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Introduction to the Special Issue on Current Legal Problems in Indonesia

In 1937, Fred Rodell from Yale Law School wrote an article entitled *Goodbye to Law Reviews* criticizing the exclusivity of legal writing. He said, “[t]here are two things wrong with almost all legal writing. One is its style. The other is its content” (Rodell, 1937, p. 43). With regard to the style of legal writing, it has been commonly accepted among legal scholars that a piece of legal writing should maintain the dignity of law as an objective knowledge by saying nothing forcefully and amusingly, using deductive reasoning, and being insular (dedicated for lawyers only).

Although the article was published eight decades ago, Rodell’s critics, to some extent, remain valid. In Indonesia, for instance, many legal review journals have retained the traditional style of legal writing. As a result, articles published in those journals are hardly readable by readers without a legal background. This is not to mention impacting society that is supposed to be the beneficiaries of the law and legal studies. Therefore, it is essential to bring legal writing beyond its traditional sphere to widen its readers because, as Lawrence Friedman (1986, p. 780), a prominent scholar of the Law and Society Movement, observed, “law is too important to be left to lawyers”.

This is why, in this issue, *IKAT: The Indonesian Journal of Southeast Asian Studies* puts together articles examining the current legal issues in Indonesia. This attempt plays two purposes: first, an academic journal focusing on Southeast Asia, *IKAT* consistently brings articles beyond a single disciplinary boundary; secondly, it provides an alternative platform for legal scholars working on Southeast Asian Studies to publish their work to be reachable by non-legal specialist readers. In this special issue, *IKAT* brings five articles from different authors.

The first article is by Myrna A. Safitri entitled *The Prevention of Peatland Fires in Indonesia: ‘Law in Action’ to Implement the ASEAN Haze Treaty*. In this article, she examines peatland governance in Indonesia to reveal political factors shaping the changes in such governance during 2016-2020. Safitri (2021) argues that the improvement of peatland governance in this period had been an attempt to implement the ASEAN Agreement on Transboundary Haze Pollution, in which Indonesia has been a state party. Several factors have been identified to contribute to such improvement: strong political leadership, improved institutional coordination, reforming relevant legal substance, the establishment of a special agency dealing with peatland restoration, and civil society engagement.

Following Safitri’s analysis of the peatland governance, an article entitled *Achieving the Nationally Determined Contribution (NDC) Through Social Forestry: Challenges for Indonesia*

is written by Etheldreda Wongkar. Wongkar (2021) discusses the attempt of the Government of Indonesia to meet its commitment to reducing emissions from forestry sectors as stated in the NDC to the Paris Agreement. One of the potential schemes in this regard is the social forestry program. However, based on her fieldwork, Wongkar finds that there have been several issues that may hinder the ability of Indonesia to achieve the NDC target. They are institutional, technical and methodological, legal, and political-economic challenges.

Putting Safitri and Wongkar's articles together, it remains to be seen how the improvement of peatland governance (in the case of Safitri) and the attempt to the achievement of the NDC (in the case of Wongkar) would be implicated by a newly enacted legislation, Omnibus Law on Job Creation. In this piece of legislation, economic growth has been an overriding policy agenda at the expense of conservation of the environment, including peatland and forest.

The following article is written by Muhammad Dwiki Mahendra (2021) entitled *Indigenous Peoples in Regional Institutions: A Comparative Perspective between ASEAN and the Arctic Council*. This article aims to discuss the different status of indigenous peoples in two different regional institutions, namely ASEAN and the Arctic Council. The author finds that in ASEAN, indigenous peoples remains unrecognized, leading to the lack of protection of their rights even though ASEAN has established a special body dealing with human rights (AICHR). In contrast, the rights of indigenous peoples in the Arctic Council has been recognized by the council, and they are given status as 'permanent participants', which means that indigenous peoples may represent themselves in the council. Accordingly, Mahendra argues that this Arctic Model is an ideal form of recognition of the status of indigenous peoples within a regional institutional framework in which ASEAN should consider adopting.

Moving from environmental law and international law, the following article falls within business law. *The Execution of Bankrupt Assets in the Case of Cross-Border Insolvency: A Comparative Study between Indonesia, Malaysia, Singapore and the Philippines* is written by Putu Eka Trisna Dewi. Using a comparative approach, Dewi (2021) discusses the weaknesses of Bankruptcy Law in Indonesia in cross-border insolvency, especially the execution of bankrupt assets located beyond the Indonesian jurisdiction. There have been cases where a court decision on bankruptcy could not be executed because the debtor's assets were located outside Indonesia. Hence, it may create a distrust of economic actors to conduct businesses in the country. Unlike Indonesia, the neighbouring countries, such as Malaysia, Singapore, and the Philippines, have changed their bankruptcy law to address the cross-border insolvency issues by creating a bilateral agreement or adopting the UNICITRAL Model Law on Cross-Border Insolvency. Therefore, the Indonesian Bankruptcy Law must follow this line of reform.

The last but not least article in this special issue is written by Anak Agung Gede Duwira Hadi Santosa, Putu Devi Yustisia Utami, and I Made Marta Wijaya entitled *Reforming the Tourism Promotion Board for an Effective Tourism Promotion in Indonesia: A Legal Perspective*. This

article contributes to the literature on Tourism Law by examining the Indonesia/Regional Tourism Promotion Board (I/RTPB). They argue that the current structure of the I/RTPB has contributed to the board's ineffectiveness to undertake its roles and duties in the promotion of tourism in the country. Hence, Santosa, Utama and Wijaya (2021) suggest that there should be a reform on how the board should be established, including ensuring its autonomy from government intervention.

In brief, those five articles represent several among many legal issues in contemporary Indonesia. By bringing them to a wider audience, not necessarily readers with a legal background, it is expected that this special issue in IKAT would invite more legal scholars to publish their work beyond traditional legal review journals, as suggested by Rodell.

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Heidelberg, 5 August 2021

Agung Wardana

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The Prevention of Peatland Fires in Indonesia: 'Law in Action' to Implement the ASEAN Haze Treaty

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Abstract

Signed in 2002, the ASEAN Haze Treaty is expected to reduce transboundary haze pollution and improve regional environmental governance. Indonesia plays a vital role in the implementation of the Treaty's goals. It has the largest forest and peatland area in Southeast Asia. Yet, its repeated forest and land fires had often caused transboundary pollution. Since 2016 the Indonesian Government has improved its national laws and strengthened institutional aspects of peatland protection. The peatland ecosystem is essential because it is prone to burning. Unfortunately, few studies describe how these policy changes have impacted fire prevention in degraded peatland ecosystems. This article scrutinizes the political factors behind the legal and institutional changes in Indonesia's peatland governance during 2016-2020. The theory of legal culture becomes the primary reference in this regard. This article then identifies six predominant factors in peatland law improvement: strong leadership, improved coordination at the national and sub-national levels, making operational directives, establishing a specialized Government institution dealing with peatland restoration, law enforcement, and the strength of civil society in doing public oversight.

Keywords: ASEAN Haze Treaty; Forest and land fire; Indonesian Peatland; Peatland Restoration; Transboundary Haze

Introduction

Nearly two decades ago, an effort to improve environmental governance in Southeast Asia was carried out through the ASEAN Agreement on Transboundary Haze Pollution, or often referred to as the ASEAN Haze Treaty. Signed in 2002, the treaty aims to prevent and monitor transboundary haze pollution that occurs due to land and forest fires. Air pollution due to the haze has been a thorny environmental problem for decades in the region. The ASEAN Haze Treaty, thus, is expected to provide a solution.

Indonesia plays an important role in the implementation of the goals of the ASEAN Haze Treaty. Not only because it has the largest forest area in Southeast Asia but also due to the repeated forest and land fires that had blamed the country for being the cause of the transboundary haze disaster. The most significant criticism addressed to Indonesia occurred in 2015-2016 when forest and land fires burned some 2.6 million hectares of the country's land, and around 800 thousand hectares of those burned lands were peatland (Chamorro,

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Minnemeyer, & Sargent, 2017). This figure is lower than the incidence of fires in 1997-1998 that burned some 8 million hectares of land, but the regional impact was similar (Glover & Jessup, 2006).

The year 2016 was a significant turning point for Indonesia to prevent and control forest and land fires. Institutional improvements were carried out in various ways under the leadership of President Joko Widodo. The result is a decrease in forest and land fires in the period 2016 to 2020. If in 2016 the fires scorched 2.6 million hectares of forest and land, in the following years, that number decreased significantly (figure 1). In 2019, however, there was an increase where 1.6 million hectares of forest and land were burned. The effects of climate and weather were likely to be important determinants of the spread of fires in that year (Ministry for the Environment and Forestry, 2020). NASA and the European Union's Climate Monitoring Service state that 2019 was the second warmest year in the human history (Kann, 2020). Forest fires during the year were also occurring in Australian and American continents. The fires that hit Indonesia were much smaller than those that occurred on the two continents. The fires in Australia, for example, burned 12.6 million hectares, and in the Amazon, there were 7.1 million hectares of forest burning (Gan, Choo, Leng, & Sharif, 2020).

Indonesia's peatland fires are critical to the occurrence of transboundary haze in Southeast Asia. Part of this is due to the characteristics of the peatlands, which, if they burn, will be more difficult to extinguish (Hergoualc'h, et al., 2018). Another part is because the distribution of Indonesia's peatlands is found in areas close to neighboring countries, particularly Malaysia and Singapore (Wahyunto & Suryadiputra, 2008). Thus, it is important to ensure that the prevention of peatland fires in Indonesia runs well.

Article 9 of the ASEAN Haze Treaty obliges signed countries to prevent and control forest and land fires that can cause transboundary haze pollution. The obligations include zero burning policies, fire management and fire-fighting actions, supervision of areas prone to fire, and public awareness. The Indonesian Government's policy to prevent fires in damaged and burnt peat ecosystems is the main themes discussed in this article. In particular, the observations were made on the efforts carried out from 2016 to 2020. This observation time was chosen because there was very little literature related to the implementation of the treaty to discuss legal developments in Indonesia. In general, studies, especially in the field of law and policy, have been carried out to explain the situation before 2016 (Heilmann, 2015; Lee, et al., 2016; Nurhidayah & Lipman, 2017; Santosa & Putra, 2016; Varkkey, 2017). As previously stated, many legal and institutional changes occurred in Indonesia in 2016-2020.

This article is divided into five parts. Following this introductory section, a review of peatland fires and their relation to the ASEAN Haze Treaty will be discussed. After that, the research methodology that underlies the data exposure in this article is explained. The following section discusses findings that are divided into three subsections, each of which describes the latest laws and policies on peatland restoration in Indonesia, the implementation and achievement of peat rewetting and zero burning policies in peatland restoration targeted areas. Then, an analysis identifying politico-legal factors behind the success of reducing peatland fire. Last, the author presents conclusions and recommendations.

Peatland Fire and Indonesia's Obligation to the ASEAN Haze Treaty

Global peatlands are equivalent to 3% of Earth's land cover. Peatlands are found in 180 countries covering 400 million hectares (Clarke & Rieley, 2010). About 60% of tropical peatlands are in Southeast Asia, covering an area of 25 million hectares (ASEAN Environment Division, 2016). Indonesia has around 13 million hectares of peatland, making it the country with the largest tropical peatlands after Brazil.

One of the functions of the peatland ecosystem is its ability to store carbon. Indonesia's peatlands store 46 Gt of carbon or 8-14% of the world's carbon stock. Peatlands also serve local communities by serving as water storage and providers of some endemic plants and animals. In short, peatlands provide food, energy, building materials, livestock bedding, and environmental services (Biancalani & Avagyan, 2014). However, irresponsible management of peatlands had been carried out by draining and burning. The conversion of peatlands made a change from a carbon reservoir to a source of greenhouse gas (GHG) emissions (Syahza, et al., 2020).

The forest and land fires that hit Indonesia in 2015 burned around 2.6 million hectares of land, and around 800 thousand of the burned land was peatland. The World Bank report states that the economic losses caused by the fires reached USD 16.1 million, equivalent to 1.9% of Indonesia's GDP. Meanwhile, other losses cannot be calculated in terms of health and education. Greenhouse gas emissions from burning peatlands are also enormous. Quoting data from the Global Fire Emission Database, the World Bank states that fires in Indonesia contributed around 1,750 million metric tons of carbon dioxide equivalent (mtCO_{2e}) to global emissions in the same year (Glauber, Moyer, Magda, Adriani, & Gunawan, 2016).

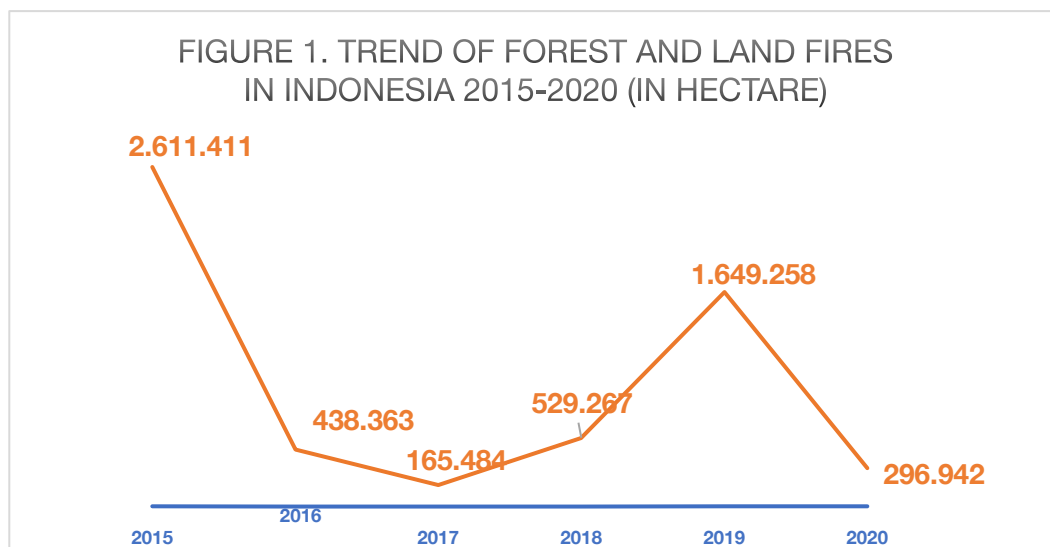
The peat fires in Indonesia in 2015 prevented the country from implementing the ASEAN Haze Treaty immediately. Indonesia has ratified the treaty through Law 26/2014. Criticism was aimed at Indonesia for this late response. However, in 2016, the Government of Indonesia stated its commitment to eradicate haze by, among other things, implementing a peatland restoration policy. President Joko Widodo also established an *ad hoc* organization, the Peatland Restoration Agency, which is mandated to undertake coordination and facilitation in the restoration of Indonesia's seven major peat provinces.

Two years after the peatland policy was launched, there was a significant reduction in peat fires. The Ministry for the Environment and Forestry claimed this as a significant achievement in reducing fires and haze since 2015. As mentioned earlier, the forest and land burned in 2015 were 2.6 million hectares. However, in 2016 fires occurred in forests and land covering an area of 430 thousand hectares, then to only 165 thousand hectares in 2017 and 529 thousand hectares in 2018. Despite the increase in 2019, the Indonesian authorities believe that this happened more due to natural factors. It has been explained that 2019 was a very hot year that sparked fires in various parts of the world. In 2020, Indonesia again recorded an achievement in suppressing forest and land fires with a total burned area of 296 thousand hectares.

The ASEAN Haze Treaty stipulates obligations to state parties to mitigate and prevent forest and land fires that can cause transnational haze pollution. Article 9 of the treaty states that the obligations include developing and implementing laws and policies and monitoring

the potential for fires. It is also required to increase community participation, including indigenous peoples, and to conduct broader public education and awareness building.

Analysis tends to be skeptical to the implementation of the treaty. A point of skepticism is related to the approach of handling environmental problems which prioritizes the use of persuasion rather than coercion. This approach is often referred to as the ASEAN Way in the contexts of environmental protection. However, the author believes domestic politics is also an essential factor in this regard. The year 2022 will come to mark two decades of the ASEAN Haze Treaty. For Indonesia, it will also mark eight years of adoption of this regional treaty into the national legal system. Studying how Indonesia prevents a recurrence of this transboundary haze disaster has rarely been done in previous studies. Several studies highlighting Indonesia's role in the ASEAN Haze Treaty were conducted before 2016 (Heilmann, 2015; Lee, et al., 2016). However, the incidence of forest and land fires in the country has decreased significantly since 2016. This article, therefore, fills this gap by explaining the efforts that the Indonesian Government has made through legal and institutional measures to prevent forest fires and land, especially in the peat ecosystem.



(Source: Ministry for the Environment and Forestry, 2021).

Methods

This research uses a socio-legal approach where legal and social science analysis is combined to explain the problems of law implementation related to fire prevention on peatlands in Indonesia. The legal research is conducted to analyze changes, continuity, and consistency of legal norms that underlie peatland restoration policies in Indonesian national law. Meanwhile, anthropological research that includes participant observation and actors' point of view methods is used to explain political factors that influence the effectiveness of the law.

The theory of legal culture becomes the basic framework in this analysis, particularly to describe the point of view and choice of actions of policy implementers. In a classic book published in 1975, entitled *The Legal System: A Social Science Perspective*, Friedman defines legal culture as "values, ideas, and attitudes that a society has with respect to its law." Friedman

further divides the legal culture into an internal legal culture and external legal culture. This research focuses merely on the internal legal culture that describes the law-makers and implementers' values and attitudes. It does not explore the external legal culture as can be seen in the general public's values and attitudes towards law and legal actors (Michaels, 2012).

This research is participatory in nature, where the author was involved in the activities that were observed. The observation was carried out mainly on legal and policy development from 2016 to 2020. At the end of 2020, Law on Job Creation was enacted. It has changed many legal provisions in Environmental Protection and Management Law (EPM Law) as well as Forestry Law. This article, however, provides only some preliminary thoughts on the impact of this Law on peatland fire prevention policy. Thus, further research is recommended to scrutinize this problem.

Milestones in Peatland Protection Law

The policy for protecting peatland ecosystems in Indonesia was first established in 1990 and marked by the issuance of a Presidential Decree on the management of protected areas (*Keppres* 32 of 1990) which stated that the peatland was one of the protected ecosystems. According to this Regulation, peatland protection was intended to control the hydrological aspect of the peatland, including preventing flooding.

The 1990 Peatland Regulation did not place fire and drought as a threat to the peat ecosystem. Forest and land fires in Indonesia were still under control during this year. As stated in the previous section, the greatest forest and land fires in Indonesia occurred in 1997-1998, which burned around eight million hectares.

The Government of Indonesia only made few peatland policies in the period 1990-2014. After 1990, provisions for peatland protection emerged in spatial planning laws. Spatial Planning Law No. 26/2007 and Government Regulation No. 26/2008 on National Spatial Planning include peatlands as national protected areas. The Government Regulation states that protected peatlands must have a peat layer of 3 meters or more and are located upstream of rivers or swamps.

Regulations related to peatlands in Indonesia are also part of environmental protection in general. Environmental Protection and Management (EPM) Law requires the central and local governments to have an Environmental Protection and Management Plan (*Rencana Perlindungan dan Pengelolaan Lingkungan Hidup, RPPLH*), including plans related to peatland ecosystems protection. In addition, the EPM Law also states that the maintenance of the peatland ecosystem is part of natural resource conservation.

In the plantation sector, the Minister of Agriculture has issued a regulation related to the use of peatlands for oil palm plantations. This regulation is known as Ministerial Regulation of Agriculture No. 14 the year 2009 on Procedures on Peatland Ecosystem Use for Palm Oil Cultivation.

Attention to the peatland ecosystem then resurfaced in 2011-2014 by enacting a Presidential Instruction (*Instruksi Presiden, Inpres*) to temporarily suspend the issuance of new permits for natural forests and peatlands (Presidential Instruction No. 10 the Year 2011). This

instruction produces an indicative map of the licensing moratorium zones, which is revised every two years. The most recent indicative map was published in 2019 (*Inpres* No. 5/2019). In 2012, the Ministry for Environment released the National Strategy for Sustainable Management of Peatlands. Then, provisions related to the protection of the peatland ecosystem are also found in Soil and Water Conservation Law (Law 37/2014) and Government Regulation on Swamps (the 2013 Swamps Regulation). However, more detailed arrangements regarding the peatland ecosystem are contained in Government Regulation Number 71 of 2014 concerning the Protection and Management of Peatland Ecosystems (thereafter the 2014 Peatland Regulation).

Unfortunately, until 2016 many of these regulations had yet to be implemented. The legal provisions in the 2014 Peatland Regulation, for example, were still a lot on paper. The devastating forest and land fires in 2015, as explained by the data and their impact in the previous section, prompted the Government of Indonesia to protect their peatland more seriously. The Ministry for the Environment and Forestry said it as corrective actions in protecting peatland (Ministry for the Environment and Forestry Republic of Indonesia, 2019). The year 2016 was an important milestone in these actions.

In 2016, the 2014 Peatland Regulation was amended by Government Regulation 57/2016 (thereafter the 2016 Peatland Regulation). This new regulation concerning the protection and management of peatland ecosystems has been an important legal source in understanding the direction of peatland protection policies in Indonesia. In this regard, the policies for protecting and managing the peatland ecosystem include planning, utilization, control, maintenance, supervision, and administrative law enforcement. The following subsection will briefly describe the main points of the six ministerial regulations by referring to the 2016 Peatland Regulation.

Planning and Utilization of Peatland

Peatland protection and management planning are carried out through an inventory of the peatland, assigning functions, and formulating and stipulating a Peatland Ecosystem Protection and Management Plan (*Rencana Perlindungan dan Pengelolaan Ekosistem Gambut, RPPEG*). Detailed arrangements regarding this plan can be found in the Minister for the Environment and Forestry Regulation Number 14 of 2017 (the 2017 MoEF Regulation) concerning the inventory and determination of the function of the peatland ecosystem. In addition, there is also a Decree of the Minister for the Environment and Forestry Number 129 of 2017 regarding the map of the National Peat Hydrological Unit (*Kesatuan Hidrologis Gambut-KHG* in Bahasa Indonesia) (the 2017 MoEF Decree No. 129), and a Ministerial Decree Number 130 of 2017 concerning the stipulation of the National Peatland Ecosystem Function Map (the 2017 MoEF Decree No. 130).

The inventory activities are carried out based on satellite imagery, aerial photographs, and field surveys. This checking activity refers to the indicative map of the distribution of the peatland ecosystem that was determined in 2014. The results of this inventory are the basis for the government to determine the Peat Hydrological Unit (PHU) map as legalized by the 2017 MoEF Decree No. 129.

The Peat Hydrological Unit or often abbreviated as PHU is the locus of peatland protection and management activities implemented. It is defined as a peat ecosystem located between two rivers, between a river and the sea, or a peat ecosystem in a swamp. The Ministry for the Environment and Forestry has designated 865 PHU with an area of 24.7 million hectares. This area is spread across four major islands, namely Sumatra Island (207 PHUs, 9.6 million hectares); Kalimantan Island (190 PHUs, 8.4 million hectares); Sulawesi Island (3 PHUs, 63,290 hectares), and Papua Island (465 PHUs, 6.6 million hectares). The largest distribution of peat ecosystems are in Sumatra, Kalimantan, and Papua. As noted in the introduction, the peat-rich locations in Sumatra and Kalimantan are in close proximity to neighboring countries, particularly Singapore and Malaysia.

The PHU is an ecosystem landscape dominated by peatlands. However, with a landscape approach, lands that are no longer peat can be included in a PHU. From the PHUs area of 24.7 million hectares, for example, the peatland recorded by the Ministry for the Agriculture in 2019 shows an area of 13.43 million hectares.

The PHU map is the basis for determining the function of the peat ecosystem. The 2016 Peatland Regulation states two main functions of the peat ecosystem: protection and cultivation functions. The 2017 MoEF No. 130 states that there are 12.4 million hectares of peat ecosystem with protection functions and 12.3 million hectares for cultivation functions.

As its name implies, the protection function necessitates careful and limited use, such as for environmental services and research. This function is mainly assigned to the peat domes and the surrounding area. Likewise, peat with a depth of more than three meters, or areas of peat that have specific germplasm, protected species, and areas previously designated as protected and conservation areas, are also enacted as protected functions. In addition, this protection function is also applied to areas that have been designated as moratorium areas for licensing. As mentioned earlier, since 2011, the Indonesian Government has issued a moratorium on the issuance of new permits for natural forests and peatlands. This policy is updated periodically. The last update one is Presidential Instruction Number 5 the Year 2019 which stipulates that areas that are the objects of moratorium have been designated as protection functions for the peat ecosystem; thus, no utilization permit shall be granted within such areas.

Meanwhile, the peat ecosystem with a cultivated function is allowed to be utilized. However, such utilization has to consider the groundwater level in the peatland and keeps the sediments from being exposed to the pyrite in the peatland that is used. The utilization of peat ecosystems conforms to national and subnational Protection and Use Plans (*Rencana Perlindungan dan Pengelolaan Ekosistem Gambut, RPPEG*). This *RPPEG* is prepared based on a map of the function of the peat ecosystem. The *RPPEG* includes national, provincial, and district/municipality spatial planning.

The Peatland Damage Control

The damage control of the peatland ecosystem is carried out through prevention, mitigation, and restoration efforts. Several regulations outline the Government of Indonesia's policies on

controlling peatland damage. Besides the 2016 Peatland Regulation, there are also regulations from the Minister for the Environment and Forestry regarding the measurement of peatland groundwater level, implementing peat ecosystem restoration, and handling burned land within concession areas.

The Indonesian Government has set standards and criteria for the peatland ecosystem damage. For a protected function of peatlands, for example, the criteria include the artificial drainage, exposure of pyrite and or quartz sediment beneath the peat layer, and decreased area and volume of land covers. Meanwhile, the damage to the peat ecosystem, which functions for the cultivation, occurs when the criteria for the groundwater level in the peatland are more than 0.4 meters below the peat surface, at a predetermined compliance point. In addition, a peat damage in areas with a cultivation function also occurs when the pyrite and or quartz sediments are exposed under the peat layer.

The prevention of the peat ecosystem damage includes the establishment of operational regulations, development of early detection systems, strengthening government institutions and community resilience, and increasing legal awareness of the community. In addition, it is also carried out to secure areas prone to fire or burn scars. The 2018 Peatland Regulation stipulates several restrictions to effectively prevent the peatland damage. These include a ban on clearing peatlands, making drainage channels that result in peat draining, burning peat and allowing fires, and prohibiting actions that impact the fulfillment of the standard criteria for peat damage as previously explained.

The responsibility for undertaking the legal provisions regarding the prevention of peat damage is put under the domain of the government. Meanwhile, the management of the peat damage is borne by permit holders. These countermeasures are carried out, among others, through fire suppression, isolating areas that have been exposed to pyrite sediments, or constructing water-control structures or structures. The permit holders are obliged to handle the damage within a maximum period of 24 hours after the damage is found. If this obligation is not complied with, the Government will assign a third party to recover the damage. The costs will be borne by the permit holders. This is a kind of payments for environmental losses and is determined based on an agreement between the government and the permit holders.

The responsibility for restoring damaged peat ecosystems is divided according to the land tenure. In the concession area, the responsibility lies with the permit holder. In areas controlled by a local community, the restoration is carried out by the community, including the customary law-based communities. The responsibility for restoring damaged peatlands within conservation areas rest with the national government while the regional government is responsible if the damage of peatland ecosystem occurs outside forest areas without any license (Safitri, 2018).

The recovery of degraded peatlands is carried out either by natural succession, rehabilitation, restoration, or other methods determined later according to developments in science and technology. Regarding to the restoration, it is stated in the 2016 Peatland Regulation that the implementation is carried out through the arrangement of water management at the site level, the development of peat rewetting infrastructure, and the utilization of peat according to local wisdoms.

If a permit holder knows that a damage of peatlands under his/her concession occurs but he/she does not take recovery measures within 30 days after it is firstly known, the government will assign a third party to carry out recovery, and the costs are borne by the person in charge of the business activity. In particular, with regard to restoring the damage to the peat ecosystem due to peat fires, Article 31B of the 2016 Peatland Regulation states that the government takes actions to save and temporarily take over areas that have been burned. This takeover aims at carrying out a verification process, where the results of such verification can allow the government to decide either to return the management of the area to the permit holder or to reduce his/her concession or even to revoke the permit altogether.

The Preservation of Peat Ecosystem

The maintenance of peatlands is carried out by reserving and preserving the functions of their ecosystem. Reservation here means the determination of peatland that cannot be managed within a certain period of time. The 2016 Peatland Regulation stipulates four types of those reserved peat ecosystems. First, the peatland with protective function that covers less than 30% of the total PHU area. The second reserve area is applied if 50% of the peat ecosystem with cultivation functions has been used for activities that have exceeded the standard criteria for the peat damage. Third, reserves are also applied for the peatland, which is the object of the moratorium policy. Finally, the reserve is carried out for the peat ecosystem with a predetermined cultivation function to be converted into protected peat. The preservation of the function of the peat ecosystem is more directed towards controlling the impacts of climate change.

Government Supervision and Law Enforcement

The Ministry for the Environment and Forestry and local governments have supervised the compliance of permit holders with their obligations concerning the peatland protection. For this purpose, an environmental supervisor is appointed. These officials have to monitor and investigate suspected violations and stop certain violations that may cause peat destruction.

The law enforcement in terms of protecting peatland mostly employs administrative law enforcement. Violations to laws and regulations, such as land clearing, burning, and construction of drainage channels that cause peat dryness, are subject to administrative sanctions, which include a written warning, coercion, permit suspension and permit revocation. Specifically on coercion, in this regard the government may impose measures such as a temporary suspension of activities, a removal of activity facilities, a closure of drainage channels, dismantling and confiscation of goods or tools that have caused and used for violations, and a temporary suspension of activities. If this coercion is not undertaken by the person in charge of the business/activity in concerned the government will suspend the environmental permit. In the case that the permit suspension is not practical, the government will then revoke the environmental permit.

Since the 2016 Peatland Regulation strictly stipulates the obligations of the permit holders and the administrative law enforcement for their violations, the regulation has been criticized by private sectors. From the beginning, objections were raised against the enactment of this regulation claiming that such regulation would hinder investment (Fernandez, 2017; Muhanda, 2017; Widyastuti, 2021). In addition, the main concern for forestry and plantation companies operating on peatland areas at that time was not only related to the provisions on new obligations to protect peatland and to ensure the wise use of it but also to the certainty of the continuation of their concessions on peatland. The question was that whether or not the provisions regarding the determination of the protection function of the peat ecosystem would make business activities impossible.

This concern has been anticipated by the 2016 Peatland Regulation by stipulating several transitional provisions. The 2014 Peatland Regulation, as amended by the 2016 Peatland Regulation, stated that a utilization permits on peatland within protected areas that had been granted before the enactment of the 2014 Peatland Regulation would remain valid until the permit's expiry date. In general, the average forestry permit lasts for 60 years and can be extended for up to 35 years. A plantation permit is granted to a company for 35 years and can be extended for another 25 years period. Meanwhile in the 2016 Peatland Regulation, it stipulates that for a permit granted before the enactment of the 2016 Peatland Regulation but it has not yet in operation, it remains valid. However, once a company as a permit holder undertakes its activities in protected areas, it must maintain the hydrological function of the peat. If this obligation is neglected for two years, the government has the authority to revoke the permit.

The Peatland Restoration Policy and Its Implementation

The highlight of the corrective policy to protect the post-2016 peatland ecosystem is preventing peatland damage and restoration of the degraded peatland. The introductory section of this article has stated that the 2015 forest and land fires also scorched around 800 thousand hectares of peatland. However, the damage did not only occur due to fire. Land clearing and land conversion were also other causes. The Indonesian Government has found that around two million hectares of peat ecosystems are degraded and have to be restored.

In January 2016 a Presidential Regulation No. 1/2016 on Peatland Restoration Agency (*Badan Restorasi Gambut, BRG*) (thereafter the 2016 Presidential Regulation) was issued. This regulation puts forward a direction for a 5-year peat restoration policy (2016-2020) and provides tasks that had to be undertaken by a newly established Peatland Restoration Agency for coordinating and facilitating this restoration. This section describes key provisions of peatland restoration policies and their implementation during the last five years.

Approaches of the Peatland Restoration

As previously mentioned, the Peatland Restoration Agency (*BRG*) that now becomes the Peatland and Mangrove Restoration Agency (*BRGM*), was given mandates to undertake

coordination and facilitation of peat restoration in seven provinces. They were: Riau, Jambi, South Sumatra, West Kalimantan, Central Kalimantan, South Kalimantan, and Papua. The *BRG* had also special functions to coordinate and strengthen policies for implementing peat restoration, planning, controlling, collaborating in implementing peat restoration and mapping the PHUs and zoning of protection and cultivation functions. In addition to these, the *BRG* undertook activities for rewetting peatland and managing ex-burned peatlands. This agency conducted programs to build public awareness toward the ecological functions of peatlands through socialization and public educational campaigns on peatland restoration. It also provided technical assistance to concessionaires in the construction, operation, and maintenance of infrastructure on their concession lands.

The area targeted for peatland restoration of *BRG* was 2.67 million hectares. An area of 1.7 million hectares was located in forestry and plantation concessions, and about 900 thousand hectares were situated within local community's land or forest/land areas without permits. The peatland restoration carried out directly by the *BRG* and its partners was located outside the concession areas. Meanwhile, the restoration in a concession area is carried out by the permit holders. The government plays the role of monitoring, supervision, and law enforcement. This role is shared by the Ministry for the Environment and Forestry, the Ministry for the Agriculture, and local governments.

Peatland restoration in 2016 to 2020 was carried out through three approaches, namely rewetting, revegetation and livelihood revitalization. In the rewetting activities, they were conducted through building canal blocks, canal stockpiling, and constructing drilling wells. Revegetation activities were carried out by planting burnt peatlands with endemic or suitable plants on peatlands. Peatland restoration also had to ensure the enhancement of local communities' welfare. Therefore, livelihood revitalization activities would empower the community to develop small and medium enterprises based on land, water, and environmental services.

As (Ward, et al., 2020) observed, local communities play a central role in peatland restoration. The *BRG* has put community participation as the key indicator of a successful peatland restoration program. For this reason, the Peat Care Village Program (*Desa Peduli Gambut, DPG*) had been developed to strengthen village institutions and community participation in supporting the restoration. Through the *DPG* Program, community education is carried out to protect peat and to avoid farming practices involving peat burning. The *BRG* also provided educational programs to support the company in restoring its concessional area.

Peatland Fire Prevention 2016-2020

The *BRG* has ended its term of office since 2020. In fact, President Joko Widodo has extended the Agency's duties and added a new task to accelerate mangrove rehabilitation. On 22 December 2020, the *BRG* changed its name into the Peatland and Mangrove Restoration Agency (*Badan Restorasi Gambut dan Mangrove/BRGM*).

During the five years of carrying out its duties, the *BRG* reported several achievements. Initial efforts of peatland rewetting had been carried out in an area of 835,288 hectares. The area that had been intervened was 94% of the target area for peat restoration, outside

commercial concessions. For areas under concessions, restoration was carried out by companies with a supervision from the Ministry for Environment and Forestry and the Ministry for the Agriculture. The BRG provided technical assistance to 186 plantation companies with a peat area of 538,439 hectares (Badan Restorasi Gambut dan Mangrove, 2020).

Assistance and strengthening of village institutions has been carried out in 640 Peat Care Villages. The peatland situated within village areas is estimated around 4.6 million hectares where 1.4 million hectares of them have been included in the peat restoration target. Moreover, economic empowerment was also carried out involving 2,295 community groups. The *BRG* also educated agricultural without burning to local communities, with more than 1000 farmers involvement. The Peat Farmers Field School has been an important learning center for this activity. Many farmers after the program have started to transform peat burning to non-burning technology.

Besides that, the *BRG* also facilitated the formation of peat community paralegals. The aim was to create legal literacy among local communities, and if there is a legal issue related to peatland faced by community members, the paralegals would provide legal assistance to them. Indeed, the Farmer Field Schools and paralegals are two sides of the coin that support each other in protecting the community. With this school, people are expected to change their behavior in utilizing peatlands.

Law and Institutional Factors for the Effective Prevention of Peatland Fires

Several factors have influenced the reduction in forest and land fires in Indonesia since 2015. First, the solid and consistent leadership from President Joko Widodo has provided a significant political support for the central and local governments' efforts to contain and prevent fires. The political will has become the predominant factor in this reform. Santosa and Putra (2016) in their research observe the weakness of peatland governance before 2016 by stating that Indonesia needs leaders who "have integrity and the courage to make radical changes to achieve comprehensive governance reform". They argue that "[p]olitical support is essential for these leaders to execute their roadmap for comprehensive reform" (Santosa & Putra, 2016). In post-2016, such leadership exists and has managed to provide directives of the peatland law and institutional reform.

The second factor is related to the integrated coordination in preventing forest and land fires. Coordination meetings for forest and land fires are held regularly, chaired by President and senior ministers. At the provincial level, similar coordination is carried out through the Forest and Land Fire Prevention Task Force, in which the governor serves as its chair.

The third factor is more comprehensive legal and policy instruments. As explained in the previous sections, several peat protection regulations were made in the 2014-2020 period. The Presidential Instruction on suspending the issuance of permits in natural forests and peatlands, and a moratorium on permits for oil palm plantations, for example, aims to improve peat governance. Fourth, a particular institution, the *BRG*, was formed to coordinate peat restoration as a measure to prevent peat fires.

The strength of civil society is the fifth determining factor for this success. Legal advocacy, including in the judicial process, encourages law enforcement in forest and land fire

cases. Finally, the law enforcement has started to be stricter than ever. The Ministry for the Environment and Forestry states that in 2017, there were 510 companies subjected to administrative sanctions. Then, from 2015 to 2019, the ministry reported nine tort cases with final verdicts in which most of them punish companies for paying compensation and restoring the environment due to the fires occurred within their concessions (Syarifah, et al., 2020).

Although much progress was achieved in preventing peatland fire, many obstacles remain to be overcome. The issue of peatland map accuracy and overlapping hinders the implementation of proper peat restoration. Indonesia has been pursuing a one map policy to solve the map problems. Different laws and regulations are also on the agenda for further harmonization. This may include the Omnibus Law on Job Creation which was enacted in the end of 2020. In the context of the peatland ecosystem protection and law enforcement of the forest fires, this law opens up various legal interpretations related to strict liability, a procedure which helps the law enforcement officers, including the Ministry for the Environment and Forestry, to punish companies committing forest fires without necessary to prove their fault. Several researchers view that the strict liability has been removed by the Omnibus Law because it omits the phrase "without previously proving the types of faults" from Article 88 of Environmental Protection and Management Law (Muamar & Utari, 2020; Putra & Prasetyo, 2020). But, in its Elucidation, Law on Job Creation clarifies that the strict liability principle is still applicable. Hence, how such omission would affect the enforcement of strict liability in the peatland fire cases in the future will be subject to further research.

Furthermore, peatland restoration is an extended effort that requires consistent political will. This is increasingly seen with the Presidential Regulation Number 120 of 2020, which extends the working period of the *BRG* until 2024 while adding new tasks to this institution to accelerate mangrove rehabilitation. However, the success of restoring peatlands, and therefore preventing fires in peatlands, does not depend solely on the existence of government institutions and regulatory instruments. As many actors with various and contested interests take part on peatland, making peat governance a shared responsibility of all parties is an influential agenda. Hybrid peatland governance, which is an effort to build governance that involves many actors, including concessionaires, communities, government, universities, and environmental activists has been introduced (Astuti, 2020). The biggest challenge for peatland restoration in the future is to make that hybrid governance exist and work. There is room for this in the Peat Hydrological Unit landscape. Designing hybrid governance in one PHU will be an essential task for the newborn BRGM.

Conclusions

The prevention of peatland damage and the restoration of the degraded peatland ecosystems are two corrective policy agendas undertaken by Indonesia since 2016. These efforts are made through the issuance of operational regulations to implement environmental Law and government regulations related to the peat ecosystem's protection and management. It took 16 years to improve and strengthen laws and policies on peatland protection after being published for the first time in 1990. The devastating fires in 2015 were the main trigger for reforms in peat governance.

By ratifying the ASEAN Agreement on Transboundary Haze Pollution, Indonesia is committing to a regional obligation to prevent forest and land fires. The domestic political factors also determine the success of reducing cross-border haze. Indonesia is an example that shows how national politics is the primary determinant of improving existing peat governance. There have been six factors that play a role in this improvement. They are leadership, improved coordination at the national and regional levels, more operational legal instruments, a specialized agency dealing with peatland restoration, law enforcement, and the civil society's role of enhancing public oversight. Although not completely perfect, these consistent efforts to make legal and institutional improvements have shown considerable results. The incidence of forest and land fires has decreased since 2016. Although there was an increase in 2019, it is confirmed that it was due to global climate factors within ongoing efforts to restore the peat ecosystem. In order to move forward, Indonesia needs to maintain these six assets plus concrete efforts to build the right institutions at the PHU landscape level to facilitate coordination, collaboration, and collective action of various stakeholders.

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Achieving the Nationally Determined Contribution (NDC) Through Social Forestry: Challenges for Indonesia

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Abstract

Indonesia's determination in realizing the Nationally Determined Contribution target as a follow-up to the Paris Agreement resulted in concrete steps in climate change adaptation and mitigation efforts, one of which is through social forestry. This paper aims to describe the various efforts to achieve Indonesia's targets on both conditional and unconditional, especially applying and linking social forestry schemes to climate change. This research finds that after the MoEF Decree No. 83/2016, social forestry regulations in Indonesia have begun to accommodate ecological elements. However, its accommodation remains partial in the policy context and is still not in line with the scope of activities of REDD+ programme. Several critical issues could be identified further: institutional, technical and methodological, legal, and most importantly, political-economic challenges.

Keywords: Climate Change; Nationally Determined Contribution; Social Forestry; Indonesia.

Introduction

Forest plays a double role in the context of climate change. It is the source of carbon emission, especially when the forest is cut down, burn, or degraded, while at the same time, the forest also is regarded as the storage of carbon stocks (FAO, 2021). In Indonesia, the forest is calculated to cover 120 million hectares of the country's terrestrial. However, there has been an alarming rate of deforestation and forest degradation in the country as the expansion of palm oil plantation, mining, as well as infrastructure projects have continued to be the main priority of Indonesian development policies. Consequently, Indonesia has been a persistent contributor to world carbon emissions from forestry sectors. It is estimated that each year Indonesia contributes approximately 451 million tons of carbon dioxide, with 2.563 thousand tons of CO₂ comes from deforestation (Sari, 2007).

It is frequently argued that two main problems have caused forestry issues in Indonesia. First, the failure of forest governance. The World Bank has officially stated that programs sponsored by the Indonesian government have caused 67% of all deforestation (World Bank, 1994). This statement is also reinforced by a study from Forest Watch Indonesia (FWI) affirming

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that 72% of the deforestation in North Sumatra, East Kalimantan and North Maluku is in an area burdened by a management permit from the government (Barri *et al.*, 2018). Second, there has been a chronic problem of poverty among local communities who live in forests or nearby the forests. There is a lack of recognition of indigenous peoples' rights and forest-dependent communities despite the fact that they play an important role in managing the forest sustainably (Colfer and Dudley, 1993). As several scholars have pointed out, deforestation and forest degradation do not only provide impacts on global carbon emissions but also on socio-economic conditions of forest-dependent communities due to the loss of their livelihood (Rahmina, 2012).

The main response of the Government of Indonesia has been two folds. The first one is the direction of environmental and forestry development toward strengthening the circular economy of environmental development (including strengthening governance and human resource development). The second direction is toward maintaining and reducing deforestation and forest degradation rates. In the first direction, since 2016, the national government through the Ministry for the Environment and Forestry has undertaken social forestry program in a serious manner. The realization of the social forestry program is important to be discussed given the essence of the program which does not only empower people but also emphasizes efforts to reduce global emissions (Attachment I MoEF Decree No. 82/2019). This was further affirmed by the Presidential Regulation Number 56/2018 concerning the Acceleration of the Implementation of National Strategic Projects, that fastens the President target to allocate 12.7 million hectares of forest area to be used as social forestry land with enthusiasm on realizing the sustainability of ecosystems (both socially and ecologically) through the opening of legal access to the community to participate in making responsible use of forests for welfare (Indonesia Secretariat Cabinet, 2020).

Meanwhile, in the second direction, Indonesia has responded by ratifying the Paris Agreement through Law No. 16/2016 to show a willingness to the international community in undertaking mitigation efforts to reduce its emissions, especially from forestry sectors. As mandated by the Paris Agreement, every state party, including Indonesia, has to put forward its commitment to reduce emissions domestically in the form of a Nationally Determined Contribution (NDC). In November 2016, the Government of Indonesia announced its First Nationally Determined Contribution (NDC) to reduce emissions by 29% on its own effort and up to 41% with international supports. Forestry sectors were convicted as one of the main targets (Presidential Executive Office, 2019). It was targeted that 17.2% of the 29% target would be achieved through reducing deforestation from 0.9 million hectares per year in 2010 to 0.35 million hectares per year in 2030 (Presidential Executive Office, 2019).

At first, there was no connection between the social forestry program and efforts to achieve the target in the NDC, especially emission reduction in forestry sectors. The social forestry program focused on the economic empowerment of local communities while the climate change mitigation is about enhancing the carbon stocks. Later on, the Government of Indonesia has even undertaken a more significant step by adopting a "bottom-up" approach on the climate change agendas. In short, a bottom-up approach is a decision-making process where it originates from lower levels and proceeds upwards. Therefore, communities are given the capacity to be able to optimize the existing programs through community initiatives and

brainstorming processes in order to make a more harmonized and inclusive system (Khadka dan Vacik, 2012). This approach was adopted to comply with the Paris Agreement nature which endorsed the bottom-up approach in both its process and substance (Zaman, 2018). In response, the Indonesian government then made a breakthrough strategy by giving people open access and management rights of land through capacity building and empowerment to muster active local participation to manage forest management systems and making it affordable even at the lowest level, with one of the goals to involve the community in achieving the NDC targets.

Hence, it is suggested that there is a need for comprehensive recognition of the community in and around the forest to be involved in the management of forest resources. One way is by formulating strong legislation to enhance the protection and optimal management of the land resource, specifically in forestry areas with objectives of success determined by how well the communities in and around forests being involved as a key stakeholder in running the forest resources (Mawardi and Sudaryono, 2006). The objectives of this program are further translated into specific programs, namely Social Forestry (SF).

In relation to the context of climate change, SF has been placed in special proportions as one of the climate change mitigation programs (MoEF, 2018). However, Nurfatriani and Alviya's study shows that the policy of opening land access for the community through social forestry has not been able to achieve the ideal target of restoration of forest functions due to the arising problems from the forest management itself (Nurfatriani and Alviya, 2019). In line with this explanation, the National Development Planning Agency notes that this results from ineffective land resources management by the government (Thamrin, 2011). It is important to note beforehand that under the Ministry for the Environment and Forestry (MoEF) authority, the social forestry program is managed by the Directorate-General of Social Forestry and Environmental Partnership (DG SFEP) while the undertaking of the NDC target is placed under the Directorate-General of Climate Change (DG CC).

Therefore, in this article, the author aims to explore Indonesia's policies concerning the effort on reducing greenhouse gas emissions, especially in the forestry sector, in its national development agenda and seeks to find whether the progress of the social forestry program in regard to the achievement of NDCs targets. The author observes that considering the nature of the social forestry program on the ground, there are several challenges faced by Indonesia in achieving its NDC targets in forestry sectors, which include: the absence of a uniform and applicative carbon measurement, the lack of calculation methods for beneficiary communities, the problem of the national forest carbon certification system for social forestry areas, the weak recognition of indigenous peoples' rights, as well as persistent political-economic challenges.

Literature Review

This article contributes to the literature on environmental law in Indonesia by focusing on the nexus between forest and climate change. Indeed, the topic of forestry and climate change has been widely written (Mawardi and Sudaryono, 2006; M. Nijnik, J. Bebbington, B. Slee and G. Pajot, 2009; Wardana, 2012). In *Conservation of Forest and Land Through Empowerment of*

Communities Around the Forest, for instance, Mawardi and Sudaryono (2006) discuss the problems arising from past forest destruction by taking community forestry mechanisms as the main focus, especially to explain it as one of the solutions on realizing sustainable forest management. Nijnik *et al.* (2009) in *Forestry and Climate Change: A Socio-economic Perspective* draws the linkage of the forestry sector and its contribution to climate change while endorsing the importance of developing forest-based activities to tackle climate change through community involvement at the local level to be actively involved in this agenda. It underlines the importance of forestry governance to be cost-effective, ecologically sustainable and socially desirable in order to achieve sustainable development objectives and climate change agenda. The author then uses this approach and paradigm in order to overview, asses and gives the recommendation to be able to maximize the concept of social forestry in achieving the climate change target agenda. Wardana (2009) in *A Critical Analysis of the REDD+ Legal Architecture in Reducing Emissions in Forestry Sectors in Indonesia* discusses the development of the legal framework to govern the REDD+ scheme.

However, they were published prior to the adoption of the Paris Agreement in 2015. Hence, they use the United Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol as the main legal frameworks in analysing the forestry/climate change nexus. In fact, the 2015 Paris Agreement provides a different and important legal framework for Indonesia to undertake its legally binding commitment in reducing emissions from deforestation. This commitment was not required under the previous climate change legal regime, especially the 1997 Kyoto Protocol, which only obligated to reduce emissions for developed countries. Hence, this article will enrich the literature by using the Paris Agreement as the legal framework to analyse the relationship between forestry sectors and climate change mitigation in Indonesia.

Methods

The research method used is a combination of library-based research and fieldwork. In this regard, the writer examined secondary data through relevant library materials in order to seek the Indonesia climate change target and objectives, also the original concept of Social Forestry. The sources of secondary data include various policies and regulations, published reviewed papers, theses, formal reports, and many supporting literatures regarding climate change and social forestry, specifically in Indonesia. Moreover, the author also collected primary data through interviews in order to know the further translation of NDC's target and the ongoing Social Forestry implementation on the ground. The research was conducted on January 2020 to February 2021 through semi-structured interviews with several key informants, representing the government, environmental NGOs that have been work as a partner for local communities in undertaking social forestry.

Resultas and Discussion

Forestry and Climate Change Agenda

It is inevitable that Indonesia through its forestry sector has contributed up to 47.8% of Indonesia's total greenhouse gas emissions and reached a deforestation rate up to 0.920 Mha per year in the 2013-2020 period (First NDC, 2016). Therefore, Indonesia has long recognized the importance of the forestry sector in meeting climate change targets. As can be observed from the first (2004-2009), second (2010-2014) and third (2015-2019) period of Indonesia medium-term development plan (re: RPJMN), the issue of climate change is consistently being occupied in an important proportion in each period, with forestry sector as one of its pressure points in regards with the fulfillment of national development agenda.

Being aware of its large scale of tropical forests, Indonesia then expressed its concern by taking concrete steps to protect its forests (Indonesia Government, 2017). In the forestry sector, climate change policies have been built under a scheme known as Reducing Emissions from Deforestation and Forest Degradation in Developing Countries plus Conservation, Sustainable Management of Forests and Enhancement of Carbon Stocks (REDD+). REDD+ is developed as an important component in achieving the NDC target for developing countries. Conceptually, it has developed within a framework of low carbon development and a green economy to ensure that efforts to address climate change from the land-use sector align with Indonesia's sustainable development policies and needs (Rustiadi, 2014). The scope of REDD+ consists of reducing emissions from deforestation, reducing emissions from forest degradation, conservation, sustainable forest management, enhancement of forest carbon stocks (Wardana, 2012).

The use of REDD+ is further emphasized in the NDC, especially related to the unconditional target for mitigation from the forestry sector. As Marispatin (2017) puts it, mitigation efforts will be implemented through sustainable forest management, including social forestry. As a response, Indonesia then carried out categorization as well as further targets of the planned mitigation efforts. At first, the foundation for climate change mitigation actions in the forestry sector was put through Presidential Regulation No. 61 of 2011 which included 13 core activities and 17 supporting activities, with the forestry and peatland sector carried the largest reduction target, 0.672 tons of total 0.767 tons of carbon dioxide (Darajati, 2012). Afterwards, the MoEF took action in translating the specified target through a series of actions to reduce emissions in the forestry sector based on budget tagging by the Directorate-General of Climate Change Control. In a book entitled *Guidelines for Determining Climate Change Mitigation Action* published by the Directorate for Climate Change Mitigation, these activities include: (1) Prevention of Reducing Natural Forest Cover or Conversion of Natural Forest (Reducing Deforestation and Degradation Rates); (2) Sustainable Forest Management; (3) Development of Industrial Plantation Forest (HTI); (4) Rehabilitation of Forest Areas (regeneration / without logging); (5) Rehabilitation of Production Forests and Land (with Rotation); (6) Peat Restoration; (7) Forest and Land Fire Control; and (8) Peatland Restoration.

In achieving the climate target, the Indonesian government then realise the importance of maximizing the involvement of the local community. This is in line with the sustainable forest management concept which encourages important principles in forest management

includes: monitoring, reporting and management instruments at a global, national, and also community level (UNCED, 1992). The social forestry program is designed as one of the derivative programs from the rehabilitation of forest areas category. Through the social forestry scheme, it is expected that an increase in the area of land granted a permit to be planted with annual and timber species. Besides the mitigation effort, being aware that climate change also impacts local communities living around the forest, the land rights entitlements through the social forestry program are designated to allow them to manage their environment to adapt to climate change.

Social Forestry in Indonesia

It is important to be noted firstly that Minister of Environment and Forestry Regulation Number 83 of 2016 (MoEF Regulation 83/2016) is a milestone regulation on social forestry in Indonesia. This regulation has implicitly created a linkage between community empowerment and a need to mitigate climate change through planting and sustainable forest management. First, by its definition, social forestry is described by the regulation as a "sustainable forest management system implemented in state forest areas or customary forests implemented by local communities or customary law communities as the main actors to improve their welfare, environmental balance and social and cultural dynamics." Social forestry aims to resolve tenure and justice issues for local communities and indigenous peoples in or around forest areas in the context of community welfare and preservation of forest functions.

Given attention to the choice of word, by using a grammatical interpretation of "sustainable forest management," it is noted that this word implicates not only economic and social sustainability but also the ecosystem and hydrological aspects of the forest (Indonesia Forestry Certification Cooperation, 2013). Moreover, "environmental balance" in biological science is interpreted as the ability of the environment to cope with disturbances of pressures arising both from nature and human activities and the ability of the environment to maintain the stability of life. This balance can only occur when there is a proportional interaction between living things and their environment (Kricher, 2009).

In addition, under the social forestry scheme, forest's environmental services are utilised for ecotourism, water management, biodiversity services and carbon sequestration or storage services (Article 1 paragraph 8 of MoEF Regulation 83/2016). The government is also encouraged to facilitate programs or activities for the rehabilitation of forest and land, the conservation of soil and water, the empowerment of community-based conservation, and the certification of sustainable forest management and/or timber legality (Article 61 paragraph 4 of MoEF Regulation 83/2016). Therefore, despite the fact that it is not explicitly stated, the ministerial regulation accommodates the mitigation efforts to climate change under the social forestry scheme. After the enactment of MoEF Regulation 83/2016, the social forestry program is delegated to the Directorate-General of Social Forestry and Environmental Partnerships (DG SFEP). The DG SFEP has enacted several regulations to achieve the objective of social forestry in Indonesia as follows:

Table 1. *Social Forestry-Related Regulations that Support the NDC Target*

No	Rules	Contents
1	Article 1 Paragraph (l) of DG SFEP Regulation No. P.3/PSKL/SET/KUM.1/4/2016 concerning Guidelines for Developing Social Forestry Businesses and DG SFEP regulation Number P.2/PSKL/SET/KUM.1/2018 concerning Guidelines for Social Forestry Business Development	Business in the field of social forestry is a business of non-timber forest products and/or wood forest products which includes nurseries, planting, enrichment, maintenance, harvesting, processing, marketing, protection and security of forests and forest environmental services (natural tourism, storage and absorption forest carbon, water management services and germplasm services) carried out by the Social Forestry Business Group (KUPS) based on the principle of forest sustainability and economic principles.
2	Article 9 jo Article 11 (c) and (d) of DG SFEP Regulation No. P.8/PSKL/SET/KUM.1/9/2017 concerning Guidelines for Preparing Forests Utilization Plans and Annual Work Plans for Social Forestry Forest Utilization Permits (RPH-IPHPS)	RPH-IPHPS document must include, among others, an overview, action plan, monitoring and reports, as well as a work plan map (Article 9). The planned activity must cover the utilization of forest environmental services which can be in the form of business utilization of natural tourism services/facilities and/or water/ energy business and/or business on the utilization of carbon sequestration and storage and forest protection and security (Article 11).
3	Article 5 of DG SFEP Regulation No. P.2/PSKL/SET/KUM.1/2018 on Guidelines for Social Forestry Business Development (KUPS)	KUPS facilitation forms include increasing the value of production and environmental services as one of the components facilitated for the development of social forestry businesses.
4	Appendix I of DG SFEP Regulation No. P.9/PSKL/PKPS/KUM.1/2019 concerning the Evaluation Guidelines for Social Forestry Permit	Several aspects to be achieved in the framework of community empowerment through social forestry, namely: (a) production/economic, to increased income and welfare of the community around the forest, (b) ecological, the realization of forest utilization which does not damage and disturb ecosystems and the environment, (c) social, changes in the behavior of the permit holder/management rights community towards an awareness of the preservation of forest functions and the use of forests that contribute to development.
6	Appendix I of DG SFEP Regulation No. P.9/PSKL/PKPS/KUM.1/2019 concerning the Evaluation Guidelines for Social Forestry Permit	There are four indicators of the evaluation process carried out on social forestry permit holders, namely: 1) Prerequisites, emphasizing the existence of work plan documents as initial legality; 2) Production and economy, looking at the governance and utilization of forest resources, timber forest products, non-timber forest products, and environmental services, as well as

		economic activities of forest products, 3) Ecology, which focuses on aspects of equilibrium in the management of forest resources in the context of sustainable management of forest resources.
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(Source: Author from various sources)

Based on the table above, it is inevitable that some regulations have tried to accommodate ecological perspectives in order to achieve their targets. Moreover, DG SFEP Regulation No. 9/2019 concerning the Evaluation Guidelines for Social Forestry Permit also indicates several points in line: *First*, the inclusion of plans for planting and improving conditions of land covers in the General Work Plan (RKU) and Annual Work Plan (RKT) established by the community receiving the land. Since the planning stage, ecological aspects have been given a place in the formulation of social forestry scheme planning. *Second*, there is an encouragement for the community to actively participate in protecting the forest from fire and occupation through the inclusion of action plans in the planning documents and realization of forest area utilization, as well as the formation of community groups concerned about fire and equipment supply and mitigation when forest fires occur. *Third*, there is a concrete mandate for the MoEF to form concrete steps in securing forests from illegal logging activities. Lastly, the community shall formulate an internal term of conditions on forest maintenance and protection activities.

However, there are some major critics can be conveyed. *First*, activities and/or goals that are in line with efforts to achieve climate change targets are still not portrayed as a major agenda or target component that must be met and fully considered in the running of social forestry. *Second*, one of the components that are a channel in the realization of this integration, namely the carbon sequestration and storage, and the absorption forest carbon under the environmental services concept, does not yet have clear and definite rules and schemes legally, so that it still cannot be implemented optimally in the community. *Third*, there is an absence of further arrangements and weak political will from the government. As can be seen from other DG SFEP regulations that are not in line with the spirit of achieving NDC targets as follows:

Table 2. *Social Forestry-Related Regulations that Do Not Support the NDC Target*

No	Rules	Contents
1	Article 5 of DG SFEP Regulation No. P/3/MENLHK/PSKL/SET-1/1/2016	Identification of KPS to facilitate the development of social forestry businesses to become KUPS covering the potential for business development, counterpart institutions, financial institutions, and marketing of business results only.
2	Article 8 and 9 of DG SFEP Regulation No. P.2/PSKL/SET/KUM.1/2018	There are classifications and criteria for evaluating the ability of KUPS, broken down by categorization, such as: <ul style="list-style-type: none"> a. Blue <ul style="list-style-type: none"> - Has been determined as KUPS - Business potential has been identified b. Silver <ul style="list-style-type: none"> - Has been determined as KUPS - Business potential has been identified

		<ul style="list-style-type: none"> - Has established RPHD/RKU/RPH/RKT - Has established a business unit <p>c. Gold</p> <ul style="list-style-type: none"> - Has been determined as KUPS - Business potential has been identified - Has established RPHD/RKU/RPH/RKT - Has established business unit - Already processing the results/tourist facilities - Already have access to capital (independent/assistance/loan) - Already have a market/tourist (local) <p>d. Platina</p> <ul style="list-style-type: none"> - Has been determined as KUPS - Business potential has been identified - Has established RPHD/RKU/RPH/RKT - Has established business unit - Already processing the results/tourist facilities - Already have access to capital (independent/assistance/loan) - Already have a market/tourist (local) - Already have a market/tourist (regional)
3	Appendix 1 Regulation of the Minister of Villages, Development of Disadvantaged Regions and Transmigration Number 19 of 2017 concerning Determination of Priority in the use of village funds in 2018	One of the activities prioritized in the management of economic facilities and infrastructure is the management of village forests, customary forests and social businesses, with a note devoted to the formation and development of superior village products.

(Source: Authors from various sources)

The above table clearly shows that the ecological context in several regulations under the MoEF regime is neglected for further accommodation and elaboration within the context of social forestry. For example, as stated in Article 5 of DG SFEP Regulation No. 3/2016, environmental services activities in the storage and absorption of forest carbon and nursery and forest plant maintenance activities are not proportionate in the categorization of assessments to facilitate business development. Even in determining the criteria and benchmarks for the success of the activities carried out by the KUPS, it is clear that the criteria assessment highly focuses on economic and natural tourism aspects only, while the proportion of forest carbon storage and sequestration, despite being included in the scope businesses in the field of social forestry is not given a place in determining the success of the program. This clearly shows the 'disconnection' of social forestry regulation between one another.

At another ministerial level, as can be seen from the first appendix of Minister of Villages, Development of Disadvantaged Regions and Transmigration Regulation No. 19/2017 concerning Determination of Priority in the use of village funds in 2018, it is stated that one of the activities that are prioritized in the management of economic facilities and infrastructure is the management of village forests, customary forests and social businesses, with a note devoted to the formation and development of superior village products. Thus, for the development of

businesses that are non-environmental products or services in the form of forest carbon storage and absorption, water management services and germ plasma services have not been prioritized in the allocation of the use of village funds. From this, we may conclude that although there has been a will to integrate climate mitigation into the social forestry program, but there is no clear guide or direction regarding this will. Therefore, the nature of the disposition is very partial even under the same directorate-general.

In order to see the implementation on the ground, I conducted empirical research by interviewing two NGOs assisting the social forestry village, namely Kehati and Madani Berkelanjutan Foundation. Both of them have assisted several social forestry villages throughout Indonesia. It finds that there is no clear program or communication from the government regarding the implementation of the climate change mitigation will in social forestry. In fact, the program's success is still largely determined by the capacity of the local community, the support from local governments, and local initiatives at the site level. Because until recently, there has been no training, standardisation, and certification regarding the facilitators, as well as the lack of extension of the center to the regions to assist and control the implementation of social forestry (Liman, 2020). As a result, facilitators who suppose to help local communities in achieving the objectives of the program do not yet have official guidelines and regular training on basic values or intentions that the central government intends to carry out as the initiator of the social forestry program (Hidayat, 2020). For this reason, it can be concluded that success in the ecological context depends on the capacity of the related facilitator, whether they have a good insight and are oriented to ecological values or not. In addition, the monitoring and evaluation carried out at this time is still not being done regularly and clearly measuring the evaluation aspects (Amelia, 2020). This, in fact, is due to the just issuance of DG SFEP Regulation No. 9/2019 as a guideline for monitoring and evaluation.

The series of exposures above shows that the translation model of Indonesia's ideals and objectives in climate change mitigation in the social forestry sector is still not comprehensive and designed sustainably. Although there has been a will to adopt climate change issues in the social forestry scheme through the adoption of content in several laws and policies, as well as an ideal target framework for achievement, I find that the built ecological context is still not well-designed and holistic, so that it applies partially in every policy momentum. Therefore, lack in the implementation. This makes it visible that the social forestry program currently being built seems to be very oriented towards community economic empowerment. Although several pro-ecological actions have been present, they generally only depart from local initiatives in preserving and conserving forests so that the actions carried out are still partial and have minimal supervision. So, it only works in areas with a companion or facilitator who is aware of the issue of climate change.

Getting Back in Track: Integrating Social Forestry to Climate Change Agenda

While the social forestry program is under the domain of the DG SFEP, climate change adaptation and mitigation is under the domain of the Directorate-General on Climate Change (DG CC). Under the DG CC, there is also a scheme related to community empowerment to protect forests, with focus on reducing Indonesia's carbon emissions called "the Community

REDD+ model” (CIFOR, 2009), one of which is the climate village program (ProKlim). MoEF Regulation No. 19/2012 concerning the Climate Village Program has defined ProKlim as “a national scope program managed by the MoEF in order to encourage communities to increase their capacity to adapt to the impacts of climate change and decrease greenhouse gas emissions and give awards for climate change adaptation and mitigation efforts that have been carried out at the local level according to regional conditions” (Article 1). Climate village itself is a location where the community has made efforts to adapt and mitigate climate change on an ongoing basis (Emilda, 2017). ProKlim activities applied the concept of community empowerment carried out by the community and their institutions in mobilizing and managing human and natural resources to strengthen the efforts of mitigating and adapting rural communities to the impacts of climate change. Thus, we may assume that both ProKlim and Social Forestry share a similar principles, community-based and sustainable use of local resources.

In 2019 the initiative to combine ProKlim and Social Forestry programs became an initiative of the Madani Berkelanjutan Foundation. This was undertaken through the establishment of Lampo and Nagari Sirukam Villages as pilot villages for the development of ProKlim while maintaining the existing social forestry program. Previously, the Lampo and Nagari Sirukam Villages had worked under the social forestry regime with a village forest (*Hutan Desa*) entitlement. Hence, in practice, there has been an attempt to combine two programs together. In principle, there is no doubt that social forestry and ProKlim schemes have the same goal, which is to improve the welfare of the community and forest resources through efforts to provide legal access to local communities to be able to contribute to the reduction of GHGs and environmental quality (Albar, 2017). While social forestry is expected to also be able to encourage the preservation of forest resources through community empowerment activities in and around the forest, ProKlim clearly carries out its activities with an orientation towards climate change adaptation and mitigation efforts, even both have the same mission in the form of land cover activities and forest fire prevention. Therefore, an integration of these two programs is needed considering the essence of the two programs is actually in line.

However, to date, this integration is a matter of experiment. There are several fundamental problems in integrating these programs. The first is the absence of national standards regarding methods for measuring and calculating carbon from community-managed forests, so reforestation efforts from the community are not taken into account. Secondly, no official methodology is simple and applicable that can be understood by the people who benefit from forest carbon services. Thirdly, the payment of ecosystem services (PES) mechanisms are not clearly regulated and accommodated in MoEF regulations and budget planning; thus, there is no certainty and clarity of potential incentives that can be given. This is also exacerbated by the absence of a national forest carbon certification system for social forestry so that people are more motivated to orient their forest productivity in the agroforestry domain compared to environmental services in the form of compensation for protecting forests. Moreover, there has not been an intersection map that combines the reference map determining the social forest area and the ProKlim area to find their possible overlapping (Amelia, 2020). Therefore, addressing those problems would be essential in

integrating the ProKlim and Social Forestry schemes in order to increase community income and at the same time, reduce the pressure for deforestation and forest degradation that contribute to climate change.

Challenges Ahead

Apart from institutional challenges and technical/methodological challenges, as mentioned in the previous chapter, there are also several other challenges in the context of achieving the emission reduction target through social forestry. Firstly, the lack of recognition of indigenous peoples' rights. Due to the absence of a coherent piece of legislation recognising, respecting, protecting, and ensuring the enjoyment of indigenous peoples' rights may affect the implementation of social forestry within indigenous peoples' territories (*Ulayat*). Although MoEF Regulation No. 83/2016 recognises the importance of consent from indigenous communities in utilising their territory for social forestry, the existence of indigenous communities would be determined by whether or not a regional regulation has recognised their existence. Hence, without such regulation in place, the communities are considered non-existence; consequently, their rights are not taken into account.

The second challenge is a political-economic one. It is important to note that the natural resource-based economy remains overriding Indonesia's economic sector to date. The series of existing legislation in Indonesia still provides a red carpet for extractive industries, starting from providing incentives, ease of licensing and information flows. This results in an unfair distribution of land, where the majority of land ownership is still held by the industries that not only systematically destroys the quality of the environment in Indonesia but also has created a condition where local communities suffer and live in poverty. Unfortunately, until recently, there is no indication that this political-economic situation will change. In fact, through the enactment of Omnibus Law on Job Creation No. 11/2020 and the revision of Mineral and Coal Law No. 3/2020, it is clear that the stimulus for the implementation of extractive business practices in Indonesia is getting stronger. Besides ease of licensing, environmental safeguards have also been weakened, making the government's commitment to people's welfare remain questionable.

Moreover, Article 29A of Job Creation Law widens the scope of a party that may be granted a social forestry permit under a term "individuals." It should be understood that previously, the scope of individuals who could obtain a social forestry permit was limited to forest farmers and experts. Meanwhile, the Job Creation Law does not provide any limitation on who should be considered as "individuals." Therefore, it can be interpreted that business actors or big landowners or land speculators can also be granted a social forestry permit and have access to social forestry benefits that are supposed to improve the well-being of forest-dependent communities. In the long run, this could further widen the gap in land tenure. Furthermore, economically, the local community can lose out to the business actor due to the similarities of the benefits obtained. This may lead to social forestry governance that moves away from local communities and will be even more difficult to control and to be integrated into ProKlim in achieving the NDC target. Potentially, a conflict of interests may conquer due to the addition of new actors who have the high potential to contra to the main original goal

of social forestry, which is to empower the community in responding to the climate change agenda.

Furthermore, Presidential Regulation No. 23/2021 as the derivative regulation of the Job Creation Bill, the Forest Management Unit (“Kesatuan Pengelolaan Hutan/KPH”) is only acting as a regional technical implementing unit or structural organization with its main function only to be a facilitator. Hence, the function of KPH is very limited, focusing primarily on administrative tasks with no longer implementing forest management at the site level. As a result, this may lead to the inability of the local community who have been granted a social forestry permit to utilise their permit effectively to achieve the objectives without technical assistance from the KPH. Whereas so far, the KPH had been quite active in developing forestry commodities through cooperation and partnerships that succeeded in boosting local revenue (Kartodihardjo, 2021).

In addition, neither the Job Creation Law nor its implementing provisions confirm communal principles to be implemented in forest management by the community, as well as not confirming the effort to strengthen “*Koperas*” (cooperative), a local institution that has long been designed for the welfare of forest communities (Suharjito, 2020). To conclude, the Job Creation Law and its derivative regulations, which generally centralize the forestry sector, have a great potential to bring little economic and social benefit to the local community. Moreover, they potentially will open up possibilities for greater land occupations by the private sector and capital owners to invest in social forestry ventures. In the end, the target for reducing emissions from social forestry would also be implicated.

Conclusion

After the enactment of MoEF Regulation No. 83/2016, Social Forestry in Indonesia has started to accommodate ecological elements in its standards, albeit partially. In fact, the current social forestry scheme is still not in line with the framework for the scope of activities of REDD+. Departing from the practice in the pilot village of ProKlim, there are several shortcomings that need to be addressed in the context of mitigating GHGs through social forestry in Indonesia. They include: 1) the absence of uniform methods of measuring and calculating carbon from each compatible scheme applicable in the community and easily understood by beneficiary community groups; 2) there is no a national forest carbon certification system for social forestry; 3) there are differences in map references used in determining the location of program implementation. Therefore, it is necessary to encourage synergy between the DG CC and DG SFEP in the realization of ecological social forestry; 4) another legal challenge also includes the recognition of indigenous peoples’ rights, a necessary safeguard to ensure their rights being respected in the implementation of the social forestry program; 5) the political-economic condition also remains problematic in producing progressive climate change and social welfare policies; and 6) the enactment of the Omnibus Law on Job Creation which broadens the subject of social forestry permit grantee that may result in new social problems which in turn potentially deflect Indonesia’s priority in achieving its climate change targets. Hence, it remains to be seen how the Government of Indonesia will respond to those challenges if it is serious in achieving its pledge to the international community stated in the NDC.

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Indigenous Peoples in Regional Institutions: A Comparative Perspective between ASEAN and the Arctic Council

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Abstract

Studies on indigenous peoples are a vast subject and continuously growing. Indigenous peoples often lack in formal recognition over their lands, rights, and at worst, their identities. Hence, they are often marginalized by the government and international law. Such treatment is made possible since the recognition of indigenous peoples is varied and depends on each national or regional perspective. Within Southeast Asia's regional organization, the Association of Southeast Asian Nations (ASEAN) has no reference to the indigenous peoples on its founding document. This paper focuses on the issue of indigenous peoples by comparing the position of indigenous peoples within the regional institutional frameworks. By qualitatively analyzing relevant references on ASEAN and the Arctic Council, this article aims to understand the stark differences of how ASEAN and the Arctic Council recognize indigenous peoples. This article discusses the similar framework of ASEAN and the Arctic Council alongside its difference in terms of recognizing indigenous peoples within their respective regions. This will further lead to deeper discussion on the issue of indigenous peoples from the international relations and regional perspective.

Keywords: ASEAN; Arctic Council; Indigenous Peoples; Human Rights

Introduction

The study of indigenous people is a vast subject and continuously growing. Approximately, there are 476 million indigenous peoples worldwide which make up 6 percent of the global population; however, indigenous peoples account for about 15 percent of the extreme poor (World Bank, 2020). The situations that surround the indigenous peoples are due to a myriad of factors including geographical, historical, and socio-political exclusion.

Indigenous peoples often lack formal recognition over their lands, rights, and at worst, their identities. Hence, they are often undermined by the current system. Indigenous peoples were only recognized by the United Nations in 1993 and more than a decades later when their rights have been granted through the United Nations Declaration on the Rights of Indigenous People (UNDRIP) since 2007. The declaration is considered a milestone as it lays the foundation of redefined relations, cooperation, and interaction between indigenous peoples and member states of the United Nations, alongside other actors and stakeholders. Even though the

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declaration serves both as a source of relevant rules and mechanism for the recognition of indigenous peoples, its implementation is limited because the recognition of indigenous peoples is varied and depends on national or regional perspectives.

Such national and regional perspectives can be seen through the legal status of indigenous peoples within both national constitutions and the international organization frameworks. The Southeast Asia region, for instance, is characterized by great ethnic, cultural, and religious diversity. Such diversity can be seen from the standpoint of minorities in which there are three types of minorities exist within the region: ethnic and linguistic minorities; religious minorities; and indigenous peoples (Clarke, 2001). These minority groups oftentimes lack in recognition within their own countries. As an example, only a few of the member states of the Association of Southeast Asia Nations (ASEAN) recognize the existence of indigenous peoples. In regards to this, ASEAN as an international organization has a significant role in promoting inclusive human rights through its member states. At most, international organizations should include indigenous peoples in the global policy-making process to prevent bizarre and unfair outcomes that tend to override them.

The issues of indigenous peoples in another region, such as the Arctic Council in the Arctic region, have shown greater concern towards the indigenous peoples in the region. The differences upon the recognition of indigenous peoples worldwide are now more important than ever due to various reasons. To name a few, the impacts of the climate crisis and the rapid expansion of the economy and urban development cost indigenous peoples, including their traditional or ancestral land along with their livelihood.

Therefore, the main objective of this study is to analyze the recognition and status of indigenous peoples within the institutional framework of regional organization in Southeast Asia (ASEAN) by comparing it with the indigenous peoples' state in the Arctic Region (Arctic Council). The Arctic Council was chosen as a comparison model to ASEAN not only because it has been successfully involved the indigenous peoples in regional policy-making but also because ASEAN and the Arctic Council have a similar mechanism on how both institutions operate. Furthermore, the comparison is necessary to achieve the second objective of the study which seeks to understand the big picture on how indigenous peoples are currently recognized and participate within the regional organizations. This article tries to discuss the similar framework of ASEAN and the Arctic Council alongside its difference in terms of recognizing the indigenous peoples within their respective regions. This will further lead to deeper discussion on the issue of indigenous peoples from the international relations and regional perspective.

Literature Review

Numerous articles have discussed the issue of indigenous peoples using a regional perspective. These articles, however, mainly discuss the indigeneity and the legal recognition of indigenous peoples among countries of the specific region. It often examines the situation of indigenous peoples by analyzing each country within the region to draw the conclusion of the regional situation (Clarke, 2001; Inguanzo, 2014; Morton, 2017).

The discussion of indigenous peoples in international relations perspective is often drawn alongside the post-colonial perspective. In contrast, very few of them discuss the representation and political position of indigenous peoples within the regional organization (Blåhed, 2018; Tennberg, 2010). The Arctic Council becomes the most discussed organization in regards of protecting and serving indigenous peoples' rights. The Arctic Model is also considered to be the potential model to serve indigenous peoples in achieving their participatory rights as a political actor within the regional framework (Koivurova, 2010; Koivurova & Heinämäki, 2006; Poto, 2016). It is because the Arctic Council recognizes indigenous peoples as a political actor by giving some of them legal representations within the council as Permanent Participants. By contrast, the position of indigenous peoples within ASEAN is caught in the middle of rhetoric in which there was a "lack of effective participation and representation" within the association (de Vries & Meijknecht, 2010, p. 105). It is regardless of the similarities of ASEAN and the Arctic Council in terms of how it operates.

This article discusses both the recognition of indigenous peoples by comparing their position within the institutional frameworks of ASEAN and the Arctic Council as a regional organization. ASEAN and the Arctic Council are chosen because both regional organizations have similar mechanisms and frameworks yet put indigenous peoples in a different position. By comparing the situation within the organization, this article aims to understand how indigenous peoples are being recognized within the international institutions and in the study of international relations as a whole.

Methods

This study is based on a qualitative analysis of how both ASEAN and the Arctic Council frame and recognize indigenous peoples. To analyze those organizations, this study applies a comparative analysis method. This article focusses on understanding the position of indigenous peoples within both ASEAN and the Arctic Council. This can be achieved by understanding the institutional frameworks alongside the system and mechanism uses by both organizations.

The study is conducted in three main phases: (1) preparation and research planning; (2) data collection through a literature study in which all of data collected in this research is categorized as secondary data. The data derives mostly from digital data, particularly online journals, articles, and selected news resources; (3) data analysis by reading the collected resources to find any patterns or characteristics that can be interpreted based on the historical alongside any other context.

Findings and Discussion

Scholarly, the place for indigenous peoples alongside their rights has been widely discussed (Clarke G. , 2001; Wardana, 2012; Inguanzo, 2014; Morton, 2017). In the Southeast Asia region, the rights of indigenous peoples within the ASEAN framework are not sufficiently guaranteed. As observed by de Vries & Meijknecht (2010, p. 107), "ASEAN seems to avoid explicit reference

on minorities and indigenous peoples in its official documents". De Vries & Meijknecht (2010) further explain that this is due to the fact that ASEAN in the very idea was meant to focus on economic, social, and cultural cooperation, while the focus on human rights is very young. Regardless, they conclude that the recent development of the protection of human rights within the region "was not very promising" (de Vries & Meijknecht, 2010, p. 106). The recent development upon the status of indigenous peoples – and human rights in general – within the ASEAN framework was marked by the adoption of the ASEAN Charter in November 2007.

The charter explicitly mentions that a human rights body shall be established under ASEAN (Article 14) which is later established under the name of ASEAN Intergovernmental Commissions on Human Rights (AICHR). However, despite its renewed commitment, ASEAN is "clearly a laggard in terms of human rights commitment" (Jetschke, 2015, p. 109). The lack of representation and recognition within the legal framework forces organizations or foundations such as the Asia Indigenous Peoples Pact (AIPP) to have a bigger role to help and facilitate indigenous groups. They take a key role in promoting solidarity, networking, and capacity building among indigenous peoples in the region as well as linking local communities with international donors (Morton, 2017). Compared to other regional organizations, such as the Arctic Council, indigenous peoples in the Arctic region are more represented both in national and international governing systems. This is due to the unprecedented status which is given to them in terms of the recognition as they are recognized as permanent participants (Koivurova & Heinämäki, 2006). Hence, this section will look at both regional frameworks more closely.

Defining Indigenous Peoples

There are no generally accepted definition of indigenous people as the term often used locally with various names and meanings. Groups who are generally understood as "indigenous peoples" are estimated to comprise up to 476 million people or roughly 6% of the world's population (World Bank, 2020). They inhabit areas rich in biodiversity whose survival as distinct peoples and cultures has been endangered by the effects of what has been called modernity and globalization. Their situation was also worsened by their economic condition which is considered to be among the poorest. The roots of the legal concepts of "indigenous peoples" were considered started through the colonial policies by the nineteenth century. Moreover, many theorists also suggested that they are also a product of such policies.

The current approach with regards to the recognition of indigenous peoples in international law is generally based on two treaties. They are: the International Labor Organization (ILO) Convention on Indigenous and Tribal Populations 107 (1957) and the ILO Convention on Indigenous and Tribal Peoples 169 (1989). In addition, there is one important declaration, namely the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). However, international treaties, including the 1989 ILO No.169 Convention, are rather focused on describing who is covered by the convention instead of defining indigenous peoples. The decision does not to formally adopt any formal definition due to the consideration that it is crucial to recognize the rights of self-identify as part of the right of self-determination. Self-identify means that the person must identify himself or herself as a member of indigenous people (the subjective definition) and on the other hand, the group

must also acknowledge and accept that person as the member of the people (the objective definition) (Sarivaara, Maatta, & Uusiautti, 2013). Moreover, during the discussion and the drafting process of the Declaration of the Right of Indigenous Peoples, many states' delegations believed that a formal definition of indigenous peoples is neither necessary nor useful as no single definition can fully capture the distinctive characteristics of widely diverse indigenous populations. However, it would be more constructive to consider those characteristics in identifying them as such.

Furthermore, James Anaya in *Indigenous Peoples in International Law* defines the term "indigenous" to describe "the living descendants of pre-invasion inhabitants of lands now dominated by others" (Anaya, 2000, p. 3). Indigenous peoples are the peoples whose existence is strongly linked to their communities, tribes, or nations of their ancestral past. They are indigenous because their ancestral roots are embedded in the lands in which they live or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity (Anaya, 2000). This definition is no less similar than the working definition provided by Jose Martinez-Cobo that author uses in this article. He states that:

"Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems."(UN DESA, 2019, p. 5)

In this sense, Cobo sees that indigenous peoples are not in a ruling position in modern society and they want to maintain, develop, and transmit the inherited lands and ethnic identity to future generations. Their ethnic identity forms the existence of the people as one, the unitary population in harmony with their own cultural practices, social institutions, and legal systems (Cobo, 1987). Cobo's perspective on indigenous peoples has also been included in the ILO No. 169 Convention. It includes Cobo's definition which covers the group- and individual-level definitions of indigeneity. According to the group-level definition, those communities and peoples, who still have a continuous historical connection to the societies preceding colonization, who developed on areas populated by these peoples and who consider themselves as clearly separate from other societal structures currently prevailing in the area, are indigenous (Sarivaara, Maatta, & Uusiautti, 2013).

The Recognition of Indigenous Peoples in the Southeast Asia Region

Due to the various distribution and diversity of indigenous peoples among countries across the globe, the recognition of the rights of indigenous peoples varies from one region to another. Moreover, environmental changes as an impact of the climate crisis have and will continue to

affect indigenous peoples globally. Thus, the recognition of indigenous peoples' rights within the most affected regions has become even more important.

Moreover, environmental changes, including the climate crisis, have and will continue to affect indigenous peoples globally. Thus, the recognition of indigenous peoples' rights within the most affected regions has become more important than ever. Furthermore, we can assume that the position of indigenous peoples and the recognition of their rights is not homogenous within each state's constitutions, despite being in the same region. Even though almost all states in Asia voted for the adoption of the UNDRIP on September 13, 2007, many refuse to respect and implement it. In Southeast Asia for instance, neither Cambodia, Thailand, nor Myanmar recognize indigenous peoples within their constitution albeit the number of indigenous peoples within this region reaching around 20 million combined. The Asian Forum for Human Rights and Development (Forum Asia) even argue that the policy of none of the ASEAN member states "reflects an ethos that celebrates and promotes diversity, or empowers and protects the rights of its national, ethnic, religious and linguistic minorities/nationalities" (Asian Forum for Human Rights and Development, 2007, para. 5).

The non-recognition of indigenous peoples is due to the assumption that all citizens in the country are "equally indigenous", especially in third world countries (Tessier, 2015, p. 45). This assumption, however, is wrong because it ignores the distinction of indigenous peoples from the "mainstream society". It also betrays an underlying assimilationist attitude of the respective state, which is itself an expression of the still prevailing discrimination of indigenous peoples within mainstream society in most nation-states of Southeast Asia (Tessier, 2015). For instance, Isabel Inguanzo, analyzed the situation of indigenous peoples' rights within the legal framework among different countries of Southeast Asia. She concludes that "the analysis shows that it is undeniable that in Southeast Asia the rights of the IPs are poorly recognized" (Inguanzo, 2014, p. 64). Furthermore, Table 1 provides a brief overview of the position of indigenous peoples among countries in Southeast Asia.

Table 1. *Indigenous Peoples in Southeast Asian*

Country	Est. Population of Indigenous Peoples	Constitutional Recognition of Indigenous Peoples	Legal Recognition of Indigenous Peoples
Cambodia	197.000	No. The 1997 Constitution guarantees all "Khmer citizens" the same rights.	Yes. 2001 National Land Law; 2002 Forestry Law; 2009 Policy on Registration and Right to Use of Land of Indigenous Communities; and the 2009 Policy on the Development of Indigenous Peoples.

Indonesia	50-70 million	Yes. 2000 Constitutional recognition of “ <i>Masyarakat hukum adat</i> ” or “Customary law based communities”; and not as indigenous peoples per se.	yes. Implicit, though conditional recognition of some rights of “ <i>Masyarakat hukum adat</i> ” in laws on agrarian reform (Decree 9/2001), agrarian regulations (Act 5/1960), and human rights (Act 39/1999). More explicit recognition in Regulation No. 52 of 2014 on Guidelines for Recognition and Protection of Indigenous Peoples.
Malaysia	3,4 million	Yes. 1957 Federal Constitution recognizes and calls for special protection of the “natives” of Sarawak and Sabah (Article 161A) and the “aborigines” of peninsular Malaysia.	Yes. In Sarawak, the 1958 Sarawak Land Code. However, that code, which recognizes “native customary rights to land”, is improperly implemented and “even outright ignored by the government” (AIPP 2015 <i>b</i> , Lasimbang 2016, 273). Common law in Peninsular Malaysia recognizes Orang Asli customary land tenure. The 1954 Aboriginal Peoples Act continues to be the principal act governing Orang Asli administration
Myanmar	14,4-19,2 million	No. 2008 Constitutional recognition not as Indigenous Peoples but rather as “Ethnic Nationalities” alongside of the dominant ethnic Burmans (see Morton 2017).	Partially. In the 2015 Ethnic Rights Protection Law where Indigenous Peoples are specifically recognized in Article 5, Chapter 4 as “Local Ethnic Nationalities” — the Burmese language term that Indigenous advocates adopted as their official translation of “Indigenous Peoples”; in all other sections of the law, however, they are recognized as “Ethnic Nationalities” alongside of the dominant ethnic Burmans rather

			than as a distinct group (i.e. Indigenous Peoples).
Philippines	12-15 million	Yes. 1987 constitution guarantees the rights of "indigenous cultural communities/indigenous peoples".	Yes. 1997 Indigenous Peoples' Rights Act.
Thailand	1,1-4,3 million	No. Near recognition in an early draft of the 2016 constitution; eventual recognition as "ethnic groups" in an all-inclusive manner that does not recognize Indigenous Peoples as a distinct group.	No. Although the state argues that they are afforded the same legal protections as other citizens of Thailand. Several ministerial decrees from 2010, however, which recognize collective rights to land and culture for "local communities" and certain "ethnic groups," in some cases, have yet to be adequately implemented by the state due to bureaucratic obstacles, political instability, and government turnover

(Source: the data obtained from (Tessier, 2015) and adapted from (Morton, 2017))

International regimes or broader functions of the international organization actually have an important role in promoting the rights of indigenous peoples as well as their recognition. It is because such a regime has the ability to call governments – or at least give them pressure – to recognize indigenous peoples' rights. Unfortunately, in the Southeast Asia region, indigenous peoples remain invisible in ASEAN through its Human Rights Declaration (AHRD) or in the work of the ASEAN Intergovernmental Commission of Human Rights (AICHR). This is contradictory to position of AICHR as the core human rights mechanism of ASEAN.

Established in 1967, ASEAN is basically a political and economic entity. The Bangkok Declaration, the founding documents of ASEAN, highlights the commitments of fellow ASEAN members to unite and work together in order to achieve regional stability that can support national developments in all fields. The declaration itself was signed at the time of upheavals, particularly between Indonesia and Malaysia, as well as other actors from outside the region. However, the declaration has no reference to the indigenous peoples or even minorities in general. Later on, when the ASEAN Charter was adopted in 2007, the only indirect reference to indigenous peoples lied in a principle saying that "respect for the different cultures, languages, and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity" (ASEAN, 2007). Nevertheless, since there is no explicit reference to indigenous

peoples, the connection between ASEAN and indigenous peoples – if there is any – remains obscure.

In general, within the ASEAN framework, the AICHR is considered to be the core human rights mechanism with its primary function on interpreting provisions and ensuring the implementation of the AHRD. Such consideration is due to the fact that AICHR has a better position in promoting human rights compared to other mechanisms such as the ASEAN Commission on the Protection of Women and Children (ACWC) or the ASEAN Committee of Migrant Workers (ACMW) because they have a wider and more general mandate. Moreover, the AICHR also falls within the ASEAN's pillar of Political-Security Community – one of ASEAN's three pillars – while the ACWC and the ACMW are within the Socio-Cultural Community.

However, ever since its adoption, the AICHR has been criticized for its terrible implementation in protecting human rights and addressing violations. Rodolfo Severino, the former ASEAN Secretary-General, once stated that, at this stage, it was expected that the AICHR acted merely as an "information center" for human rights protection, and nothing else (Chachavalpongpun, 2018). Nevertheless, despite the constant criticism on its implementation, the AICHR remains to be the only available regional institution working on human rights, particularly on the issues related to indigenous peoples within the Southeast Asia region. There have been gradual changes in making the AICHR – and ASEAN in a broader sense – more inclusive.

Given the lack of both recognition and representation in the intergovernmental body, indigenous people in the Southeast Asia region tend to be in need of organizations such as the Asia Indigenous Peoples Pact (AIPP). Within the region, the AIPP focuses on networking Indigenous Peoples at the grassroots level while also helps in terms of advocacy at the regional and international levels. They have been engaging with ASEAN alongside other civil society organizations. Notably, the AIPP first began to engage with ASEAN following the establishment of the AICHR in 2009. Furthermore, the AIPP initiates Indigenous Peoples Task Force (IPTF) is a place where the Indigenous Peoples organizations within the region gather and prepare for further engagement in ASEAN and other relevant bodies (Wilson, 2020). It is now part of the global indigenous movement with 47 members in 14 countries. It is now in partnership with more than 80 organizations and institutions from local to global levels (Tessier, 2015).

A Comparative Analysis Between ASEAN and the Arctic Council

The Arctic Council was founded in 1996 on the basis of the Ottawa Declaration as its founding documents and function as a unique venue for dialogue between its eight member states along with other participants and observers. The council mainly focuses on the issues of sustainable development and environmental protection while limiting its focus on military issues. As a result, both organizations work on a certain norm instead of referring to legal documents – in ASEAN known as the ASEAN Way. This also leads to similar natures on how both organizations operate.

However, the nature and objectives of ASEAN and the Arctic Council are different resulting in problems on how a consensus mechanism works at a certain level. This cannot be separated from its historical context. ASEAN was formed to promote political and

economic cooperation alongside regional stability. The Arctic Council, however, was preceded by the Arctic Environmental Protection Strategy (AEPS) which was established in 1991 and in essence only focused on the cooperation of environmental protection and sustainable development. As ASEAN's concern involving politics and regional stability, it is more problematic to use consensus compared to the Arctic Council because security issues tend to be seen as zero-sum. In terms of issues regarding indigenous peoples, the mechanism of consensus is an example of a soft-law instrument which arguably "offer[s] indigenous peoples more opportunities to influence the development of international norms than do the international law-making" (Koivurova & Heinämäki, 2006, p. 104)

Within the framework of ASEAN, as the regional organization of Southeast Asia, there is no explicit reference made to the indigenous people despite its keen interest in promoting the cultural and ethnic diversity in the Southeast Asia region. This kind of recognition of indigenous peoples within the ASEAN framework is in contrast with how indigenous peoples are framed in the framework of the Arctic Council. The founding document of the Arctic Council was created with the inclusion of indigenous peoples in mind. The declaration consists of three key paragraphs stating the concerns towards indigenous peoples (Arctic Council, 1996). Those paragraphs are;

"(...) provide means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic Issues (...)"

"The category of Permanent Participant is created to provide for active participation and full consultation with the Arctic Indigenous representatives within the Arctic Council"

"(...) desiring further to provide a means for promoting cooperatives activities to address Arctic issues requiring circumpolar cooperation, and to ensure full consultation with and the full involvement of indigenous peoples and their communities (...)"

These paragraphs illustrate that indigenous peoples are allowed to participate as "Permanent Participants" within the Arctic Council. Instead of being represented by their national states at the council, they have the right to represent themselves. This recognition gives indigenous peoples "full consultation right on all proposals set forward by the member states even though final decisions are made by the Arctic State" (Blåhed, 2018, p. 5). It means that, legally, indigenous peoples in the Arctic can negotiate on the same table with the Arctic states and may table proposals for decisions. The position of indigenous peoples within the Arctic Council is argued to be a good example of how to include indigenous communities into the international policy-making arena. Thus, it is believed that if other regions followed by adopting the council's approach, there would be an improvement in the representational status of indigenous peoples (Koivurova & Heinämäki, 2006).

The recognition of indigenous peoples as a "permanent participant" is actually a follow-up of the objectives of the AEPS. Essentially, the AEPS was built on the idea of protecting vulnerable Arctic ecosystems from human-induced pollution, both from within the region and,

perhaps more importantly, from outside of it (Koivurova, 2010). The AEPS has five objectives in which the second objective states that the purpose of AEPS is “[t]o provide protection, enhancement, and restoration of environmental quality and the sustainable utilization of natural resources, including their use by local populations and indigenous peoples in the Arctic” (Young, 1991, p. 1). In the first phase of the cooperation, indigenous peoples were entitled to the observer position as provided in the AEPS: “[i]n order to facilitate the participation of Arctic indigenous peoples the following organization will be invited as observers...” (Young, 1991, p. 2). The establishment of the Arctic Council, therefore, clarifies and enhances the status of the Arctic indigenous peoples as a political actor within the region.

The decision to recognize and give the indigenous peoples of the Arctic a right to be a political actor is due to the consideration that indigenous peoples are the experts of their own condition. The focus of the Arctic Council on sustainable development is given to the indigenous people due to their traditional knowledge of the Arctic Region. It is stated in the Ottawa Declaration to affirm “the traditional knowledge of the indigenous people of the Arctic and their communities” and to take note “of its importance and that of Arctic science and research to the collective understanding of the circumpolar Arctic.” This, therefore, gives a significant influence on the matters concerning environmental issues. Furthermore, permanent participants of the council worked together in 2015 to create the Ottawa Traditional Knowledge Principles to provide guidance for the use of indigenous peoples’ knowledge.

The position of indigenous peoples within the Arctic Council is by any means have their own shortcomings. Indeed, the Permanent Participants are invited to negotiate on the same table alongside Council’s member states, they are also invited into the Working Groups, Task Forces, and Expert Groups. Nevertheless, Permanent Participants are often deliberately excluded when it comes to legal and jurisdiction matters. Some even argue that despite having the status of Permanent Participants, the inclusion of indigenous peoples in the policy-making is limited on the ‘soft’ areas of policy but not the ‘hard’ areas of policy such as land ownership (Koivurova & Heinämäki, 2006). In other words, although Permanent Participants are included in the policy-making, they do not set rules and procedures by which the council operates. It could not be made possible, would they want to engage in matters of hard policy (Blåhed, 2018).

The drawbacks of the Arctic Model are caused by state-centrism in international relations. The state-centric frameworks adopted by the Arctic Council, as also used by other regional organizations, are visible as member states hold the decision-making powers. The member states are also entitled to take turns in leading the council through the rotating two-year chairmanship and have the veto rights at the Ministerial Meeting, unlike the Permanent Participants. These roles and rights gave the member states certain opportunities and influence that the Permanent Participants do not have. It also explains why the indigenous peoples’ participation through the Permanent Participants is often limited in the ‘soft’ areas or low politics as the member states have bigger power and influence within the council. Furthermore, Permanent Participants are not having equal resources as the member states. For instance, lack of funding and human resources are affecting the attendance rate of Permanent Participants which further considered to be the drivers of low representation of the Permanent Participants.

As the drawbacks in the Arctic Model are mainly caused by the state-centric institutional frameworks of the regional organization, the most feasible modification is introducing an alternative to the funding of the IPs representation within the organization (Permanent Participants in the council). Nevertheless, by having a legal position within the Arctic Council framework, the proactive measure taken by the council of each indigenous community could influence national behavior in international forums. Indigenous peoples' activism within the region has been an important background factor in establishing the procedures of the Arctic Council. If we compare such activism of indigenous communities within ASEAN in which they do not have the same level of recognition, the results would be starkly different. Arctic indigenous peoples have provided important experiences and models for other indigenous peoples around the world. Through the council, Arctic indigenous peoples have been able to participate at a transnational level to express their interest and rights. This is an important step towards alternative sovereignty and self-determination. The Arctic model, in terms of recognizing the indigenous peoples, could be used in other regions of the world. It could possibly solve the current anomaly that indigenous peoples participate as and through NGOs in the whole global policy-making.

Conclusion

ASEAN and the Arctic Council have a similar mechanism on how both institutions operate. However, indigenous peoples in the Arctic region are now in a better position within the framework of the council compared to their Southeast Asian counterparts. Indigenous peoples in Southeast Asia are barely referred to in any of the ASEAN documents. Despite having its own mechanism within the body of ASEAN, indigenous peoples are still heavily relying on civil society organizations alongside other non-government organizations to accommodate both their rights and needs. The aforementioned mechanism, such as the AICHR, seems to be incapable of promoting – let alone guaranteeing – the rights of indigenous peoples.

In contrast, the Arctic Council has been successful in at least recognizing the indigenous peoples while also has contributed to a new way of perceiving how indigenous peoples should be involved in global policy-making processes. Arctic's indigenous people have equal rights with the member states to negotiate at the same table. To be recognized as an equal actor within the political system, indigenous peoples activism in the Arctic is more likely to meet a better outcome. Therefore, it is believed that if other regions followed by adopting the council's approach, there would be an improvement in the representational status of indigenous peoples. The model implemented by the Arctic Council could be used particularly ASEAN due to the similarity of how both institutions operate. Such model would help the indigenous peoples in Southeast Asia to participate as a political actor within ASEAN while also participate through civil society organizations or non-governmental organizations in the whole global policy-making.

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The Execution of Bankrupt Assets in the Case of Cross-Border Insolvency: A Comparative Study between Indonesia, Malaysia, Singapore, and the Philippines

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Abstract

Insolvency institutions have an important role in realizing legal certainty in the settlement of debt and credit disputes, which is one of the risks that arise from the rapid development of international business transactions. Bankruptcy cases containing foreign elements are called cross-border insolvency. The problems that arise in cross-border insolvency are more complex, especially regarding the execution of assets of bankrupt debtors situated outside Indonesia's jurisdiction. This study uses a doctrinal legal research method with a statutory approach. Bankruptcy in Indonesia is regulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. In this law, the execution of assets of bankrupt debtors outside the jurisdiction of Indonesia has not been regulated so that the curator as the body appointed to carry out the execution cannot carry out the task as mandated by the law. The non-executable assets of the bankrupt debtor outside the jurisdiction of Indonesia have caused the bankruptcy estate (*de boedel*) ineffective; therefore, creditors do not receive a maximum payment related to debtor's debt. For this reason, Indonesia needs to adopt the UNCITRAL model of law on cross-border insolvency or to make bilateral and/or multilateral agreements that are reciprocal in nature related to the execution of bankrupt debtors' assets located outside Indonesia's jurisdiction.

Keywords: Cross-Border Insolvency; Bankruptcy Law; Southeast Asia; Execution

Introduction

In the era of globalization, trade is no longer only carried out within one country, but can also be carried out between countries, known as international trade or international business. In the contemporary context, cross-border shopping is one of the most popular trends in people's consumption practices in the border areas of neighboring countries (Stepanova & Shlapenko, 2018). The rapid pace of international business transactions means that national borders are no longer an obstacle in conducting business transactions. International business transactions are business transactions involving foreign elements, such as cross-border business actors. International business relations are activities aimed at obtaining profits carried out by business actors containing foreign elements (crossing national borders/involving more than one legal system of different countries) (Aminah, 2019).

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An accounts-payable agreement is a familiar model in international business transactions. The agreement regulates the parties' rights and obligations, namely the debtor and the creditor. If the parties do not set a deadline for performance implementation, the agreement must firstly be invoiced. If the performance implementation is not made immediately, a proper grace period is required for the debtor to carry out the agreement (Sudjana, 2019). This is important to consider that in business there are risks that cannot be eliminated. One of the business risks that often occurs is when the debtor is unable to fulfill his obligations, in this case, to return the loan according to the initial agreement.

In this context, bankruptcy law plays its role. Bankruptcy is a process in which a debtor who has financial difficulties is declared bankrupt by a court, in this case a commercial court because he is unable to pay his debt (Asnil, 2018). The provisions regarding bankruptcy in Indonesia are regulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter Bankruptcy Law). According to Article 1 point 1 of Bankruptcy Law, bankruptcy is defined as "general confiscation of all the assets of the bankrupt debtor whose management and settlement are carried out by the curator under the supervision of a Supervisory Judge."

Each country that has bankruptcy laws will certainly apply this positive law in solving a bankruptcy case. However, in cross-border bankruptcy cases, there is more than one bankruptcy law becoming the variable (Amalia, 2019). Bankruptcy involving foreign parties or business actors that are cross-border is known as cross-border bankruptcy. In English, it is used with several terms, namely transnational bankruptcy, cross-border bankruptcy, transnational insolvency, and cross-border insolvency. In addition, it is also called international insolvency (Sjahdeini, 2016). The possible application of more than one bankruptcy laws from different countries causes cross-border insolvency becomes more complex than bankruptcy in general.

One of the difficulties in cross-border insolvency is the difficulty in implementing the execution of the bankruptcy debtor's assets abroad because it deals with the jurisdiction of other countries. Therefore, it is necessary to pay attention to the laws of the other countries where the bankruptcy assets are located. Historically, most legal systems have developed on a territorial basis, and this also applies in relation to bankruptcy (Imanullah, Latifah, & Ratri, 2018). In fact, Bankruptcy Law in Indonesia has not regulated cross-border insolvency, namely the execution of bankrupt debtor assets located outside the territory of Indonesia. In addition to the vacuum of norm on the execution of debtor assets outside the territory of Indonesia, the State of Indonesia also adheres to the principle of territoriality so that bankruptcy decisions only apply and have execution power in Indonesian jurisdiction and do not apply and do not have the power of execution beyond its jurisdiction. In addition, this is also related to the sovereignty principle adopted by countries in which each country has a legal sovereignty that cannot be penetrated or challenged by the laws of other countries.

The vacuum of norms regarding cross-border insolvency in Indonesia will certainly open opportunities for rogue business actors who will ultimately injure the sense of fairness for parties who use the bankruptcy route to solve their debt problems. Thus, the bankruptcy institution will lose the public trust because it cannot provide legal protection and certainty for the parties. Several neighboring countries, such as Malaysia, Singapore and the Philippines, have given serious attention regarding the problem of cross-border insolvency. Accordingly,

their bankruptcy law has been improved considerably in order to find a solution related to the cross-border insolvency, namely the execution of bankrupt debtor's assets abroad.

Therefore, this article aims at discussing the state of Indonesian Bankruptcy Law concerning the execution of bankrupt assets located outside its jurisdiction. In doing so, a comparative study with other neighbouring countries, such as Malaysia, Singapore and the Philippines would be employed in order to provide a lesson learned how they deal with the issue.

Literature Review

The role of the bankruptcy institution is basically very important to ensure that the parties, namely debtors and creditors, receive fairness from the bankruptcy process. According to Edward A. Haman (2005), bankruptcy is a legal procedure that debtors can use to get out of debt and restart their business (Haman, 2005). Bankruptcy is also regarded as a constitutional right (Ventura, 2004). Bankruptcy legal instruments are very important, namely as an institution that provides justice for the distribution of assets of bankrupt debtors to their creditors and a "fresh start" for debtors, namely as a new start financially for debtors who no longer have the ability to pay their debts to their creditors. Bankruptcy is actually one way to resolve debt disputes.

Since 2013, there have been many cases of debtor's assets abroad which have caused the curators difficult to take over those assets. Since 2013, the ASEAN Cross-Border Insolvency Regulation has proclaimed for the purposes of the bankruptcy process in ASEAN countries, but unfortunately but there has been no meaningful realization (Aritonang, 2012). If this matter is not regulated, there are a number of difficulties for both Indonesian and foreign parties in filing a bankruptcy case before a competent court as well as in executing the assets. This is related to the existence of state boundaries or the sovereignty of a country. Cross-border bankruptcy is a term used to describe a situation in which a bankrupt debtor has assets and/or creditors in more than one country (Commonwealth of Australia, 2002).

On January 30, 1998, the United Nations Commission on International Trade Law (UNCITRAL) adopted a framework for bankruptcy across borders known as the Model Law on Cross-Border Insolvency (MLCBI). The UNCITRAL Legislative Guide on Insolvency Law provides a reference for national authorities and legislative bodies in preparing new laws and regulations or reviewing existing laws and regulations regarding bankruptcy across national borders. Sections one and two of the UNCITRAL Legislative Guide on Insolvency Law were completed in 2004 discussing the main objectives and effectiveness of the insolvency/insolvency law. The third part of the UNCITRAL Legislative Guide on Insolvency Law was adopted in 2010 and focused on groups of companies that are under insolvency, both nationally and internationally. Part four of 2013 focuses on the obligations of corporate decision-makers in insolvency. The UNCITRAL Legislative Guide on Insolvency Law provides a detailed set of legislative recommendations, covering various options and approaches.

Methods

The research method used in this article is doctrinal legal research with a statutory approach. In this approach, legal norms need to be understood as a hierarchical arrangement (Marzuki, 2017). This approach looks not only at the form of legislation, but also at the content of the norms, the philosophical basis of the norms, as well as the ratio legis of the provisions of the norms (Marzuki, 2017). In this regard, Terry Hutchinson puts: "if you know the name of one Act, then you should be able to use this piece of information to locate: 1) An updated version of the Act and any amendments through the annotations: Cases discussing the legislation through the annotations and encyclopedias. 2) you will be using existing knowledge to link to further information relevant to your subject" (Hutchinson, 2002).

This study examines the voidness of norms related to the problems of cross-border bankruptcy mechanisms and procedures, which include the implementation of foreign bankruptcy decisions and the execution of bankrupt debtor assets outside the jurisdiction of Indonesia. Basically, according to Article 431 Rv., court decisions in Indonesia are only valid and have the power of execution in Indonesian territory and the decisions of foreign court judges are not binding and are not recognized in Indonesia. Referring to this article, decisions of foreign courts are not recognized in Indonesia as well as bankruptcy decisions in Indonesian courts are not recognized abroad so that curators cannot execute debtors' assets outside the jurisdiction of Indonesia. A country is allowed to carry out the execution of a bankruptcy decision from another country if there is an international agreement between the two countries, either a bilateral or a multilateral agreement, and has bankruptcy rules governing it.

Results and Discussion

Cross-Border Insolvency in the Execution of Bankrupt Assets in Indonesia

Chapter II Part X of Indonesian Bankruptcy Law stipulates cross-border insolvency briefly in the Provisions of International Law, namely Article 212, Article 213, and Article 214. However, those three articles do not clearly regulate the bankruptcy procedure across national borders. The unregulated mechanisms and procedures include the implementation of foreign bankruptcy decisions and the execution of bankrupt debtor assets located abroad.

Article 212 of Bankruptcy Law stipulates that creditors who, after pronouncing the declaration of bankruptcy, take full or part of their receivables in full from the assets including bankruptcy which are located outside the territory of Indonesia, which are not bound to them with the right to take precedence, are obliged to replace all bankruptcy assets what they have received. Furthermore, in Article 213 paragraph (1) Bankruptcy Law stipulates that creditors are transferring all or part of their receivables from the bankrupt debtor to a third party, with the intention that the third party takes full or part of the receivables from the assets included in the bankruptcy located outside the territory of Indonesia, it is obliged to replace the bankruptcy assets with what they have. However, what is stipulated in Article 213 paragraph (1) there is an exception in Article 213 paragraph (2), namely if it is proven otherwise, any transfer of accounts receivable must be deemed to have been carried out in accordance with the provisions referred to in paragraph (1), if the transfer is carried out by the creditors and they

know that a bankruptcy statement has been or will be filed. Article 214 of Bankruptcy Law stipulates that every person who transfers all or part of his receivables or debts to a third party, who, because of this, has the opportunity to meet debts outside the territory of Indonesia which is not permitted by this law, is obliged to replace them with bankrupt assets.

The provisions of international law in Bankruptcy Law only regulate the transfer of objects including bankruptcy assets located outside the territory of Indonesia and the transfer of all/part of debts/receivables to third parties to meet debts outside the territory of Indonesia. In the section on International Law in Bankruptcy Law, it is still unclear about the mechanisms and procedures for cross-border bankruptcy related to the implementation of foreign bankruptcy decisions and the execution of debtor's assets that are included in bankruptcy boards located abroad.

In principle, the embryo of cross-border insolvency is stated in Chapter II Part X concerning Provisions on International Law of Bankruptcy Law. However, regarding the implementation of the rule, it is still lack of norms related to the execution of bankrupt debtor's assets that are outside the jurisdiction of Indonesia. The reasons for the inability to execute the assets of the bankrupt debtor that are outside the jurisdiction of Indonesia are as follows:

1. Article 431 of the Code of Civil Procedures (*Reglement op de Rechtsvordering/Rv*) basically regulates:
 - a. Court decisions in Indonesia are only valid and have the power of execution in Indonesian territory;
 - b. Therefore, it has no power of execution abroad;
 - c. Likewise, *vice versa*, decisions of foreign court judges are not binding and are not recognized in Indonesia.

Referring to Article 431 of the Code of Civil Procedure, the curator cannot execute the debtor's assets that are outside the jurisdiction of the Republic of Indonesia.

2. The principle of territoriality adhered to by the Indonesian nation:
Mukesh Chand (2018) in his writing entitled *Cross-Border Insolvency: From Territorialism To Universalism To Modified Universalism* explains as follows:

As the term itself explains, "territorialism" is based on the principle of supremacy of local jurisdiction and recognizes multiple proceedings operating in different and diverse national systems and leads to a "divided administration of debtor's insolvency". This limits the effect of insolvency of an enterprise to the local limits of the country where insolvency proceedings are initiated. It does not recognize or give effect to the proceedings initiated in other countries. This principle is based upon states' sovereignty and vested rights of local players. Under this system action may be initiated against a debtor and its assets independently in deferent countries where such assets might be located. Due to emphasis on localism, this system is also sometimes called "Grab Rule" as different legal systems apply their own law in respect of a single debtor with no regard to proceedings in foreign states. Thus, it practically deglobalizes the business and fails to work for collective benefit of stakeholders and totally disregards the fact that even a domestic enterprise may have assets and financial transactions and creditors in many jurisdictions across many countries (Chand, 2018).

In Bankruptcy Law, according to this principle, bankruptcy only concerns parts of the assets located in the country's territory where it is pronounced. In essence, a bankruptcy decision pronounced abroad does not have legal consequences in the country (Gautama, 2013).

3. The principle of sovereignty adopted by countries, meaning that each country has a legal sovereignty that cannot be penetrated or challenged by the laws of other countries.
4. The dual principles adhered to by Bankruptcy Law in Indonesia.
The bankruptcy law in Indonesia adheres to two principles, namely the principle of universality and the principle of territoriality. The principle of universality, bankruptcy law in Indonesia is the implementation of *paritas creditorium* principle as stipulated in Article 1131 of the Civil Code and the principle of *pari passu pro rata parte* in Article 1132 of the Civil Code. Article 1131 of the Civil Code is reflected in the principle of universality of all assets belonging to the debtor, which is a guarantee for repayment of debts to creditors, in which the scope of the material area in question includes all assets belonging to the debtor wherever the assets are located, both within the territory of Indonesia and outside the territory of Indonesia.

Further implementation of the universal principle can be seen through the arrangement of "provisions of international law", Articles 212-214 of the Bankruptcy Law which are a legacy of the *Faillissements-Verordening* arrangement (Stb. 1905-217 jo. Stb. 1906-348). The regulation of the universality principle in the Bankruptcy Law is to provide legal protection and certainty for creditors' economic rights to obtain payment of receivables from bankrupt debtors through general confiscation of all assets belonging to bankrupt debtors, including assets that are outside the territory of the Indonesian State. Therefore, with the application of the principle of universality in the Bankruptcy Law, the decision on the bankruptcy of the Commercial Court in Indonesia should be enforced not only within the territory of Indonesia but also outside the territory of Indonesia. In practice, this is constrained by the sovereignty factor of the state (sovereignty) which hinders the application of the universality principle. The same thing is stated by Jerry Hoff that: "[o]bviously, this principle is limited by the concept of sovereignty; the powers and authorities of the Indonesian receiver under the Bankruptcy Law can be exercised in a foreign country only if the laws of the country in which the receiver attempts to exercise them allow it" (Gautama, 2013, pp. 302-303).

The second principle is the principle of territoriality. In the legal system in Indonesia itself, the decisions of foreign judges cannot be directly implemented within the territory of the Republic of Indonesia, especially the decisions of foreign judges which are condemnatory (sentencing). This also has an impact on the bankruptcy decision of judges in Indonesia who are unable to execute the assets of bankrupt debtors abroad. This thing appears because it is considered a violation of the principle of state sovereignty as an independent and sovereign state. This is due to the enactment of the "principle of territoriality" or "principle of territorial sovereignty" which requires

that decisions made abroad cannot be directly enforced in other areas on one's own authority. Therefore, one side of the Bankruptcy Law adheres to the principle of universality and on the other hand, territoriality. However, if the principle of universality and the principle of territoriality collide, then what applies is the principle of territoriality, this is what causes the execution of the assets of the bankrupt debtor who is abroad cannot be executed.

The vacuum of norms related to the implementing rule of cross-border insolvency in the Bankruptcy Law in Indonesia is certainly an urgent matter to find a solution, given the increasingly rapid development of international business and trade. A country is allowed to carry out the execution of bankruptcy decisions from other countries if there is a bilateral or multilateral agreement between these countries. The countries that have made bilateral agreements in facilitating cross-border insolvency are Malaysia and Singapore, then the Netherlands and Belgium through the signing of the Netherlands-Belgium Treaty regards, an agreement to mutually recognize and mutually acknowledge and implement the bankruptcy decision. Countries that have entered into multilateral agreements are the European Union (EU). Hence, EU countries that are members of the multilateral agreement can execute the assets of the debtors in the member countries of the agreement which are decided bankrupt by the court.

Cross-Border Insolvency in Malaysia, Singapore and the Philippines

The United Nations Commission on International Trade Law (UNCITRAL) has issued a breakthrough to overcome and anticipate problems in cross-border bankruptcy cases. It is undertaken by issuing a Model Law, namely the Law on Cross-Border Insolvency with Guide to Enactment, which several countries have adopted since 1997 (Mason, 1999). The model law's stated purpose is to provide effective mechanisms for dealing with cases of cross-border insolvency. The interpretation of the model law is to assist with the promotion of the following objectives which are contained in its preamble:

- (a) cooperation between local and foreign courts and other competent authorities involved in case of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximisation of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Neil Hannan (2017) explains the four main concepts in the UNCITRAL model of law on cross-border insolvency as follows:

The model law is premised on four primary concepts: access, recognition, relief and cooperation. The model law in general has three key elements:

- (a) It provides for expedited control of the debtors' local assets and their protection from unilateral actions by creditors.
- (b) It then gives the local court considerable discretion to grant all sorts of relief to an administrator from a main foreign proceeding.
- (c) The discretion is accompanied by a statutory mandate to cooperate subject to ensuring that the debtor and its creditors are adequately protected (Hannan, 2017)

UNCITRAL Model Law on Cross-Border Insolvency focuses on four key elements in dealing with transnational bankruptcies (CBI cases): access, recognition, relief (assistance), and cooperation. Regarding the problem of cross-border insolvency in Indonesia, these elements can be adopted according to the legal needs of our country or ratify the provisions of the law model.

Cross-Border Insolvency in Malaysia

Bankruptcy in Malaysia was first regulated in the Insolvency Act 1967 (*Akta Kebankrapan 1967*) which was based on the UK Bankruptcy Act, namely the Bankruptcy Act of England 1914. However, since 1967 there have been several amendments to the bankruptcy law in Malaysia.

The 1967 Bankruptcy Act is the main law, but it is not the only law regulating bankruptcy in Malaysia. There are various other laws, namely the Malaysian Limited Liability Company Law known as the 1965 Syarikat Act, which regulates companies' inability to pay debts (insolvency) due to the company's inability to pay debts. According to the 1965 Syarikat Act, if the debtor is unable to pay the debt, the bankruptcy notification may begin. Although the 1965 Company Act is based on the UK Bankruptcy Act, namely the Bankruptcy Act of England 1914, there are differences between them. In Malaysia, individual bankruptcy and corporate insolvency are governed by separate laws. Individual bankruptcy is regulated in the 1967 Bankruptcy Act, while the company's insolvency is regulated in the 1965 Syarikat Act (Wijayanta, 2016). The most recent Bankruptcy Act is the Bankruptcy (amendment) Act 2017.

The Bankruptcy (amendment) Act 2017 basically does not regulate bankruptcy across national borders, except in cross-border bankruptcy cases with Singapore. The international cooperation carried out by Malaysia with Singapore in the cross-border bankruptcy sector is partly due to the similarities in the two countries' bankruptcy laws, which are mostly adapted from British law, the United Kingdom Bankruptcy Act 1883 (Omar, 2008). This bilateral cross-border bankruptcy cooperation between Malaysia and Singapore can also be seen in Article 105 which regulates the cancellation of the bankruptcy order by stating: (1) where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the bankruptcy order; (2) where a bankruptcy order is annulled under this section, all sales and dispositions of property, and payments are first made, and all acts thereto done by the Director General of Insolvency, or other person acting under his authority, or by

the court, shall be valid, but the property of the debtor adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order; (3) notice of the order annulling a bankruptcy order shall be forthwith gazetted and published in at least one local paper; (4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court.

Cross-Border Insolvency in Singapore

Singapore has become the 42nd state to implement UNCITRAL's Law on Cross-Border Insolvency Model. The 2017 Singapore Companies Act (Amendment) facilitates the recognition of the cross-border insolvency process in Singapore. According to Prakash Pillai and Junxiang Koh (2017), "[u]nder the Model Law, a foreign representative can apply to the Singapore High Court for recognition of foreign insolvency proceedings. The application must be accompanied by: (a) a certified copy of the decision commencing the foreign insolvency proceedings and appointing the foreign representative; and (b) a statement identifying all insolvency proceedings in respect of the debtor that is known to the foreign representative" (Pillai & Koh, 2017, p. 1).

The Singapore Companies (Amendment) Act 2017 has introduced the UNCITRAL Model Law on Cross-Border Insolvency into Singapore law. This provision facilitates the recognition of the cross-border bankruptcy process in Singapore and introduces new legislative tools to rescue distressed companies (Minjee, 2019). Article 354A states in this division that "Model Law" means the UNCITRAL Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on May 30, 1997. The Tenth Schedule Sections 354B and 354C UNCITRAL Model Law On Cross-Border Insolvency The Singapore Companies (Amendment) Act 2017 states the following:

The purpose of this law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of —

- (a) cooperation between the courts and other competent authorities of Singapore and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximisation of the value of the debtor's property; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Prior to the application of the Model Law, applications for the foreign insolvency process are finalized on a case by case basis. Singaporean courts are not required to recognize foreign insolvency proceedings unless the Singapore government has a bilateral agreement on this

(bilateral bankruptcy agreement between Singapore and Malaysia). According to S. Chandra Mohan (2012), "[i]n addition, a series of regional insolvency agreements, treaties and conventions have provided consenting States a basis to deal with cross-border issues that may arise between them" (Mohan, 2012). After adopting the Law on Cross-Border Insolvency Model from UNCITRAL into the Companies Law (Amendment) 2017, Singapore facilitates the recognition of the cross-border insolvency process in Singapore.

Cross-Border Insolvency in the Philippines

The Philippines Bankruptcy Act was first promulgated in 1909. This provision represented a modernization of law in the Philippines. The Bankruptcy Act of 1909 attempted to amend the Corporation Code and Securities Act (Torrijos, 2012). In its journey, the Philippines has two main laws, namely the Insolvency Law 1956 and Presidential Decree 902 as amended and known as the Rules of Procedure on Corporation Rehabilitation. The Philippines Congress then began discussions on the Corporate Recovery Act which aims to streamline the bankruptcy regime in the Philippines (Sjahdeini, 2016).

The provisions of cross-border bankruptcy in the Philippines have basically accepted and respected the jurisdiction of foreign courts. This can be seen in the provisions in Section 140 on Initiation of Proceedings. The court shall set a hearing in connection with an insolvency or rehabilitation proceeding taking place in a foreign jurisdiction upon the submission of a petition by the representative of the foreign entity that is the subject of the foreign proceeding. The court will hold a hearing in connection with bankruptcy or a rehabilitation process taking place in a foreign jurisdiction, after filing a petition by a representative of a foreign entity that is the subject of a foreign legal process.

The bankruptcy rule that is enforced in the Philippines, which is one of its articles regulates the possibility for judges of that country to be able to enforce judicial decisions of foreign countries without having to carry out relocation, if the decision is considered feasible to be immediately implemented in the jurisdiction of the country (Simanjuntak, 2015). In connection with the issue of recognition, the Philippines considers unilateral discretionary legislation as an effort to reform their bankruptcy legal instruments. The Philippines is currently preparing several drafts of legal instruments related to corporate rehabilitation, known as the Corporate Recovery Act (CR Act).

The development of international business is accompanied by the need for accommodative laws as well as bankruptcy law. The execution of bankrupt debtor's assets abroad would not have been possible if there is no law regulated cross-border insolvency in Indonesia. As mandated by the Bankruptcy Law, the curator has the main task of carrying out the sale and settlement of bankruptcy boards. The meaning of the word "settlement" in the context of bankruptcy law based on the Bankruptcy Law is to liquidate bankruptcy assets. The curator in the process of clearing bankruptcy assets adheres to the principle of cash is the king, in which the curator must liquidate the bankruptcy assets (in the sense of selling all bankruptcy assets, to be distributed to creditors in accordance with applicable regulations) (Jonifianto & Wijaya, 2018). However, in the absence of arrangements for procedures and procedures for

executing the assets of a bankrupt debtor outside Indonesia's jurisdiction, this main task is hampered and cannot even be carried out.

Bankruptcy debtor's assets outside Indonesia's jurisdiction cannot be executed, of course, will have an impact on ineffectiveness of the bankruptcy estate which will be shared with creditors in accordance with the principle of *pari pasu pro rata parte*. This is very detrimental to creditors, especially if debtors take advantage of the existing legal loophole by deliberately making investments or transferring assets abroad. Thomas H. Jackson and Robert E. Scott (1989) state that: "finance theorists have a long recognized that bankruptcy is a key component in any general theory of the capital structure of business entities. Legal theorists have been similarly sensitive to the bankruptcy law's substantial allocational and distributional effects (Jackson & Scott, 1989).

The practice of collecting debt and liquidating bankruptcy assets is ineffective and costly. On the other hand, creditors are not always able to obtain maximum payment of their debt only by liquidating bankruptcy assets. In fact, not infrequently, when a debtor is declared bankrupt, no debtor's assets can be executed for payment of his debt. This condition, known as a common pool, is a condition in which the accumulated claims of creditors cannot be paid from the existing bankruptcy assets because the debtor's liabilities are greater than the value of the assets. To avoid this common pool condition, the efficiency of managing and resolving bankruptcy assets must be increased with the main focus on increasing or accumulating the value of bankruptcy assets and at the same time reducing bankruptcy costs in the best manner agreed by creditors. For this purpose, bankruptcy law as a collective debt payment instrument or collectivized debt collection service should ideally be aimed at providing maximum payment to each creditor by making the best efforts applicable to bankruptcy assets (the best use of the common pool). This best effort can be achieved by bargaining the interests of fellow creditors (creditor's bargaining). In this way, creditors agree to determine the best way to go about increasing the value of the bankruptcy's assets (Jackson, 1986).

To maximize bankruptcy estate, it is necessary to have comprehensive arrangements regarding the execution of bankrupt debtor assets abroad (cross-border insolvency) either by adopting the UNCITRAL model of law on cross-border insolvency as has been done by the Philippines and Singapore or making a bilateral bankruptcy agreement related to execution the assets of the bankrupt debtor who are located outside the country such as that of Singapore and Malaysia. With the existence of regulations related to cross-border insolvency, of course the benefits of bankruptcy institutions can be maximized and legal certainty of the rights of business actors will be guaranteed so that the domestic economic investment climate increases.

Conclusion

The implementation of cross-border insolvency in the execution of bankruptcy assets outside the jurisdiction of Indonesia cannot run optimally because Indonesia adheres to the principle of territoriality. Therefore, the court decisions in Indonesia only apply and have an execution power in Indonesian territory so that they do not have the power of execution abroad. The principle of sovereignty adopted by countries is also an obstacle in implementing cross-border

insolvency. In addition, the implementation of cross-border insolvency in the execution of bankruptcy assets outside Indonesia's jurisdiction cannot run optimally because Indonesia has not adopted the UNCITRAL model of law on cross-border insolvency which is a framework for cross-border insolvency regulations that can be implemented in bankruptcy laws and international agreements in Indonesia and other countries with reciprocal characteristics related to the execution of bankruptcy assets abroad, such as those that have been carried out by Malaysia, Singapore and Philippines.

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Reforming the Tourism Promotion Board for an Effective Tourism Promotion in Indonesia: A Legal Perspective

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Abstract

The Indonesia/Regional Tourism Promotion Board (or I/RTPB) is an agency having duties to assist the development of the tourism sector. Since its establishment, it has not been able to play an optimal role in performing its duties and responsibilities. The purpose of this study is to find out and understand the institutional arrangements for the I/RTPB in the current legislation and to find out and formulate the ideal form of the I/RTPB in accelerating its functions especially for the recovery of the tourism sector in the post-pandemic context. This article uses a doctrinal research method with a statutory approach. The study shows the problem of the provisions on the I/RTPB in the Tourism Law in Chapter X from Article 36 to Article 49. To properly function for the economic recovery after the pandemic, there is a need to restructure the I/RTPB as an independent body with a mandate in the field of tourism promotion.

Keywords: Tourism Law; Board; Tourism Promotion; Recovery; COVID-19

Introduction

To date, the Tourism Promotion Board (hereinafter referred to as TPB), as one of the institutions owning the tasks in the development of the tourism sector, has not been able to play an optimal function in undertaking its duties as mandated by Law No. 10/2009 on Tourism (hereinafter Tourism Law). Amidst the COVID-19 Pandemic, the TPB has not undertaken the necessary measures to address the collapse of the tourism industry in the country. Tourism promotion is very important to restore the tourism sector during the pandemic. Despite the fact that international tourists are unable to travel to Indonesia, domestic tourists may become potential markets to help the tourism sector to recover. In this regard, the role of the TPB is urgently required. Even before the pandemic, the TPB did not play an adequate role in

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advancing the tourism sector, although pursuant to Tourism Law, it is mandated as a supporting agency in the tourism sector to promote tourism and increase national or regional revenues from the tourism sector through innovative tourism promotion programs.

The TPB is specifically regulated in Chapter X of Tourism Law on the Indonesian Tourism Promotion Board in which it should be established at the national level, known as the Indonesian Tourism Promotion Board (hereinafter ITPB) regulated in Articles 36-42, and at the regional level, known as the Regional Tourism Promotion Board (hereinafter RTPB) stipulated in Articles 43-49 of Tourism Law. Despite its firm legal basis, the TPB (both the ITPB and the RTPB) does not necessarily make the TPB a capable agency of having a positive influence to the tourism sector. Moreover, those problems have become more challenging due to the impacts of the Covid-19 Pandemic. As a result of the impact caused by Covid-19 Pandemic, the government has stimulated the tourism sector to bounce back with its various strategic policies. The government also has made various efforts to improve the conditions of the tourism sector to bounce back. Highlighting various efforts to optimize tourism stimulus policies by the government to date, it appears that these policies were issued without the involvement of the TPB in the policy-making process.

When the central and regional governments optimize its role, the TPB will be able to develop and advance the tourism sector. It could also get involved in the making of strategic policies for the development of the regional tourism sector. In fact, the TPB is not given the space to carry out its duties and functions formally as stipulated by law. This is because of the assumption that regional governments could handle tourism matters with the Ministry of Tourism and Creative Economy (thereafter MTCE) only. In fact, the government bodies have not failed to organize the tourism sector both at the central and local levels. Whereas the duties and functions of the MTCE with the ITPB/RTPB in principle a difference as set forth in the respective laws. The differences between them are the MTCE has duties and functions to regulate, control, and make a decision regarding the tourism policies, while the ITPB/RTPB has duties to manage and develop tourism promotion. During the pandemic, for instance, the TPB could have undertaken quick and appropriate measures to help revive the tourism sector if there was support by the governments to carrying out its duties and functions. This has implicated responses of the tourism sector to the pandemic leading to a period of a relatively deep and prolonged recession (Al Faqir, 2020).

This situation reveals how vulnerable the tourism sector is and the government should not let it alone deal with the impacts of the pandemic. This is especially true for tourism-dependent regions like Bali. Hence, now appears to be the right moment for those regions to make changes in their tourism policy implementation strategies becoming more effective and targeted. As mentioned in Tourism Law, tourism concerns economic issues and social, political, cultural, and other (Santosa & Saraswati, 2020). Indeed, tourism is a multi-complex system by linking various interrelated aspects where in recent times, tourism has played an important role as a driving force for community dynamics that affect socio-cultural change (Santosa & Saraswati, 2020). The complexity of tourism as a system should be the cognitive basis for the government to bring various stakeholders in finding solutions and applicable policies facing tourism today.

Governments took various policies in the context of handling a pandemic such as the regional quarantine policy or lockdown, a large-scale social restriction (PSBB) and a local-scale of community activities restriction (PPKM) (Azanella, 2020). However, there has been a concern that such restrictive policies would hit the tourism sector, especially the regions whose regional revenues are highly dependent on the tourism sector. Indeed, tourism-related businesses have been closed down and did not earn enough revenues resulting in terminations of their employees and creating unemployment. Likewise, the slowing down of tourism in those regions has also affected the regional economy in general. In Bali alone, for example, the Covid-19 Pandemic has caused economic losses up to USD 9.7 trillion per month which has a domino effect on other economic sectors in Bali (Rosidin, 2020).

Those regions should take appropriate measures through re-planning and management of tourism. Whereas with the synergy or cooperation formed to manage the tourist attractions of each region, it will be easier to carry out promotions even though it is still in the state of the Covid-19 Pandemic. The interaction as such will be able to involve various stakeholders such as business operators and travel, accommodation and transport for travel as well as observers of the world of tourism and educational institutions as well as a non-profit organization (Fatah & Yuniningsih, 2019).

Therefore, it is important to build partnerships between parties involved in the development of tourism businesses in order to create adequate facilities for marketing tourism destinations in each region by correcting the weaknesses and ambiguities of both the ITPB and the RTPB (Fatah & Yuniningsih, 2019). The weakness and uncertainty could be identified from several respects, namely the position of the ITPB/RTPB in the state administration system, its structure, sources of funding, as well as its duties and authorities. Institutionally, the ITPB/RTPB is not a government agency, but it still has to collaborate with the government to promote the tourism sector (Arifin & Yuningsih, 2019).

The question then is how to be an independent private agency. This is a matter of ongoing debate because not only the fact that the ITPB/RTPB is regulated by the government, especially in relation to its institutional elements, and its funding is also derived from government grants and other legitimate funding contributions. Hence, there have been conflicting provisions governing the ITPB/RTPB which in turn may inform the extent to which it manages to undertake its role and duties stipulated by law. Therefore, it is important to examine these problems in order to be able to resolve these conflicting norms and find solutions that are able to solve the problems of tourism sector development in each area that have occurred so far and are exacerbated by the impact of the Covid-19 Pandemic. Based on the background above, the problem addressed by this article is how the Tourism Promotion Agency should be arranged institutionally for an effective delivery of its objectives.

Literature Review

Tourism is defined differently by different scholars. Asmara (2020), for instance, defines it as a journey from one place to another for recreational purposes. Hunziker and Kraft's 1942 study (as cited in Bedasari, Prayuda, & Saputra, 2020) states that tourism is the whole of activities that arise as a result of the journey of foreigners where they stay temporarily. Burkat provides

another perspective on the definition of tourism, namely the mobility undertaken by people in a short period of time short to a place of interest that is not familiar to where they usually live and work (Haryati & Hidayat, 2019). Legally, tourism has been governed by Tourism Law No. 10/2009 and it defines tourism as "all kinds of activities of travel which are supported by amenities and services and are provided by the public, employers and government both government centers and regions".

Tourism is also able to encourage equitable growth in the development of the region which has the potential of natural and potential history (Putra et al., 2003). Tourism requires promotion that is an activity that aims to inform about a product or service that will be offered to the consumer that in case this is the travelers who made the target market. Promotion is considered as a marketing component (Atiko, Sudrajat, & Nasionalita, 2016; Bahar & Marpaung, 2002). According to Kotler and Armstrong, a promotion will be effective if it meets several elements including: 1) identifying the target market, 2) determining the purpose of communication, 3) designing a message that will be delivered, 4) choosing the media to distribute messages, and 5) measuring promotion results and managing as well as coordinating the communication process (Rachmayanti & Nofharina, 2018).

To date, there have been previous studies on the topic of the tourism promotion board. Fatah & Yuniningsih (2019) for instance, discuss the effectiveness of the Regional Tourism Promotion Board. Bagiastuti (2017) examines the contribution of the Bali Tourism Promotion Board to the development of Bali's tourism industry. Arifin & Yuniningsih (2019) conduct research to examine the effectiveness of the Tourism Promotion Board in Semarang Municipality, Central Java. However, the previous studies mentioned all fall within Tourism Studies. Hence, they tend to ignore the questions of how law, especially the legal substance in Tourism law, has contributed to an ineffective role of the tourism promotion board in achieving its objectives. Hence, this article aims at adding the discussion of the agency in tourism from a legal viewpoint.

Methods

This article is based on a doctrinal legal research method. In this regard, research focuses on analysis-based norms, principles and legal doctrines (Muhammad, 2015). A statutory approach is employed in this article, meaning that legal issues are examined in the light of relevant legal frameworks. In this article, because the legal issues addressed are related to the tourism promotion board, the legal framework used as a reference to examine the board is Tourism Law. Hence, the result of this analysis is presented based on a qualitative model in order to provide a deep understanding of the issues and in turn to provide a recommendation for addressing the issues at stake.

Results and Discussion

The Legal Framework on the Tourism Promotion Board

Efforts to promote the tourism sector will be maximized if relevant stakeholders are involved because the government is not the sole actor in this regard. The existence of synergy between

the government and other stakeholders is a good step to maximize the development program design that will be carried out. Charles Kaiser Jr. and Larry E. Helber's 1978 study (as cited in Aditama & Husni, 2019) emphasize that "the levels of tourism planning start from regional tourism development which includes physical development of tourist objects and attractions." Then an evaluation to the existence of the tourism sector is carried out to see the level of success based on the level of visits and the number of tourists whether they reach the target that has been set priorities. Whereas according to Carlina and Pandoyo that "tourism business is an activity aimed at providing tourism services or providing or commercializing tourist objects and attractions, such as those in Tourism Law on tourism goods businesses and other businesses related to the said sector" (Carlina & Pandoyo, 2020). To maximize these efforts, the government has established several supporting institutions or agencies in the tourism sector. One of them is the TPB (at national and regional levels).

In addition to the ministry dealing with the tourism sector and the local government through its tourism agency, the government is also mandated by Tourism Law to form the TPB. As regulated in Chapter X of Tourism Law, the ITPB should be established at the national level and the RTPB should be established at the provincial and district levels. Through a Presidential Decree No. 22/2011 concerning the Indonesian Tourism Promotion Board (hereinafter Presidential Decree on ITPB), the ITPB has officially been established. The establishment of the ITPB is government's step to spur the advancement of the national tourism industry to compete with other countries.

The RTPB is regulated in the second part of Chapter X of Tourism Law, from Article 36 to Article 49. Accordingly, Article 36 paragraph (1) in relation to Article 43 paragraph (1) states that central and regional governments should facilitate the formation of the TPB to assist the government in implementing strategic development for the tourism sector. Furthermore, Article 36 paragraph (2) in relation to Article 43 paragraph (2) stipulates that the status of the ITPB/RTPB is a private, independent institution. Although the procedures for its formation and structure are regulated by the government, it still has a status as an independent private institution in carrying out its duties and functions. This means that the ITPB/RTPB is not a public agency within government's structure; hence it is expected that it could be managed in accordance with the dynamics in the tourism business and without government intervention.

Consequently, the existence of the ITPB/RTPB could be referred to the doctrine of private legal entities. Rido (2004) notes that there are several criteria for qualifying an entity as a private legal entity, which are: holding separate assets, having a specific purpose and having own initiative and management. Based on such understanding, the ITPB/RTPB as a private institution should have a separated asset and different sources of funding which may include government budgets and other legitimate sources. The ITPB/RTPB has to have specific objectives, namely being an agency capable of maximizing tourism promotion in order to increase government revenues from foreign exchange and to come up with strategic programs for improving the tourism sector in the country. In addition to those objectives, the ITPB/RTPB should focus on their strategic agenda and should not be too influenced by political interests of the government officials, even though the funds may come from the government. In order to become an effective private and independent agency, the ITPB/RTPB should follow the doctrine of private legal entities in its management and operations.

The implementation of the ITPB/RTPB's duties and functions is stipulated by Article 41 paragraph (1) and (2) in relation to Article 48 paragraph (1) and paragraph (2) of Tourism Law. Article 43 governs the relationship between the ITPB and the RTPB in which they shall coordinate with each other to harmonize and unify their perception before undertaking measures to plan and execute their programs. Whereas for the initial establishment, as referred to in Article 43 paragraph (4) of Tourism Law, the RTPB is established or dissolved by a decision of the head of regional governments. This also applies to the TPBI as stipulated in Article 36 paragraph (3) of Tourism Law. If we look at those provisions closely, they appear to be in contradictory to the provisions of Article 36 paragraph (2) and Article 43 paragraph (2) which clearly states that the ITPB/RTPB is a private and independent institution.

If the RTPB is an independent private institution, it should not be established by the government. Still, it should follow the establishment procedure of other private entities such as corporation, which is established and dissolved through an agreement between private actors or through a court ruling. Thus, this normative contradiction has resulted in legal uncertainty of the ITPB/RTPB and then implicated its poor performance. Furthermore, Article 37 in relation to Article 44 of Tourism Law states that the organizational structure of the ITPB/RTPB consists of 2 (two) elements, which are the policy development division to develop adequate strategies for undertaking tourism promotion and the division for the implementation to be responsible to execute the strategies into practice.

The provisions that are no less important regarding the TPBD are in Article 41 paragraph (1) in relation to Article 48 paragraph (1) of Tourism Law regarding the duties. The articles state that the ITPB/RTPB has the following duties: (1) improving the image of Indonesian tourism; (2) increasing foreign tourist visits and foreign exchange earnings; (3) increasing domestic tourist visits and spending; (3) raising funding from sources other than the State Revenue and Expenditure Budget and the Regional Revenue and Expenditure Budget in accordance with the provisions of laws and regulations; and (4) conducting research in the context of developing tourism businesses and businesses. Furthermore, Article 40 paragraph (2) in relation to Article 48 paragraph (2) states that the ITPB/RTPB has functioned as: (a) the coordinator of tourism promotion carried out by the business world at the central and regional levels; and (b) the partner for the national and regional governments

The imposition of the duties and functions of the ITPB/RTPB in Tourism Law can be done optimally when the norms governing the status of the ITPB/RTPB are harmonized with the other provisions on the ITPB/RTPB. This is because there are still discrepancies between Article 36 paragraph (2) *jo.* Article 43 paragraph (2) of Tourism Law, for example with Article 42 paragraph (1) *jo.* Article 49 paragraph (1) of Tourism Law which states that "[t]he source of funding for the Regional Tourism Promotion Board derived from: (a) stakeholders; and (b) other legitimate and non-binding sources in accordance with the provisions of the legislation." In Article 42 paragraph (2) *jo.* Article 49 paragraph (2) of Tourism Law states that "[f]unding assistance originating from the State Revenue and Expenditure Budget and the Regional Revenue and Expenditure Budget is a grant in accordance with the provisions of statutory regulations." The provisions in Article 42 paragraph (1) to (3) *jo.* Article 49 paragraphs (1) through (3) of Tourism Law shows that the ITPB/RTPB still allows government funding through grants for implementing the ITPB/RTPB program. This is because the government forms the

policy development division as a stakeholder in the ITPB/RTPB. Hence, the government has the authority to provide the grant as a funding source for the ITPB/RTPB.

With regard to the status of the ITPB/RTPB, there has been an inconsistency and disharmony between norms in Chapter X of Tourism Law. Despite being designated as a private and independent institution, the government has a strong role in regulating the ITPB/RTPB. This can be seen by the authority of the government to define the term in office for the members of the division of the implementation. The government is also one of sources of funding for the ITPB/RTPB in which the government may play an important influence on the ITPB/RTPB programs and agendas. This has resulted from a vague definition of "private and independent institutions" in the legislation. Therefore, there should be a consistent treatment toward the ITPB/RTPB in which it should be given more autonomy akin to private legal entities to pursue their objectives in developing strategic measures to accelerate the recovery of the tourism sector after the Covid-19 Pandemic.

The Future of the ITPB/RTPB

The status of the ITPB/RTPB whether it should be a public legal entity or a private legal entity is necessary to determine the outcome of its programs. There are several elements of a legal entity, which are "an organization or association of people" that: (a) able to establish legal relations and be able to take legal actions; (b) able to own their assets; (c) having a management structure; (d) having obligations and rights; and (e) capable of filling a lawsuit or to be sued before the court. Furthermore, E. Utrecht describes that the basic division of legal entities between a public legal entity and a private legal entity is based on the division of law between public law and private law (Prasetianingsih, 2014). In line with E. Utrecht's argument, Widjaja argues that "there are several criteria for determining a legal entity as a public legal entity and a private legal entity" (Prasetianingsih, 2014). They include under which law the legal entity is established. If it is established based on the public law, it becomes a public legal entity while if it is established based on private law, it is a private legal entity in which private law applies to it.

In addition, the difference is also defined by the nature of its objectives whether it is established for a public service obligation or for profit-making. A public legal entity is established for undertaking the state obligation to provide public services (Rohendi, 2018). Putra (2018) clarifies that a body is qualified as a public legal entity if it is establishment based on the public law to implement the public policy and is given public powers to regulate and decide the policies. Meanwhile, a private legal entity is established for profit-making. According to the private law doctrine, a private legal entity is an organization or a group of people with certain goals that can carry rights and obligations (Mertokusumo, 2005; Prananingrum, 2014).

Hence, the criteria that form the basis for the qualification are based on whether a legal entity should be put under the domain of public law or private law. Whereas what is meant by a public legal entity is a part of public law that can vertically act unilaterally to carry out public legal functions in its public jurisdiction with all the legal consequences it causes. Private legal entities are included in the field of private law whose personalities are established by individuals or groups of people for the benefit of their parties with all the legal consequences.

Accordingly, the nature of the RTPB should be clarified as soon as possible, whether it is a private institution to carry out public functions in the tourism sector. It can be said that the criteria for determining a private legal entity can be based on the form and purpose of the legal entity itself which usually has certain objectives such as to obtain profit or social purposes. The next criterion is that the legal entity in question is the same as an individual and does not have an authority similar to a public legal entity (Santosa, 2019). The constitutional dynamics and the complexity of peoples' needs have widened the scope of the government in service delivery to its citizens. In order to carry out these functions that are unable to be delivered by traditional public agencies, the government establishes private legal bodies which are given the function of carrying out government civil functions. This basis should be seen as the reason for the establishment of the ITPB/RTPB as a private legal entity but is still supervised by the government directly or indirectly. In order to differentiate its scope within the public or private law regime, a combined opinion is used referring to Article 1653 of the Indonesian Civil Code (Santosa, 2019). In the case of classifying or differentiating the domain between public and private law, a regulation that establishes a legal entity should also clarify the legal status of the entity being established. This is a matter of clarity of purposes as a principle in law-making procedures required by Article 5 letter (a) of Law No. 12/2011 concerning Procedures for the Formation of Laws and Regulations (Putra, 2018). This means that the regulation regarding the position of a legal entity, both public and private, must be clear and firm to ensure legal certainty, not merely as a practical need when it is needed to resolve disputes that question the status of a legal entity.

However, the differentiation of legal entities into public legal entities and private legal entities is not always neatly defined empirically. This is because currently, there have been private legal entities that have the duty to deliver public services. In contrast, to date, there are public legal entities that still carry out their tasks under the domain of private law. Indeed, even the government including its organs (*bestuurorgan*) is also a legal entity (*rechtspersoon*) (Santosa A. D., 2019). In that regard, it is now difficult to divide a legal entity into a public legal entity or a private legal entity conceptually due to the dynamic development of law following the complexity and rapid development of society itself.

The first thing to do for both central and local governments is to conduct a study and then fix the institutional structure of the ITPB/RTPB. Article 37 in relation to Article 44 of Tourism Law has regulated the organizational structure of the ITPB/RTPB consisting of policy development and implementing divisions. It should be noted that the determining elements of the ITPB/RTPB policies are stipulated by a Presidential Decree or a Regional Head Decree as regulated in Article 38 paragraph (2) in relation to Article 45 paragraph (2) of Tourism Law and further provisions related to work procedures and so on are further regulated by ministerial regulations for the ITPB and governor/district head decrees for the RTPB. Meanwhile, the division for the implementation of the ITPB/RTPB is further regulated by the ITPB/RTPB Regulations. This does not show the independent nature of the ITPB/RTPB in determining its organizational structure and programs as a private entity. Hence, it is necessarily to establish a consistent private legal entity for the ITPB/RTPB in order to avoid control and intervention from the government.

Moreover, it is necessary to re-orient the source of funding for the ITPB/RTPB in the previous regulation. This is important in order to ensure sources of funding for the ITPB/RTPB are in line with the status of the ITPB/RTPB as a private entity. The ITPB/RTPB needs to have clear and adequate financing schemes to undertake its duties and functions effectively. However, the sources of financing for the ITPB/RTPB are regulated in Article 42 paragraph (1) and paragraph (2) *jo*. Article 49 paragraph (1) and (2) of Tourism Law. This further creates a tendency in which the ITPB/RTPB heavily relies on the government's funding to undertake its programs.

In reforming the ITPB/RTPB institutionally, the reform can be divided into short-term and long-term agendas. For the short-term agenda, recovering from the Covid-19 Pandemic is essential. The first steps to be fetched for the short-term advice is to hold a Memorandum of Understanding (MoU) between the RTPB regencies/municipalities in each region to hold the Tourism Promotion One Door Regions. Through this One Stop Tourism Promotion activity, it is expected that the tourism promotion policies of each region can be implemented effectively in a joint effort to restore regional tourism after the Covid-19 Pandemic.

Another solution that can be carried out is consistent with the provisions of Article 43 paragraph (3) of Tourism Law. This means that the RTPB at the regional level must coordinate with the ITPB at the national level in order to harmonize and unify perceptions before taking steps to implement the program. This could be a beginning of the formation of a holding entity between the ITPB and RTPB, where the ITPB can become the parent of all RTPB, following a model of holding company in company law. A holding company or group company is an association or composition of legally independent companies, which are so closely related to one another to form a single economic unit but they are subject to the leadership of a holding company as the central leader. This central leadership has the authority to control the subsidiary companies; hence, it is deemed to run the holding company. Based on this explanation, the ITPB maybe rearrange as the central leader for the RTPB in Indonesia.

Meanwhile, for the long-term solution, the RTPB as mandated by Article 43 paragraph (2) of Tourism Law to be an independent private institution must be strengthened in order to perform adequately a private legal entity. Moreover, it is necessary for the RTPB to be given strategic tasks and functions in developing tourism in the region. In doing this, it requires qualified institutional supports. This means that the division for policy development and the division for implementation should be determined internally without government intervention so that they can be occupied by capable and professional personals. Furthermore, there is also a need to provide certainty regarding funding sources and a more concrete funding mechanism from outside of the government. The ITPB/RTPB can improve performance well with adequate funding. Finally, it is important to carry out the institutional reform of the ITPB/RTPB through a revision of Tourism Law by clarifying the status of the ITPB/RTPB as a private organization with a mandate in tourism promotion.

Conclusion

The institutional arrangements for the Indonesian/Regional Tourism Promotion Board is regulated by Tourism Law in Chapter X Article 36 to Article 49. Those articles govern the basis

of the ITPB/RTPB with regard to its position, basic structure, duties and general functions. Those provisions indicate a disharmony of norms, namely in Article 36 paragraph (2) in relation to Article 43 paragraph (2) which states that the ITPB/RTPB is a private and independent institution due to the unclear meaning of "private and independent". It is necessary to provide ideas for solutions related to the formulation of improving the ITPB/RTPB in the framework of the future recovery of the tourism sector in Indonesia. For the short-term solution, such improvement can be done by undertaking a recovery program in various regions affected by the Covid-19 Pandemic. This is done by rearranging provincial and district levels of the ITPB/RTPB in all regions through enacting a Memorandum of Understanding (MoU) to hold a One-Stop Tourism Promotion. For the long-term solution, it is necessary to rearrange the institutional structure of the ITPB/RTPB through an amendment of Tourism Law to clarify the status of the RTPB as a private body with a specific mandate in the field of tourism promotion. In this regard, such a body should consistently follow the rules and doctrines in private law, such as company law.

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