinal legal research. According to Terry Hutchinson, as quoted by Peter Mahmud Marzuki, defines doctrinal legal research as research which provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development (Marzuki, 2015, h.32). Normative legal research is a library research or document study because this research is conducted or aimed only at written regulations or other legal materials.6 In essence, the research is examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. In relation to normative research, the approach used in writing law according to Peter Mahmud Marzuki as follows: (1) Case approach; (2) Statute approach; (3) Historical approach; (4) Comparative approach; and (5) Conceptual approach. The approaches used by the authors of the above approaches are the statute approach and the case approach. The statutory approach is an approach that is carried out by examining all laws and regulations relating to the legal issue being handled. The case approach is an approach that is carried out by examining cases related to the issues faced which have become court decisions that have permanent legal force (Marzuki, 2015, h.93).

3. ANALYSIS AND DISCUSSION

Since ASEAN officially launched its Economic Community (the AEC) in 2015, with its four pillars: a single market and production base, a competitive region, equitable economic development, and integration into the global economy (Acuity, 2018), has progressed the most. The creation of the ASEAN Trade in Goods Agreement in 2010 and the fact that most Intra ASEAN trade is already at zero tariffs is proof of single market progress (ASEAN, 2015). Meanwhile integration into the global economy was realized through free trade agreements (FTAs) signed and implemented with six of its East Asian partners: Australia and New Zealand (AANZFTA), China (ACFTA), India (AIFTA), Republic of Korea (AKFTA), and Japan (AJCEP). All the agreements are marking an important economic and political commitment to the region's shared and connected future in a common market. Economic cooperation in many areas has increased the number of intra-ASEAN trade from US$0.76 trillion in 2000 to US$2.3 trillion in 2016 as shown in Figure 3. (ASEAN, 2017)

Figure 3. Intra-ASEAN's Total Trades



Source: (ASEAN, 2017, p. 16)

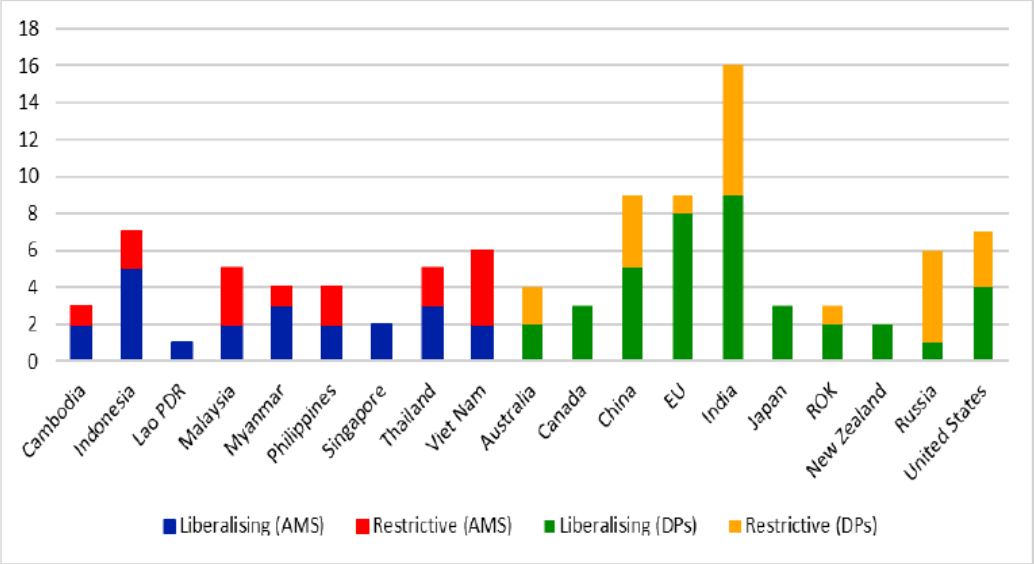
Today the economy of ASEAN has been faced with unprecedented uncertainties stemming from the COVID-19 pandemic. Preliminary ASEAN statistics also indicate that total merchandise trade in 2019 declined modestly by 1.8 percent year-on-year (yoy) to US$2.77 trillion while foreign direct investment (FDI) inflows in the same period increased by 4.7 percent yoy to US$160.7 billion. In addition, continued trade tensions between major trading partners (U.S. and China) and concerns over the outbreak (ASEAN Annual Report, 2020, p. 17). To response the early situation of COVID-19 pandemic, the ASEAN Economic Ministers agreed to issue a joint statement on strengthening the ASEAN's Economic Resilience in response to the outbreak of COVID-19 at the 26th ASEAN Economic Ministers' Retreat in the central city of Da Nang on March 11, 2020. In the joint statement, they expressed concern over the outbreak of the COVID-19, which has adversely affected the lives of people as well as economies across the globe. They underscored the importance of ASEAN solidarity and the spirit of a cohesive and responsive ASEAN community in facing the outbreak through joint efforts to avoid further adverse impacts (Vietnam Times, 2020).

Most countries are highly dependent on international trade; therefore, depressed demand and breaks in supply chain connectivity are likely to particularly affect those economies that are most integrated into global value chains such as Singapore, Vietnam, and Malaysia. China as the country ASEAN's biggest external trade partner and investor, accounting for 17.1% of ASEAN's total trade and 6.5% of its total FDI inflows in 2018, and it is tightly woven into its supply chains (ASEC, 2020). International trade is expected to plummet by between 13% and 32% in 2020 (WTO, 2020), which will likely have a broad and deep impact on the ASEAN region (ASEC, 2020). On 10 March 2020, following its 26th retreat and gathered in Da Nang, the ASEAN Economic Ministers (AEM) issued a statement calling for collective action to mitigate the impact of the virus, with a particular focus on leveraging technology and digital trade, as well as trade facilitation platforms to foster supply chain connectivity and sustainability (ASEAN, 2020c). A month later, in April 2020, ASEAN Leaders convened the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19). During the Summit, Leaders issued a declaration calling for the implementation of measures to boost confidence and improve regional economic stability, including through policy stimulus, by assisting those individuals and businesses suffering from the impact of COVID-19, particularly MSMEs and vulnerable groups (ASEAN, 2020d).

3.1. Medical Supplies Export Controls and Bans in Southeast Asia

COVID-19 not only has an impact on a country's economic growth, but trade and investment are also predicted to be burdened by this pandemic. The WTO projects that global trade in 2020 will fall by 13% to 32% in each region and cover all sectors. As a result, various countries began to experience a crisis so that they imposed trade restrictions, including export restrictions. Products such as vital medicines, medical supplies, and food are the focus of export restrictions. This restriction is carried out to meet domestic needs (ASEC, 2020). Not much different from various countries in the world, data from the World Trade Organization (WTO) and the International Trade Center (ITC) states that ASEAN countries are imposing export restrictions and relaxing imports of goods and services concerning Covid-19. ITC data states that there were 295 acts related to trafficking carried out by 139 countries and regions. 156 actions are restrictive and 139 liberalizations, the steps taken in this action are focused on exports and imports (Alberti, 2020). ASEAN Member States (AMS) and ASEAN Dialogue Partners (ASEAN DPs) in general have issued 62 liberalization measures such as reducing tariffs or import duties and trade facilitation and have taken 38 actions related to export restrictions (see Figure 4).

Figure 4. Numbers of trade and trade-related measures issued by AMS and ASEAN DPs during COVID-19



Source: ASEC, 2020

Measures to restrict exports of medical supplies and food have received special attention from the International Monetary Fund (IMF) and the WTO. Through the Managing Director of the IMF and the Director-General of the WTO, the government is not advised to impose restrictions on the export of medical supply and food. Massively, restrictions will disrupt the supply chain, suppress production, and the product may not

be in the hands of people who need it (ASEC, 2020) This restriction will hurt the exporting countries of their trading partners. The restriction is intended to reduce prices and provide the availability of domestic products, but this will only be temporary. Since the medical supply is a valuable and rare item when the item is available, the public is likely to make large purchases, hoard, and speculative actions which will cause scarcity to occur and product prices to increase (Hopewell & Joshua, 2020). Countries that carry out restrictions think that the shortage of supply will be covered by national production by each country. Hopewell and Joshua (2020) argue that it is unrealistic and impossible to do. The medical supply chain is global in nature, the complexity of the product with its various supporting components is not easily produced through the state's complete self-sufficiency. Cooperation between countries and producers is needed so that these products are ready for use and meet market needs.

The WTO stated that the long-term effect of export restrictions would result in prolonged health and economic crisis and exacerbate the situation. The more serious impact will be felt by developing countries with high poverty levels and which are still vulnerable. Experience in the global crisis shows that restrictions on food exports are multiplying rapidly in various countries and are causing greater uncertainty and price increases (WTO, 2020). Evans, a neo-liberal economist, argues that elimination of the role of the state in the economy is the key to successful reform, others argue that an 'embedded autonomy' of the state is necessary for successful reforms (Evans, 1992). For neo-liberals, state intervention creates market distortion and rent-seeking behavior leading to costly and unproductive investment. Since the intentions and capabilities of states are constantly changing in an anarchic international system, cooperation on a relative gain basis is highly unlikely and cheating is common (Grieco, 1988; Grieco, 1990; Mattar, 1994).

In general, medical products are categorized into four groups, namely: (1) medicines (including both dosified and bulk medicines); (2) medical supplies (consumable for hospital and laboratory use such as alcohol, syringes, gauze, reagents, etc.); (3) medical equipment and technology; and (4) personal protective equipment (e.g., hand soap and sanitizer, face mask, and protective spectacles) (WTO, 2020b). In 2018, the total value of global exports of personal protective equipment (PPE) products was US$47.5 billion with most of such exports consisted of gloves, masks, and gowns. Global export of gloves was recorded at $15.6 billion or 76 percent of which was supplied by China, Malaysia, Thailand, Vietnam, and Belgium. Global export of masks (i.e., textile masks and gas masks) with totaled $13.6 billion or almost 63 percent of which was supplied by China, Germany, the United States, Vietnam, and Mexico (Suvannaphakdy, 2020). The total value of ASEAN exports of PPE products was $8.5 billion or 18 percent of global exports in 2018. Many 80 percent of such exports were in gloves and gowns (13 percent). The largest exporter of PPE products was Malaysia ($4.6 billion), followed by Vietnam ($1.7 billion) and Thailand ($1.4 billion) (Suvannaphakdy, 2020). During the current COVID-19 period, however, sourcing heath supplies including PPE products from overseas have become increasingly challenging

for ASEAN countries. Thus, Governments around Southeast Asia have been implementing trade-related measures in response to the COVID-19 pandemic including trade restrictive. (See Table 2).

Table 2. Southeast Asian Regulations on Medical Supplies Export Controls and Bans in Response to COVID-19

Countries	Regulation	Description of Goods	Policy Instrument	Implementation Date
Brunei Darussalam	Royal Customs and Excise Department, Ministry of Finance on Temporary Exception for Personal Hygiene[1]	Personal hygiene products	Tariff reduction	1 April 2020
Cambodia	Government's Resolution No. 20/NQ-CP[2]	Masks	Export Ban	20 March 2020
Indonesia	Regulation of Minister of Trade Number 34 of 2020 on Second Amendment to Regulation of Minister of Trade Number 23 of 2020 (Regulation 34/2020)	Masks	License to operate	5 March 2020
		Masks	Export Ban	12 March 2020
		Temporary Export Ban for Antiseptic, Mask Raw Material, Personal Protective Equipment, and Masks	Export Ban	18 March 2020
Laos	PM Decision No.31 on Policies and Measures to Mitigate the Impact of COVID-19 on Lao Economy (2 April 2020)[3]	Masks, Soaps, other Medical Equipment	Tariff Reduction for Import	2 April 2020
Malaysia	Custom Act on Prohibition of Export No.2 2020[4]	Masks (of types: one-ply (ear loop), two-ply (ear loop), three-ply (ear loop))	Export Ban	18 March 2020
Myanmar	-	Medical Supply Products	Tariff reduction	27 April 2020

Philippines	-	Firms told to allocate 80% of production to the domestic market	Export Limit	25 March 2020
Singapore	Health Sciences Authority regulation on Import of Hand Sanitizers, Mask, thermometers and Protective Gear - 2020	Hand sanitizers, masks, thermometers, protective gear	Non-automatic import-licensing procedures	31 January 2020
		Medical, hygiene, pharmaceutical and agricultural products	Tariff reduction	16 April 2020
Thailand	WTO document G/MA/QR/N/THA/2/Add.3, 2 April 2020[5]	Masks	Export License	6 February 2020
		Masks	Export Limit	21 February 2020
		Extension on Export Ban on Masks	Export Ban	25 March 2020
Vietnam	-	Masks	Export Limit	11 March 2020

Source: [1]Trading Across Borders Brunei, 2020; [2]Customs News, 2020; [3]Lao Prime Minister, 2020; [4]Warta Kerajaan Malaysia, 2020; [5]WTO, 2020c; International Trade Centre (ITC), 2020; EUI, GTA and World Bank, 2020

Export bans and restrictions are generally prohibited by the WTO. This can be seen in Article XI paragraph (1) the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994, which states:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or the exportation or sale for export of any product destined for the territory of any other contracting party."

This indicates that WTO member countries are prohibited from introducing or maintaining any form of exports restrictions or restrictions other than duties, taxes, or other fees. Exceptions to this rule are only allowed in specific circumstances under:

1) Article XI: 2 of the GATT expressly allow, "Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party".

2) Article XX (b) of the GATT allows measures “necessary to protect human, animal or plant life or health”.
3) Article XXI (b)(iii) on “Security exceptions” states that nothing in the GATT must be construed to prevent any WTO Member “from taking any action which it considers necessary for the protection of its essential security interests” in times of “emergency in international relations”.

Therefore, it is still possible for WTO member countries to impose a quantitative restriction if they meet the exclusion criteria specified in Article XI paragraph (2) letter an of GATT 1994, namely:

> "The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."

This provision stipulates that WTO member countries can implement temporary export bans or restrictions to prevent or reduce shortages of foodstuffs or other important products in the exporting country. Apart from the exception to this paragraph (2) on Article XI, the provisions regarding export restrictions can also be exempted by referring to other GATT provisions such as Article XII, Article XX, and Article XXI. However, if it is related to the COVID-19 pandemic, the most relevant exceptions are those contained in Article XI paragraph (2) and Article XX of the GATT 1994. Furthermore, related to prohibitions and restrictions on foodstuffs during the Covid-19 pandemic can be linked on the grounds of "food security" in Article XXI GATT 1994 (Lapa, 2020). Furthermore, when WTO member countries impose export restrictions, this does not automatically apply but there is a notification mechanism that must be made in advance by WTO member countries where this has been agreed in the "Decision on Notification Procedures for Quantitative Restrictions" in 2012.

3.2. Justification of Export Prohibition and Restriction Based on Article XI

WTO member countries can take an action on export restrictions (bans) and limitation in response to the COVID-19 pandemic. Article XI paragraph (1) GATT that regulates general elimination of quantitative restrictions states that a country is prohibited from implementing a non-tariff policy (such as quantitative restrictions or non-tariff barriers). It is regulated that barriers or restrictions can only be made in the form of import duties, taxes, or other charges and not based on quotas, import, or export licenses. The export prohibition and restriction exemplified above, such as what happened in Southeast Asian on medical equipment is clearly a quantitative restriction that is explicitly covered by the term "quota" in Article XI paragraph (1) because banned exports or impose quotas on various variations of goods, especially medical equipment.

The provisions regarding the prohibition or limitation contained in Article XI paragraph (1) may be exempted from paragraph (2). During the Covid-19 pandemic, the provisions in Article XI paragraph (2) letter a, is the most relevant provisions because it allows WTO member countries to impose temporary export restrictions to reduce shortages of food and other products important to exporting countries. The provisions of Article XI paragraph (2) letter a: "Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party".

The Appellate Body (AB) decision on the case of raw materials in China has provided clear instructions on the scope of the exception to Article IX paragraph (2) and how to apply it. AB believes that the commodity in question must be "absolutely indispensable or necessary" for the exporting country and that the shortage must be "critical". This means that shortages must cause a "crisis" in the exporting country, which is described as a "turning point, a very important or decisive stage, difficult times, dangers or tensions in politics, trade, etc. Thus, when it is linked to the COVID-19 pandemic period, then this condition is included in the category of deficiency of a very important quantity; the quantity of the commodity determines a situation, a situation that has reached a very important or decisive stage, or a turning point (WTO, 2020). From the AB decision above a limitation or prohibition on exports must be carried out as soon as possible when a critical situation occurs in the exporting country.

Thus, the WTO member states should demonstrate the essential goods that are prohibited or restricted in their exports are really needed to fight the COVID-19 pandemic, if not, the export restrictions cannot be justified. However, the justification should not conflict with other WTO special agreements (Aatreya, 2020). For example, in the case of import licensing regimes by Indonesia, AB states that the exception is Article IX paragraph (2) letter c GATT 1994 does not apply based on Article 12 paragraph (1) Agreement on Agriculture (AoA) or in other words the provisions in GATT cannot be used to justify actions which constitute a violation of AoA (in the case of import licensing regimes in Indonesia against Article 4 paragraph (2) which independently does not allow QR which is enforced by Indonesia and is applied together with Article XI paragraph (1) GATT 1994). Therefore, the prohibitions and restrictions imposed during the COVID-19 pandemic must also pay attention to the existing WTO special agreements (WTO, 2017).

Table 3. WTO Cases Related to Export Prohibition and Restriction Justification on Article XI GATT 1994

Case	Appellate Body Decision
DS366: Colombia — Indicative Prices and Restrictions on Ports of Entry[1]	The Panel states that if there is an action in the form of prohibition or restriction on imports, either directly or indirectly, it will be subject to Article IX paragraph (1).

DS394: China — Measures Related to the Exportation of Various Raw Materials[2]	Case of raw materials in China that there are clear instructions on the scope of the exception to Article IX paragraph (2) and how to apply it. It is stated that the commodity in question must be "absolutely indispensable or necessary" for the exporting country and that the shortage must be "critical". This means that shortages must cause a "crisis" in the exporting country, which is described as a "turning point, a very important or decisive stage; difficult times, dangers or tensions in politics, trade.

Source: [1]WTO, 2007; [2]WTO, 2020

3.3. Justification of Export Prohibition and Restriction Based on Article XX

If a prohibition or restriction that violates Article XI paragraph (1) cannot be "justified" in Article XI paragraph (2), then the general exclusion contained in Article XX GATT 1994 could be potential. The analysis in Article XX consists of two levels which require that action (in this case a prohibition or restriction) must meet one of the exceptions set out in letters "a" to "j" and the requirements set out in the opening words of Article XX (*chapeau*) specified:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures"

This Chapeau states that measures taken by WTO member countries to protect certain interests are not allowed if the action is classified as indiscriminate or unjustifiable discrimination, or if the action is a cover to restrict international trade. Furthermore, the prohibitions or restrictions imposed during the Covid-19 pandemic will be very relevant if using letter b of Article XX which allows WTO member countries to take actions "necessary to protect human, animal or plant life or health". As an initial consideration, this ban is intended to protect lives in the face of the COVID-19 pandemic, but whether the ban is "necessary" should be discussed further.

Table 4. WTO Cases Related to Export Prohibition and Restriction Justification on Article XX GATT 1994

Case	Appellate Body Decision
DS332: Brazil — Measures Affecting Imports of Retreaded Tyres[1]	AB stated that to determine whether an action is deemed "necessary" under Article XX letter (b) necessary to protect human, animal, or plant life or health; such a holistic operation or a comprehensive study is needed to consider whether limiting or prohibiting action taken by a country

	will be commensurate with the results obtained by the country if it imposes restrictions or existing restrictions.
DS135: European Communities — Measures Affecting Asbestos and Products Containing Asbestos[2]	AB argues that the more important matters or values at stake, the likelihood that such actions will be justified under Article XX will also increase.

Source: [1]WTO, 2009; [2]WTO, 1998

In case of COVID-19 that has been classified as a pandemic by WHO (WHO, 2020a), the interests of the lives of WTO member countries are indeed at stake and it is clear this is a very important measure. This suggests that the export ban and restrictions described in the background have a high chance of being justified under Article XX. Furthermore, when talking about the measure "whether the action taken is commensurate with the results to be obtained", then AB's opinion in the EC-Asbestos case can be used as a reference, that is, if there is any an “alternative action” that can be taken by a WTO member country to face difficulties in its country, such alternative action will undermine a country's reason to justify its actions under Article XX. However, WTO member states remain free to determine the level of protection they wish to maintain, and the existence of alternative measures will affect the justification of Article XX only if the alternative measures achieve the same level of protection as the measure set by the state. During a pandemic like this, the country will set the maximum possible level of protection so that the ban or restriction on medical exports, especially those carried out by WTO member countries, can be justified, especially if the COVID-19 pandemic is very disturbing.

The analysis based on Article XX letter b and Article XI paragraph (2) letter a can be distinguished for two reasons. First, Member States’ policy to prohibition or restriction in Article XX letter b covers a broader scope and is not limited to "temporary" measures, as in Article XI paragraph (2). Second, Article XI paragraph (2) letter applies only if there is a difficulty that is already "critical" for goods deemed "essential" at that time for the exporting country. Therefore, prohibitions or restrictions during the COVID-19 pandemic can be justified based on Article XX letter b, even if the exporting country does not face “critical” difficulties (Aatreya, 2020). Furthermore, if a state action has fulfilled the provisions in one of points a to j (in this case letter b) then the next analysis is to assess the state's actions based on chapeau Article XX. As previously discussed, Article XX chapeau states that actions taken by WTO member countries to protect certain interests are not allowed if the action is classified as indiscriminate or unjustifiable discrimination, or if the action is a front for restricting international trade. The function of this chapeau is to avoid abuse, but in fact it, thwarts many attempts to justify protective measures (Joseph, 2011). Lorand Bartels further stated that there is absolutely no difference between the conditions of action specified in

the chapeau and the conditions of action referred to in point "a" so that these two conditions should be applied together and not exclude one another (Lorand , 2015).

3.4. Justification of Export Prohibition and Restriction Based on Article XXI

Article XXI regulates security exceptions that allow member states to justify actions that are not in accordance with the principles of international trade for reasons of state security. Article XXI provides that:

> Nothing in this Agreement shall be construed
> a) To require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> b) To prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> i. Relating to fissionable materials or the materials from which they are derived.
> ii. Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.
> iii. Taken in time of war or other emergency in international relations; or
> c) To prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security

The security exception embraces five broad categories: (1) national security information; (2) nuclear material; (3) military goods and services; (4) war and international emergencies; and (5) U.N. Charter obligations. To justify the prohibition and restrictions on the export during the COVID-19 pandemic, Article XXI (b) (iii) requires war or other emergencies in international relations. A global pandemic like COVID-19 cannot possibly be classified as a war, therefore, it could be proven as an "emergency in international relations". The reason of COVID-19 pandemic can be categorized as an emergency in international relations is based on the following facts:

1. Several countries such as the United States or Russia Federation have included the pandemic in their national security strategy. For example, Russia states that a pandemic is a threat to its national security in the field of public health (Lapa, 2020).
2. The Secretary-General told the Security Council on July 2, 2020, that the COVID-19 pandemic is "profoundly affecting" peace and security across the globe. He emphasized the need for collective security from United Nation Security Council (UNSC) (United Nations, 2020).
3. The UNSC unanimously passed Resolution 2532 and it considers "the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security" (preambular para. 11) (Pobjie, 2020).

Furthermore, regarding the time element in Article XXI (b) (iii), the state will clearly act during an emergency. When proposing security exemptions, WTO Members must: (1) define 'essential security interests' in good faith and (2) adopt measures to protect essential security interests in good faith, i.e., the actions taken must correlate

with the interests to be protected. This requirement is aimed at preventing the abuse of the security exemption provisions but at the same time, it is also aimed at respecting the decisions of WTO member countries to protect the sovereignty of their countries. The obligation of good faith is applied not only to the definition of essential security interests but also to implement measures to prohibit or restrict exports by the state. In other words, WTO Members are obliged to demonstrate that their actions are justified in protecting the interests of the state (Anania, 2014). Article XXI refers to steps deemed "necessary by the State" rather than actions that are objectively "necessary" under Article XX. Regarding this element, WTO member states should not experience significant difficulties because as stated above is a right of a country to determine the "necessary" elements.

4. CONCLUSION

The export prohibition and restriction of various products, especially medical supplies during the COVID-19 pandemic, is indeed a violation of Article XI paragraph (1) of GATT 1994, but this provision can be exempted by paying attention to the provisions in paragraph (2). In addition, the justification for the export ban and restriction on medical equipment can also be exempted by referring to Article XX regarding general exceptions. Such action can also be justified if the state refers to the provisions regarding security exceptions in Article XXI (b) (iii). Basically, state actions in the form of export controls and restrictions on medical supplies can be justified if these actions can be proven as an excuse to fight the COVID-19 pandemic. WTO Members exporting such products may also invoke the general exception of Article XX (b) of the GATT. Article XX (b) of the GATT allows measures necessary to protect human life or health, provided that these measures if they are strictly limited to the requirements of emergency response.

Although the decision of countries to impose export restrictions is justified, this action must also be balanced with international cooperation, thus supply shocks do not occur and create the risk of shortages of stocks for countries that depend on global supply chains and exacerbate the COVID-19 pandemic. Most of the Southeast Asian countries tried to follow the provisions of a particular treaty or rule of customary international law, in this case, WTO rules. Since most of the Southeast Asian countries were ratified, it is an expression of commitment, acting in accordance with the legal obligations established in GATT. While most of the Southeast Asian countries can be rightly criticized on some issues, their self-perception remains one of a country committed to a rules-based international order; in short, to be a good international citizen.

Overall, to tackle the COVID-19 crisis, key medical supplies, and other crucial products that related with the crisis, should freely flow from producers to where they are needed. Export restrictions and import protection are collectively inefficient, especially for least developing countries, as they see the number of COVID-19 cases rise, trade protectionism will cost lives. Trade policy cooperation should first aim at preserving open markets in this difficult time. Export restrictions on medical supplies in times of pandemic are not only related to trade regulations but also concerned with global health governance. Therefore, the cooperation between ASEAN members states with WTO and WHO is required. To solve the problem of shortages in medical products caused by a global pandemic requires improving trade regulations. The author proposed to establish a multilateral common market of medical products.

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RECONSIDERING THE MANDATORY USE OF INDONESIAN LANGUAGE IN PRIVATE COMMERCIAL CONTRACT

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Abstract

A decade after the enactment of Law Number 24 Year 2009 on the Flag, Language and Coat of Arms and Anthem which introduces mandatory use of Indonesian language in memorandums of understanding or agreements involving state institutions, government agencies, Indonesian private institutions or Indonesian citizens, there are still many questions arised about the extent of which these norms should apply in the private commercial sphere. Various litigations filed before the court to declare the agreement null and void for failure to meet the language provisions. While some lawsuit has been successful, but more recent court decisions have been consistently rejecting petition to declare an agreement as null and void for failure to comply with article 31 Law Number 24 Year 2009.

This paper will conduct a normative study to determine the extent of which the mandatory use of the Indonesian language in the agreement has affect the private commercial sphere. In what instance violation of the provision has been fully regarded as violation of an Objective Condition for a valid agreement as regulated in Article 1320 of the Civil Code which makes the agreement null and void by law and what does not.

This paper will study the laws and regulations related to the mandatory use of the Indonesian language in private commercial contracts to find out about situation and study its implementation in selected court decisions to understand the situation and provide possible recommendation for improvements.

Keywords: ***Contracts, Language, Indonesia***

1. INTRODUCTION

1.1. General

In principle, the Indonesian Civil Code (ICC) as the basis of the Law of Contract in Indonesia adheres to an open system, the Code provides public with the widest possible freedom to enter into agreements containing anything, as long as it does not violate the law, public order and decency and if they do not regulate a matter themselves, it means that the matter will be subject to the law.[1]

Such system refers to the principle of freedom of contract, which in the ICC is regulated in Article 1338 (1) as follows :

> "All valid agreements apply to individuals who have concluded them as law. Such agreements are irrevocable other than by mutual consent, or pursuant to reasons stipulated by the law. They must be executed in good faith."

This article is ICC version of the universal science doctrine of *pacta sunt servanda*, a Latin term which means a promise must be kept.

[1] Subekti, *Hukum Perjanjian*, Cet 19, Jakarta: Intermasa, 2002, p. 13.

So far, the state does not regularly intervened into the private commercial aspect, except for sectors which are strictly regulated for certain objective, such as in the sector of consumer, finance, financing, capital market, business competition and the like. Because the principle of freedom of contract is widely accepted as underlying assumption that guide activities under private commercial sector.

However, in 2009, government promulgated Law Number 24 of 2009 concerning the State Flag, Language and Emblem and National Anthem (Language Law) which introduced the obligation to use Indonesian language for Memorandums of Understanding or Agreements involving Indonesian citizens. Although it does not explain the consequences of violating the provisions on the mandatory use of the Indonesian language, the promulgation of the Language Law has caused concern among the legal profession regarding the consequences to existing agreements and agreements that will exist in the future, since English has been widely used as standard language used in private commercial contract, as logical consequences of significant dependency to foreign investment used since the New Order Government to promote growth.[2] Therefore, the issue of the obligation to use national language in commercial contract becomes very serious issue among businesses. [3]

On the other hands academics responded critically as well, some believes that private commercial agreement must be excluded from obligation to use Indonesian Languge in contract, and government has gone too far into private sphere.[4]

It is to be understood, why the legal communities and academics were responded negatively to the law. Legal practitioners seek clarity on the consequences of the Language Law on the business practices, generally because the Language Law had a direct impact on the general practice prevailing in the realm of private commercial agreements. Various seminars and discussions were held, but the results were only added to more confusion. The government insists that the Language Law is needed to uphold Indonesia's image and identity, [5] and legislators argue that agreements in Indonesian have nothing to do with economic conditions or the investment climate, because investment considers national stability and security more than language issues. [6]

More than ten years later, the issue of mandatory use of Indonesian language is still becomes important concern for business actors and still represent very important consideration to parties prior to the establishment of any agreements and resolution of disputes. Although in 2019 the government finally completed the mandate of Languge Law

[2] Indonesia have its first Foreign Investment Law in 1967 through Law Number 1 Year 1967 on Foreign Investment, which effectively promote foreign investments in Indonesia, as part of government strategy to immediately improve economic situation. Currently foreign investments are one of the key drivers of economic growth and still actively being promoted by the government.

[3] Hukumonline.com, *Kewajiban Kontrak Berbahasa Indonesia Resahkan Advokat*, 31 Agustus 2009 , https://www.hukumonline.com/berita/baca/hol23006/kewajiban-kontrak-berbahasa-indonesia-resahkan-advokat/ Accessed 18 December 2021.

[4] Priskila P. Penasthika, Hukumonline.com, *Akhirnya Terbit Juga! Perpres Tentang Penggunaan Bahasa Indonesia*, 15 Oktober 2019, https://www.hukumonline.com/berita/baca/lt5da558b417de8/akhirnya-terbit-juga-perpres-tentang-penggunaan-bahasa-indonesia?page=all, Accessed 18 December 2021.

[5] As mentioned by Dendy Sugono, Head of Indonesian Language Centre, Ministry of Education and Culture, in 2009 *ibid*.

[6] As mentioned by Chairman of Commission X Parliament, Irwan Prayitno who is responsible to deliberate the Language Law in year 2009, *ibid.*

to issue implementing regulation for the Language Law, by enacting Presidential Regulation Number 63 of 2019 concerning the Use of Indonesian Language (Perpres 63/2019), many questions remain valid.

1.2. Problem Statement

This study aims to determine the extent to which the provisions of mandatory use of Indonesian language provisions affect the private commercial sphere over the past decade. It is hoped that this study can show readers about the most current situation, how policy makers view the issue of the mandatory use of Indonesian language, and most importantly, how this issue is transpired in reality, through resolution of disputes concerning that matters, so that readers can obtain better understanding will be able to anticipate unnecessart situation.

1.3. Research Methods

This research will use the normative legal research method. It will examine the law from an internal perspective. The research object is legal norms, and it uses materials obtained in literature such as the opinions of legal scholars in reference books. Normative legal research shall functions to provide juridical arguments where there is a vacuum, inclarity, and conflict of norms. Therefore, the theoretical basis used here is one found at the level of normative/contemplative legal theory.

This research use the Statute Approach, which is a method generally used in normative legal research, as it analyzes the rule of law in normal and general circumstances. One such way of employing the Statute Approach in this research is by examining the consistency of the provisions of certain law *vis a vis* the 1945 Constitution. Further, this research will study the implementation of these provisions in reality by way of studying how court perceives the problem, through court decisions between the period after the law was enacted until the year of 2020 with the expectation to obtain better understanding on the applicability of the norm in reality.

This research makes use of secondary data obtained from library research. This study is a research using available data. The legal materials consist of primary, secondary, and tertiary legal materials. Primary legal materials are authoritative and generally include statutory regulations and official courts decisions. Secondary legal materials consist of law books or journals containing research material in the form of legal principles and doctrines of legal scholars relating to the research object. Lastly, tertiary legal materials and non-legal materials media, include legal dictionaries as well as general encyclopedias.

To support the analysis, this paper will use the theory of Ideas of Law coined by Gustav Radbruch. Radbruch writes that in law there are 3 (three) basic values, namely: 3 (1) Justice (Gerechtigkeit); (2) Utility (Zweckmassigkeit); and (3) Certainty (Rechtssicherheit). [7]

Radbruch argues that the legislation ideally fulfills the aspects of certainty, justice and expediency. He further said that the ideal of law serves as a benchmark that is both regulatory and constitutive. Without ideas of law, the resulting legal product will lose its meaning. [8]

[7] Satjipto Rahardjo, *Ilmu Hukum*, Citra Aditya Bakti: Bandung, 2012, p 45
[8] Esmi Warasih, 2010, *Pranata Hukum Sebuah Telaah Sosiologi*, PT Suryadaru Utama, Semarang,p.43

In general, the aspect of certainty refers to the law actually functioning as a rule that is obeyed. Furthermore, the aspect of justice refers to the equality of rights in law. Meanwhile, the legal expedience aspect refers to advancing goodness in human life.

Radbruch also stated that it would be very difficult to realize these three basic legal values simultaneously. If it is said that the purpose of law is to realize justice, benefit and legal certainty, is it possible to achieve this simultaneously? In reality, it often happens that the goals clash with each other. For example, a case where the judge wants his decision to be fair according to his perception, but the result is often detrimental to the benefit of the wider community, and vice versa. So Radbruch introduced the principle of priority, where the first priority always falls on justice, then benefits, and the last is legal certainty. [9]

2. ANALYSIS

2.1. Concerning Regulation on the Use of Indonesian Language in Agreements

2.1.1. Law Number 24 Year 2009 on Flag, Language and Coat of Arms and Anthem

In 7 July 2009 government of Indonesia promulgated the Law Number 24 Year 2009 on Flag, Language and Coat of Arms and Anthem (Law Number 24 Year 2009). The consideration Law Number 24/2009 says among other things, that language together with the flag, coat of arms, and national anthem, is a means of unifying, identity, and a manifestation of the existence of the nation in which establish the symbol of sovereignty and dignity of the state. Language is also a cultural manifestation rooted in the history of the nation's struggle, unity in cultural diversity, and similarities in realizing the ideals of the nation and state.[10]

The crucial part of this Law is that, it stipulates very important norms about the use of Indonesian language in an agreement. Article 31 introduce mandatory use of Indonesian language for establishment of Memorandum of Understanding or Agreement that involves the national institutions, government institutions of the Republic of Indonesia, Indonesian private institutions or Indonesian citizens.[11] While for agreement that involve a citizen of foreign nationals the MoU or agreement as mentioned in paragraph (1) is also written in the foreign party's national language and/or English.

However, in relation to the bilingual agreement made between Indonesian and citizen of foreign nationals, law is silent on which version of the agreement that will be in force and bound in the case agreement was made bilingual, as elucidation of this paragraph only says that both versions are equally authentic.[12]

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[9] John Rawls, 2006, *A Theory of Justice*, translated by Uzair Fauzan and Heru Prasetyo, Pustaka Pelajar, Yogyakarta, p. 47.

[10] Consideration of Law Number 24 Year 2009

[11] Article 31 (1) Language Law

"Indonesian Language shall be used in the memorandum of understanding or agreement that involves the national institutions, government institutions of the Republic of Indonesia, Indonesian private institutions or Indonesian citizens"

[12] Elucidation Article 31 (2)

The extent of which type of agreement that must comply with the mandatory requirement of the use of Indonesian Language, the law does not explicitly say, however, elucidation of paragraph (1) refer that such agreement includes international agreement include any agreement in the field of public law regulated by international law, and established by the government and state, international organization, or other subject of international law.[13]

The law further says that further provisions regarding the use of Indonesian language shall be regulated in implementing regulation that must be promulgated no later than 5 years after the promulgation of Law Number 29 Year 2009.[14]

2.1.2. Ministry of Law and Human Rights Letter Number M.HH.UM.01.01-35 Year 2009 on the Clarification Request on the Implication of Implementation of Law Number 24 Year 2009

This letter was official government's response to inquiries made by 11 prominent legal practitioners on 26 November 2009 to the government concerning the legal effect of the Language Law to many private commercial agreements which at that period use English extensively on their agreements.[15]

The Ministry of Law and Human Rights Letter explained four issues:[16]

1. signing of private commercial agreement in English language without Indonesian language translation does not violate mandatory requirement as mentioned in Language Law, therefore the agreement shall be still legally valid, and is not null and void or can be annulled;
2. implementation of mandatory Indonesian language in contract as stipulated in article 31 of the law is pending the promulgation of the Presidential Regulation;
3. The obligation shall not be applicable retroactively, therefore agreements made prior to the enactment of Presidential Regulation shall not need to be adjusted to comply with provisions stipulated in the Presidential Regulation.
4. In relation the use of language, the parties are basically free to choose which language will be used in the contract and if a Presidential Regulation later stipulates that the parties must use bilingual, then the parties will only be bound

In a bilateral agreement, the text of agreement shall be written in Indonesian Language, the language of the other country, and/or English language, and all text shall be equally authentic.

[13] Elucidation Article 32 (2)

term agreement referred in paragraph (1) Article 31 includes, international agreement, namely any agreement in the field of public law regulated by international law, and established by the government and state, international organization, or other subject of international law. International agreements shall be written in Indonesian language, languages of other countries, and/or English. In particular, the agreements with international organizations shall use the languages of international organizations.

[14] *Article 40*

Further provisions regarding the use of the Indonesian language as referred to in Article 26 to Article 39 shall be regulated in a Presidential Regulation.

[15] Sutan Nasution, Hukumonline.com, Menkumham: Perjanjian Berbahasa Inggris Tetap Sah, 4 Februari 2010, https://www.hukumonline.com/berita/baca/lt4b6a1df8b9cbf/menkumham-perjanjian-berbahasa-inggris-tetap-sah/ , Accessed 18 December 2021.

[16] Chandra Kurniawan, Hukumonline.com, *Catatan tentang Kewajiban Penggunaan Bahasa Indonesia dalam Kontrak*, 24 February 2010, https://www.hukumonline.com/berita/baca/lt4b84cb774f63b/catatan-tentang-kewajiban-penggunaan-bahasa-indonesia-dalam-kontrak, Accessed 18 December 2021.

by the obligation to use dual languages, but this does not prevent the parties from using the language. choose which language to use if there are differences in interpretation of the words or sentences in the agreement.

This letter was issued to bridge the gap while pending the promulgation of implementing regulation of Language Law, it aims gave certain confidence to the businesses about the status of agreements executed before the Law was passed. However, Supreme Court in decision Number 601 K/Pdt/2015 stated that Ministry's Letter is not a binding regulation and therefore cannot set aside obligation imposed by the law, therefore practitioners does not find this regulation sufficient enough to be used as reference, and albeit the absence of implementing regulation, businesses begin to draft contracts in bilingual manner to avoid possible situation where the agreement is declared as null and void.

2.1.3. Presidential Regulation Number 63 Year 2019 on the use of Indonesian Language

The government finally promulgate the implementing regulation to Law Number 24 Year 2009 ten years later in the Presidential Regulation Number 63 Year 2019 on the use of Indonesian Language. The provisions on mandatory use of Indonesian Language in an agreement is stipulated in article 26 Regulation 63 Year 2019. Paragraph (1) and (2) of article 26 reiterate the content of article 31 Law Number 24 Year 2009. Whereas paragraph 3 says that the national language of foreign parties and/or English shall be used as equivalent or translation of Indonesian language to compare the understanding on the memorandum of understanding or agreement with foreign parties. The final paragraph introduces new important norms that parties may agree on which language version of agreement will serve as ultimate reference in a Memorandum of Understanding or agreement, in the case of differences of understanding to the translation. [17]

2.2. Annulment of Agreement That Violates Article 31 (1) Law Number 24 Year 2009

In principle, Law Number 24 Year 2009 does not regulate anything regarding the status of null and void of the agreement if it is not executed in Indonesian language. Article 31 only makes compulsory that all Memorandum of Understanding and Agreements that involves the national institutions, government institutions of the Republic of Indonesia, Indonesian private institutions or Indonesian citizens to be made in Indonesian language, and does not impose any sanctions to any Memorandum of Understanding or agreements that does not executed in Indonesian language.

It should also be noted that Language Law is implementing regulation of Article 36 A, B, and C of the 1945 Constitution. Article 36 (c) specifically states that further provisions regarding the Flag, Language and Coat of Arms and the National Anthem shall be regulated by law. In the classification of regulation, Language Law is actually fall under the category of regulations related to constitutional and state administrative matter rather than a regulation

[17] Paragraph (4) Presidential Regulation Number 63 Year 2019
In the event where there has been differences on interpretation to the equivalent or translation as mentioned in paragraph (3), the language that will be used as reference shall be the language agreed in the Memorandum of Understanding or agreement

that governs private commercial relations between the parties. This explained by list of implementing regulation of Language Law which mostly regulates about protocol and administration of government.[18] Furthermore, the State Gazette No. 180 of 2019 which contains Presidential Regulation 63/2019 put the regulation under the CULTURE category. The Use of Indonesian Language, as the classification of the Presidential Regulation. So it really needs a lot of studies and efforts to adjust the context before applying this norm to the private commercial sphere.

2.3. Perspective of Civil Code

When it comes to the provision concerning validity and annulment of agreement in Indonesian law, the main reference is still Book III of Indonesian Civil Code (ICC) which governs contract, ICC is a code that was codified by colonial government in the year 1847 and currently still applicable according to article II Transitional Provision of 1945 Constitution.[19]

In order to be valid, article 1320 ICC says that an agreement must satisfy the following four conditions:

1. there must be consent of the individuals who are bound thereby;
2. there must be capacity to conclude an agreement;
3. there must be a specific subject;
4. there must be a permissible cause.

There is no requirement of consideration or that contracts have reciprocal benefit.[20]

Further, the basic concept of contract adopted in Indonesia is the doctrine of *pacta sunt servanda*, that is, any agreement that is validly executed binds the parties as if it were a statute,[21] Contracts must be concluded based on the free will of the parties.

The first condition of an agreement is consent. A contract is valid, if both parties give consent. However, such consent shall be voidable if the consent to agree has been concluded by *mistake, duress, or deception*.[22]

Case law recognize another type of act that may render an agreement void if the consent has included *abuse of circumstances*.[23] Abuse of circumstances occurs when a person in an agreement was influenced by something that prevents him/her from making an independent judgment from the other party, so that he/she cannot make an independent decision. This emphasis can be made because one of the parties has a special position (for example, a

[18] For example, Presidential Regulation Number 16 Year 2010 on the Use of Indonesian Language in Official Speech of President and/or Vice President and Other State Officials , Ministry of Youth and Sport Regulation Number 16 Year 2017 on the Guidelines on Office Administration Text in the Ministry of Youth and Sport, Ministry of Education and Culture Regulation Number 22 Year 2018 on the Guidelines for Flag Ceremony in in School, Ministry of Law and Human Rights Regulation Number 3 Year 2018 on the Protocols Applicable in the Ministry of Law and Human Rights

[19] Article II Transitional Provision of 1945 Constitution.

[20] Article 1314 ICC

[21] Article 1338 ICC

[22] Article 1321 ICC

[23] Supreme Court Decision No. 3641 K/Pdt/2001 Made Oka Masagung vs PT Bank Artha Graha, Notary Kusbiono Sarmanhadi, SH, Sugiarto Kusuma, & PT Binajaya Padukreasi, dated 11 September 2002

dominant position or has a fiduciary and confidence nature). Van Dunne stated that the abuse of this situation can occur because of economic advantages as well as psychological. [24]

The second condition of an agreement is, the capacity to conclude an agreement. A contract must be conducted by a competent person, Article 1330 ICC has regarded the following individual as incompetent to conclude agreements:[25]

1. minors;
2. individuals under guardianship;
3. married women, in the events stipulated by law, and in general, individuals who are prohibited by law from concluding specific agreements.

The third condition for the validity of the agreement is the existence of a certain thing. Article 1333 ICC stipulates that an agreement must have the subject matter of which at least the type can be determined. An agreement must have a certain object. An agreement must be about a certain thing (certainty of terms), meaning that what was agreed upon, namely the rights and obligations of both parties. The type of goods intended in the agreement can at least be determined

The fourth condition regarding the permissible cause. The word *cause* was translated from the Dutch word "*oorzaak*" or Latin word "*causa".* It does not literally refer to something that causes someone to make an agreement, but refers to the content and purpose of the agreement itself. For example, in a sale and purchase agreement, the content and purpose or cause is that one party wants ownership of an item, while the other party wants money.

The first and second conditions are known as *subjective conditions*, and if the subjective condition are not met, may rise the right to the disadvantaged party to ask for annulment.

The third and fourth conditions, i.e about specific subject and permissible cause, are known as *objective conditions*. If the objective conditions are not met, the agreement is null and void, and the agreement shall be regarded as never existed and the objective of the parties to create the agreement to create the agreement has failed. Therefore parties have no longer basis to file legal suit against each other before the court.[26]

Erawati and Budiono further state that, 'null and void' indicates that the annulment or invalidity of such (agreement) happens instantly, spontaneously, automatically, or by itself, as long as the conditions or conditions that make it null and void are fulfilled.[27]

Meanwhile, according to Kartini Muljadi and Gunawan Widjaja, on the basis of the cancellation, the situation of null and void shall be divided into relative null and void and absolute null and void situation. What is meant by absolute and relative annulment according to Prof. Dr. R. Wirjono Prodjodikuro, S.H., shall be an absolute annulment (*absolute nietigheid*), if an agreement must be considered void even though requested is not necessary.

[24] Henry P. Panggabean, *Penyalahgunaan Keadaan (Misbruik Van Omstandigheden) Sebagai Alasan (baru) Untuk Pembatalan Perjanjian*, Liberty, Yogyakarta, 1992, p 44
[25] Article 1330 ICC
[26] Elly Erawati, Herlien Budiono, *Penjelasan Hukum tentang Kebatalan Perjanjian*, Nasional Legal Reform Program, Jakarta, 2010, p.1.
[27] *Ibid.* hal. 4.

Agreements like this are considered non-existent from the start and against anyone, while relative annulment (*relative nietigheid*), which only occurs if requested by certain people and only applies to certain people.[28]

2.4. Court Decisions Over Agreement That Violates Law Number 24 Year 2009

Since the beginning of its promulgation, Language Law has invited a lot of debates about scope of its application, mainly because the passages that do not specifically define the scope of application of the laws and therefore opens up very broad a room for interpretation. In one hand, it does not specifically mention how the Article 31 should be applied in the realm of commercial civil agreements which is based on the principle of freedom of contract and *pacta sunt servanda*, but on the other hand, the elucidation of Article 31 (1) Language Law only provides an example that the agreement referred to, shall include agreement in the realm of public law. So that invites questions about these limits and their suitability with the realm of private commercial law.

Claims to annul agreement on the grounds of violation of Article 31 Language Law has been regularly appeared in court for the past 10 years. While there has not been an official court's opinion about the extent of applicability of article 31 (1) Language Law in private-commercial contract, however, there is a general trend that court would reject petitioners request to declare a contract null and void on the mere basis violation of article 31 (1) Language Law.

The following are summary of selected court's decisions where the court decides on the case where petition to declare an agreement as null and void was requested for violation of Article 31(1) Language Law.

2.4.1. Randolph Nicholas Bolton Carpenter v. Neil Allan Tate and Bati Anjani

This is one of the first dispute filed to the court on the basis of annulment of a contract on the basis of violation of article 31 Language Law. In February 2010 an agreement was made in English only between Carpenter Asia Pacific Pty Ltd (foreign legal entity) and PT Tate Development Land and Consultancy (Indonesian legal entity) on sale and purchase of a land area of 8127 m2 in the village of Kuta, Pujut District, West Nusa Tenggara Province worth Rp. 8,127,000,000.

It was later discovered that Mr Neil Allan Tate as Director of PT Tate Developments Land and Consultancy was not the official owner of the land, but rather owned by another individual named Bati Anjani. In response to this fact, Randolph Nicholas Bolton Carpenter as Director of Carpenter Asia Pacific Pty sued Mr Neil Allan Tate to the Praya District Court, Central Lombok on July 6, 2010. The reason was that the Land Sale and Purchase agreement was not made in English, and therefore violates Article 31(1) of Language Law.

While later decided that the sale and purchase agreement was null and void, it did so not because it adhere to the plaintiff's decision of violation of article 31 Language Law, the court says that such request as overexaggerated request, it did so because the Defendant was proven to have illegally sold land without any authorization from the rightful owner.[29]

[28] Kartini Muljadi & Gunawan Widjaja, *Aneka Perjanjian*, as quoted by Elly Erawati & Herlien Budiono, *ibid*, p 1.
[29] District Court of Praya, decision Number 35/PDT.G/2010/PN.PRA dated 24 Januari 2011

2.4.2. Nine AM Ltd. vs PT Bangun Karya Pratama Lestari (BKPL)

The later, and most widely known court decision on violaton of article 31(1) Language law has been Nine AM vs PT Bangun Karya Pratama Lestari (PT BKPL). In this decision, court ruled in favor to the argument that violation of article 31(1) Language Law shall represent violation of objective condition of agreement, and therefore makes the agreement null and void.

In April 2010, Nine AM Ltd, a United States legal entity, signed a loan agreement with PT BKPL, an Indonesian legal entity, with an agreement made only in English, without translation into Indonesian, the parties agree to use Indonesian law as applicable laws and PT BKPL choose legal domicile in the Registry of South Jakarta District Court. The Fiduciary Guarantee Deed written in Indonesian is made to secure the agreement. In December 2011, BKPL defaulted, and stopped paying its debts.

After PT BKPL's no response to statutory demand made by Nine AM Ltd, Nine AM Ltd filed a lawsuit to the West Jakarta District Court demanding payment of the loan along with interest. BKPL responded to the lawsuit instead, by suing Nine AM Ltd with a demand to declare the Loan Agreement as null and void, on the basis of it was made in English without an equivalent or translation into Indonesian, thus violating article 31 Language Law.

The West Jakarta District Court in its decision granted BKPL's claim and declared the Loan Agreement null and void along with the Deed of Fiduciary Guarantee Agreement as the *accessoir* agreement, and ordered PT BKPL to return the remaining loan money to Nine AM Ltd.[30]

The Panel of Judges essentially argued that since Loan Agreement dated 30 July 2010 was not executed in Indonesian Language, therefore, it was in violation to the Language Law, so that the Agreement/Loan Agreement falls into the category of a prohibited agreement because it was made based on prohibited reasons (Article 1335 ICC in conjunction with Article 1337 ICC). Furthermore, with the non-fulfillment of one of the essential conditions of the validity of an agreement, as specified in the provisions of Article 1320 ICC, the Agreement/Loan Agreement dated 30 July 2010 which has been signed by the parties is null and void. Both Court of Appeal and Supreme Court confirmed this position.[31]

It should be noted that in Supreme Court Decision Number 601 K/Pdt/2015, Justice Sudrajad Dimyati, in his dissenting opinion, disagree with the consideration that violation of article 31(1) Language Law shall automatically bring the agreement null and void. Justice Sudrajad Dimyati wrote that *judex facti's* consideration is incorrect, because a lawful causa is an objective condition of the agreement, which in essence is the content or material of the agreement itself must not conflict with the law, decency, and public order. So the lawful ground is not about the formality or form of an agreement, but the material/ content of the agreement itself.

So far, this Nine AM Ltd vs PT Bangun Karya Pratama Lestari case has been the most frequently cited precedents about application of article 31 Law Number 24 Year 2009 to

[30] West Jakarta District Court, Decision number 451/Pdt.G/2012/PN Jkt.Bar, dated 21 June 2014

[31] Jakarta High Court, Decision number 48/PDT/2014/PT.DKI dated 7 May 2014 and Supreme Court of Indonesia, Decision Number 601 K/Pdt/2015, dated 31 August 2015.

declare an agreement null and void. This case demonstrates very conservative court interpretation about article 31(1) Language Law, which directly apply the mandatory use of Indonesian language as strict non-permissible clause that falls under article 1137 ICC.

2.4.3. PT Kerui Indonesia (PT KI) vs Badan Arbitrase Nasional Indonesia (BANI) and PT Agung Glory Cargotama (PT AGC)

Another example of important court decision on applicability of article 31(1) Language Law has been the interpretation of PT Kerui Indonesia (PT KI) vs Badan Arbitrase Nasional Indonesia (BANI) and PT Agung Glory Cargotama (PT AGC).

In the South Jakarta District Court the decision, the court on the contrary take a different position with the Supreme Court Decision Number 601 K/Pdt/2015. In this case, the South Jakarta District Court refuse to grant the request to annul arbitration award issued by BANI over disputed agreement executed only in English, between two Indonesian legal entities.[32]

This case is particularly important, because one of the legal considerations made by BANI in its award stated the following *".....that the use of English in the respective agreement is not against decency and does not violate public order".* PT KI, as the plaintiff, argued that the BANI's arbitral award was an error and wrongful in making legal considerations, so it was sufficient to annul the BANI arbitral award.

However, in this instance, the South Jakarta District Court is of the opinion that this reason is not a valid reason to request the annulment of the arbitral award. The annulment of the arbitration award can only be requested on the basis of limited reasons as stipulated in Article 70 of Law Number 30 of 2009 concerning Arbitration and Alternative Dispute Resolution, and therefore rejects PT KI's application to annul the arbitral award.[33]

In Cassation, the Supreme Court upheld the decision of the South Jakarta District Court. The Supreme Court declared that the Cassation request was unacceptable, because Article 72 paragraph (4) of Law Number 30 of 1999 stipulates that what is meant by "appeal" is only the appeal against annulment of an Arbitral Award as referred to in Article 70 of Law Number 30 of 1999,[34] as also inline with to Supreme Court's Civil Chamber Formulation year 2016. [35]

Therefore, the use of English language in executing an agreement does not automatically make the agreement null and void. In this case, the court honour the original agreement executed in English and reject the request to annul arbitration award issued by BANI on that matter. It is also important to note that the Supreme Court Decision Number 8 B/Pdt.Sus-Arbt/2018 dated 25 January 2018 has been confirmed as official jurisprudence in the area of Arbitration with register number 1/Yur/Arbt/2018[36].

[32] South Jakarta District Court the decision Number 244/Pdt.G.ARB/2017/PN.Jkt.Sel dated 22 August 2017
[33] *Ibid.*
[34] Supreme Court of Indonesia decision Number 8 B/Pdt.Sus-Arbt/2018 dated January 25, 2018,
[35] Supreme Court of Indonesia Circular Number 4 Year 2016 on the Enactment of Formulation Result of Supreme Court Chamber's Plenary Meeting Year 2016 as Guidelines to Implement The Task of Court
[36] Supreme Court Indonesia, Jurisprudence Number 1/Yur/Arbt/2018

2.4.4. Gunawan Halim vs PT. ISS Facility Services

Tangerang District Court take consistent position with the position adopted by the South Jakarta District Court Number 244/Pdt.G.ARB/2017/PN.Jkt. Sel (PT PT Kerui Indonesia (PT KI) vs the Indonesian National Arbitration Board (BANI) and PT Agung Glory Cargotama (PT AGC)).[37] In this case the Plaintiff Mr Gunawan Halim (Mr. GH) an Indonesian citizen in year 2017 filed a lawsuit against PT ISS Facility Services (PT ISSFS) an Indonesian legal entity for *unlawful acts* (*Perbuatan Melawan Hukum*) to annul series of agreements consisting of the Agreement For The Sale and Purchase of The Business and the Completion Agreement along with its derivative agreements such as the Non-Binding Indicative Offer, Exclusivity Agreement and Confidentiality Agreement signed in year 2009 for violating Article 31 paragraph 1 of Law 24/2009, Article 1320 of the Civil Code, 1335 of the Civil Code and Article 1337 of the Civil Code).

This case is important, because this is an attempt by the parties to ask the court to declare an agreement which contains an arbitration clause as nul and void, on the basis that the agreement has violated Article 31(1) Law Number 24 of 2009. The Tangerang District Court rejected the request for annulment of the agreement on the grounds that the Tangerang District Court does not have absolute competence to examine unlawful acts lawsuit against a decision that has an arbitration clause.[38] The Court consider that, although the Plaintiff's claim was based on the annulment of the agreement, it turned out that the request for the annulment of the agreement was born because it was based on an unlawful act committed by one of the parties who formally objected to carrying out the agreement in accordance with the work contract that had been made, agreed upon and had also been implemented.

This decision was then confirmed by the Banten High Court through the decision Number 150/PDT/2017/PT BTN dated February 5 2018, and the Supreme Court through the decision Number 1622 K/Pdt/2019 dated July 17 2019, which is essentially consistent saying that the Tangerang District Court has no competence in cases that have an arbitration clause, even though the agreement does not meet the provisions of Article 31 (1) of Law Number 24 of 2009.

2.4.5. Alexander William Ford vs Man Lee Ford Cheung

The most recent example is the Amlapura District Court Decision in the case of Alexander William Ford vs Man Lee Ford Cheung.[39]

Mr Alexander William Ford (Mr AWF) a British citizen sued his ex-wife Mrs Man Lee Ford Cheung (Mrs MLFC), a Chinese citizen to cancel the Receivable and Liability Agreement (the Agreement), which is an agreement to share joint assets including the distribution of company assets. One of the petitions filed by Mr. AWF as the plaintiff is to the Court to declare the Agreement as null and void, among others because it is violate Article 31 (1) of Law Number 29 of 2009.

Amlapura Court Decision rejected the petition. Specifically with regards to the request for declare the agreement as null and void due to violation of Law Number 24 of 2009, the

[37] Tangerang District Court Decision Number 239/Pdt.G/2017/PN Tng dated July 25, 2017
[38] *Ibid.*
[39] Amlapura District Court Decision Number 254/Pdt.G/2019/PN Amp dated April 1, 2020

Amlapura District Court is of the opinion that the violation of Article 31 (1) of Law No. 24/2009 is not a violation of the objective legal requirements of the agreement based on Article 1320 (4) ICC. As long as the motive for making the contract is not a false one, is not prohibited by legislation and/or is not based on a motive that is contrary to decency and public order, then a contract that does not meet the requirements of Article 31 of Law no. 24/2009 shall still valid (see Article 1336 ICC). In addition, Law no. 24 Year 2009 does not stipulate sanctions applicable for violation of Article 31, so the requirement to declare the contract as null and void would also require proof that the party who is obliged can or has harmed by such a contract (vide Article 1341 Paragraph (3) ICC).[40]

In this instance, Amlapura District Court's position is similar with Justice Sudrajad Dimyati's dissenting opinion in Decision 601/K/Pdt/2015.

2.5. Analysis

Requests to declare a private commercial agreement null and void are usually associated with the argument that violation of Article 31(1) of the Language Law is a form of violation of the objective requirements as regulated in Article 1320 (4) BW, which requires an agreement to be a non-prohibited cause. Discussions that refer to forbidden words are regulated in Article 1335 of the Civil Code which reads: [41]

> An agreement that was made without a permissible cause, will render the agreement is null and void, has no legal force

What is the referred to as agreement that was made without a permissible cause? Article 1337 of the Civil Code states as follows: [42]

> A cause is not permissible if it is prohibited by law, or if it violates good conduct, or public order

The norms of Article 31(1) of the Language Law is indeed interesting, it does not prohibit, but require the use of Indonesian language by using word mandatory (wajib), but on the other hand, it does not explain the sanction, so it is a mandatory norms without sanctions, and therefore fall into the category *lex imperfecta*.[43] It is common in Indonesian legal system to contains lex imperfecta clause, some of these examples include the obligation of a child to respect and honor his parents,[44] or the obligation of a wife to obey her husband or to live with her husband and follow him wherever he deems fit to reside.[45] These are norms that comes with obligation, but does not come with sanction.

This is also coupled with the fact that Article 31(1) of the Language Law failed to comprehensively regulate situation that commonly occur in private commercial situations,

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[40] *Ibid*.
[41] Article 1335 ICC
[42] Article 1337 ICC.
[43] Prof. Dr. Sudikno Mertokusumo, S.H, ***Mengenal Hukum Suatu Pengantar***, page 23-24 and page 25, Cahaya Atma Pustaka, Yogyakarta, 2010.
[44] Article 298 ICC,
Any child, regardless of his age, obliged to revere and respect his parents.
[45] Article 106 ICC,
A wife shall obey her husband. She is obligated to live with her husband, and shall follow him, wherever he deems fit to reside.

including agreements between people who are not able to speak Indonesian but regulate the object of the agreement in Indonesia (both Indonesian citizens and non-Indonesian citizens).

Law No. 24 Year 2009 is actually not the only norm that requires the use of Indonesian in agreements. There are several regulations that refer to the mandatory use of Indonesian Language in contract, however, these are applicable only in limited circumstances as follows:

1. Article 57 Law Number 13 Year 2003 on Manpower says that an Employee Agreement for Specific Time must be made in Indonesian language and in latin letter. Failure to do so shall render the Agreement be regarded as Employee Agreement for an Indefinite Period. Bilingual agreement is allowed, however, In the event of differences of interpretation in the two versions, the Indonesian version should prevail.[46]
2. The Central Bank of Indonesia Regulation (PBI) No. 11/26/PBI/2009 concerning Prudential Principles in Implementing Structured Product Activities for Commercial Banks.[47] The Central Bank's Regulation states that a derivative contract must be executed in Indonesian language. The difference with article 31(1) Law Number 24 Year 2004, is, the Central Bank's Regulation was responded positively by market.

We can see that in the two situations above, mandatory use of Indonesian language is imposed in closed and controlled environment, where supervising authority is present and have sufficient capacity to both promote to enforce such obligation.

Now let us take a look on how other laws stipulates provisions to ensure compliance of provisions on certain matters. There are several laws that comes with clear and explicit stipulation that failure to meet the requirement shall bring the agreement as being null and void.[48] These laws explicitly stipulate consequences of violating the norm.

So, it is clear that Article 31 (1) of the Language Law failed to provide clarity about the consequences that arise as a result of violating such mandatory clause.

On the other hand, court has been consistently rejected requests to declare that agreement that violates article 31(1) of the Language Law as null and void, the following conclusion that can be drawn from the decisions studied are as follows:

1. An agreement executed in English containing arbitration clause is not null and void
2. An arbitration award over agreement that was executed in English containing arbitration clause is not null and void.

[46] Article 57 Law Number 13 Year 2003 on Manpower.
[47] Central Bank's Regulation No 11/26/PBI/2009 on the Principles of Prudent in Executing the Structured Product Activities for General Bank.
[48] Article 26 (2) Law Number 5 Year 1960 on the Basic Agrarian Law, Article 124 & 127 Law Number 13 Year 2003 on Manpower, Article 12 & 20 Law Number 4 Year 1996 on Mortgage Law, Article 32 & 33 Law Number 42 Year 1999 on Fiducia Security, Article 18 (3) Law Number 8 Year 1999 on Consumer Protection, Article 33 Law Number 25 Year 2007 on Investment, Article 37 (2) & (3) Law Number 40 Year 2007 on Limited Liabilities Company, Article 27 (1) Law Number 25 Year 2009 on Public Service, Article 66 Law Number 14 Year 2001 On Patent.

3. Other agreements made in foreign language between the parties who are Foreign Citizens and/or Indonesian Citizens are still respected and are not null and void.

The policy of making agreement bilingual is also not an effective solution. While it is costly, many regard that Law and language are inextricably linked to each other as language is the main medium of expression of law. Since it is bound to a specific legal system, legal language differs from ordinary language, hence legal language has its own lexicon that shows its complexity and particularity. For this reason, legal terms are greatly varied and the choice of language in cross-border legal relations is extremely problematic.[49]

This study is in conclusion that the principle of open agreement as regulated by the Indonesia Civil Code is still respected by the court albeit violation of the provisions of mandatory use of Indonesian language.

3. CONCLUSIONS

Until now, Article 31 of Law 24/2009 is still considered very significant in influencing the behavior of business actors in preparing private commercial agreements. The risk of facing a law suit to declare a signed agreement as null and void for failure to comply with the provisions of Article 31(1) of the Language Law is still too serious, as one of the practical reasons brought up by the parties to raise the case to avoid their obligations. So that the advice that is often given to business actors in making private commercial agreements in Indonesia in general is to execute the agreement in bilingual.

Article 26 (4) Presidential Regulation Number 63/2019 which provide freedom for the parties to determine which version of language as primary reference in the event of a difference in interpretation has in principle, reduce the obligation to use the Indonesian language in the agreement from original intent as substantial obligation as to a mere formality. Of course, this has the consequence that the additional costs needed to make a bilingual agreement has become compliance cost and for no other purpose.

From a study of decisions used as samples in this study, it is known that lawsuit to declare an agreement as null and void for violations of Article 31(1) of the Language Law are usually only carried out by one of the party when the ongoing contractual relationship face problems so that one party wants to immediately discharged of his obligations or to protect themselves from the consequences arising from the continuation of the implementation of the agreement with the minimum possible loss. So, indeed, the provisions of Article 31(1) of the Language Law in the realm of commercial private law are more widely used as the 'insurance' to escape rather than as means to obtain rights.

So in conclusion, there are three things that drawn from this study. *First*, the violation of Article 31(1) of the Language Law falls into what Kartini Mulyadi and Gunawan Widjaja called as *relative null and void*, annulment must be actively requested, and the agreement shall continue to prevail if there is no party file for application for annulment. *Second*, Article 31 (1) of the Language Law also fail to regulate the official consequences of failure to comply of the article itself. In contrast to other laws and regulations that specifically explain

[49] Priskila Pratita Penasthika, (2019) *The Mandatory Use Of National Language In Indonesia And Belgium: An Obstacle To International Contracting*? Indonesia Law Review, Vol. 9 : No. 2 , Article 6.

the consequences in the event of a violation, this will mean that this clause cannot be enforced. *Third*, we can see that the court has consistently interpret that violation of Article 31 of the Language Law does not falls under what is considered by article 1320 (4) as an agreement with a prohibited cause, namely prohibited by law or if the cause is contrary to decency or public order,[50] because in essence, court held the position that prohibited clauses comes from the content or substances of the agreement which violates the law, decency and public order and not from the formality or form of the agreement as required by the Language Law.

This situation tends to bring the clause on obligation to use Indonesian language in the context of private commercial agreements to be useless, because it is not effective, so that efforts to fulfill it will only incur additional costs, which could make doing business in Indonesia uncompetitive, something that needs to be avoided if Indonesia plans to improve its competitiveness. Apart from the argument of the need to promote the Indonesian language, this provision requires a high cost to implement, because the agreement can be made by anyone, through any platform, whose compliance control is very difficult. It is different if this obligation is carried out in a limited environment, for example in tightly regulated sectors such as banking, consumer protection, capital markets and the like.

From the perspective of the ideals of law, the norm within article 31 (1) of the Language Law is not only aimed at encouraging the use of Indonesian language as a means of unifying, identity, and a manifestation of the nation's existence which is a symbol of the sovereignty and honor of the state,[51] but also may be argued as means to create justice between the parties, by ensuring that the agreement between the two parties should be written in a language that can be understood by most Indonesians, through the obligation to use the Indonesian language. It's just that due to incomplete norms used in the Law, in this case containing *lex imperfecta* norms, it has on the other hands creates legal uncertainty. Even the provisions in Presidential Regulation 63 of 2019 which should provide confirmation about the use of Indonesian language, on the other hands, reduce the substantive meaning of the obligation into a mere formality.

Government should not seek to promote the use of Indonesian language by making them compulsory and ban the use of foreign language. But rather by providing sufficient incentive for businesses to use Indonesian language, a concept of which is needs to be developed in creative careful manner.

Lastly, in terms of expediency. The debate over which is more important between the politics of language and economic competitiveness is a political choice as both serve different purposes. However, the desire to be competitive in global trade seems to be difficult to achieve, if a country that is still relies a lot on foreign capital, insist the use of local languages in private commercial agreement, as it will bring only additional costs to comply. Moreover, Indonesia would also be wise to anticipate the trend of regional and global market

[50] Article 1335 in conjunction with 1337 Indonesia Civil Code.
[51] Consideration of law Number 24 Year 2009

integration, as part of the government's commitment in the area of international trade. [52] This expediency argument needs to be considered carefully and wisely.

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