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2nd Quarter Edition

# LOCAL CHAPTER LEGAL WRITINGS

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# *LEGAL WRITINGS*

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# Penyelesaian Kasus Dugaan Suap Airbus kepada Garuda Indonesia Melalui Sistem *Deferred Prosecution Agreement* (DPA)

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## LATAR BELAKANG

Salah satu perusahaan kedirgantaraan terbesar di dunia, yakni Airbus diduga melakukan skandal penyuapan yang telah terjadi pada rentang 2011-2014. Dugaan suap ini dilakukan guna mempermulus penjualan pesawat komersil. Penyuapan ini dilakukan dengan cara melibatkan pihak ketiga tidak resmi dan namanya tidak tercantum dalam nota kesepahaman kontrak pembelian. Beberapa maskapai yang disuap ialah maskapai yang notabene milik Pemerintah, sebagai contoh ialah Garuda Indonesia. Kasus ini banyak diselidiki oleh otoritas antikorupsi yang terdapat di berbagai negara, baik di Asia maupun Eropa.[1] Dalam kasus ini, Airbus dan Rolls-Royce, yang merupakan perusahaan produksi mesin pesawat diduga melakukan suap terhadap mantan Direktur Utama PT. Garuda Indonesia. Tbk. yang sudah dijatuhi pidana dengan hukuman penjara 8 Tahun oleh Pengadilan Negeri Jakarta Pusat dalam Putusan Nomor 121/Pid.Sus-TPK/2019/PN.Jkt.Pst, yakni Emirsyah Satar.

Kronologi kasus dimulai pada tahun 2010 saat Airbus diduga melakukan penyuapan kepada PT. Garuda Indonesia, Tbk. dan PT. Citilink, yakni sebagai berikut :

1. Diantara tanggal 1 Juli 2011 dan 1 Juni 2015, pihak Airbus dengan Garuda Indonesia sudah menandatangani perjanjian pembelian 25 unit Pesawat A320. Namun pada 2015, kesepakatan lebih lanjut mengubah kontrak perjanjian menjadi 15 unit pesawat. Lalu pihak Airbus membayar suap sebesar US$3,3 juta untuk pembelian pesawat untuk Garuda dan Citilink Indonesia.
2. Emirsyah Satar selaku mantan Direktur Utama PT. Garuda Indonesia, Tbk. telah menerima suap total sebesar Rp 46.000.000.000 dari pihak ke-3
3. Perjanjian pembelian terakhir yang relevan adalah tanggal 20 Desember 2012 untuk pembelian 25 unit A320. Pembayaran tersebut dimaksudkan untuk

[1] Ropesgray.com. Four Years and Almost $4 Billion: Airbus Corruption Investigations End with Sky-High Fine. https://www.ropesgray.com/en/newsroom/alerts/2020/01/Four-Years-and-Almost-4-Billion-Airbus-Corruption-Investigations-End-with-Sky-High-Fine . Diakses pada11 Juni 2022

memberi imbalan atas bantuan yang tidak patut oleh karyawan Garuda/Citilink tersebut sehubungan dengan bisnis tersebut.

4. *Serious Fraud Officer* (SFO) menginvestigasi Airbus dan ditemukan adanya pelanggaran atas *UK Bribery Act 2010 section 7* karena telah melakukan penyuapan terhadap pengadaan pesawat Airbus A320 melalui perantara pihak ke-3.
5. Dalam penanganannya, SFO telah menyepakati untuk menerapkan *Deferred Prosecution Agreement* (DPA) dalam penyelesaian kasus ini, untuk meminimalisir kepailitan Airbus akibat dipidana dan untuk menyelesaikan perkara secara singkat, sederhana, dan biaya yang hemat
6. Airbus sepakat untuk membayar denda total €3,6 miliar ditambah bunga dan biaya kepada Pemerintah Inggris.

Akan tetapi pada pelaksanaannya, baik Garuda Indonesia maupun Pemerintah Indonesia belum menerima ganti rugi dari Airbus dikarenakan sebelumnya belum ada kasus dengan penyelesaian DPA seperti ini di Indonesia. Oleh karenanya, perlu dilakukan pembahasan mengenai pelaksanaan DPA di Indonesia



**RUMUSAN MASALAH**

1. Bagaimana pertanggungjawaban pidana korporasi dalam lingkup internasional melalui sistem *Deferred Prosecution Agreement*?
2. Bagaimana mekanisme pelaksanaan *Deferred Prosecution Agreement* di Indonesia?

**FAKTA HUKUM**

1. Penyidikan terhadap kasus penyuapan oleh Airbus telah dihentikan per tanggal 31 Januari 2020 melalui sistem "*Deferred Prosecution Agreement"*. [2]
2. *UK Bribery Act 2010 Section 6* menyatakan penjatuhan pidana terhadap penyuapan kepada pejabat asing.[3]

[2] Admin-acch, "Lingkup Tindak Pidana Korupsi dan Pembuktian Kesalahan Dalam System Pertanggungjawaban Pidana Korporasi di Indonesia Inggris dan Prancis", https://acch.kpk.go.id/en/artikel/paper/48-riset-publik/815-lingkup-tindak-pidana-korupsi-dan-pembuktian-kesalahan-dalam-sistem-pertanggungjawaban-pidana-korporasi-di-indonesia-inggris-dan-prancis . Diakses 20 Juni 2022
[3] *Ibid*

3. *UK Bribery Act 2010 Section 7 (1)* menyatakan terkait pidana terhadap tindakan yang secara sengaja pihak dari airbus melakukan penyuapan pada pihak ketiga tidak resmi pada saat pembuatan nota kesepahaman.[4]
4. *UK Crime and Courts 2013 Section 7* mengatur bagaimana ketentuan dalam pelaksanaan DPA di Inggris.[5]
5. Pasal 2 dan Pasal 3 Undang-Undang Nomor 20 Tahun 2001 tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi, proses DPA tidak dapat dilakukan apabila menyangkut keuangan negara, manakala sebuah kasus melibatkan tindak pidana korupsi, maka hanya sebatas pada tindak pidana korupsi dalam lingkup perizinan.[6]
6. Pasal 20 Undang-Undang Nomor Nomor 20 Tahun 2001 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi menjadikan korporasi sebagai subjek tindak pidana. Artinya, peluang untuk dilakukannya DPA di Indonesia sangat mungkin.[7]

## ANALISIS

### 1. Pertanggungjawaban Pidana Korporasi Internasional Melalui *Deferred Prosecution Agreement* menurut Yurisdiksi di Inggris

Upaya hukum yang ditempuh untuk menyelesaikan sengketa Airbus ini menjadi suatu hal yang menarik untuk ditelaah, mengingat tindak pidana yang dilakukan oleh Airbus melibatkan aspek keuangan dan ekonomi yang menyangkut banyak negara, sehingga dalam hal ini tidak hanya upaya hukum untuk mengadili korporasi itu saja namun juga untuk memulihkan kerugian ekonomi negara terkait. Dalam kasus suap Airbus berakhir dengan dakwaan yang ditangguhkan dengan adanya penandatanganan *Deferred Prosecution Agreement* (DPA) dengan SFO yang disetujui oleh Dame Victoria Sharp selaku hakim pengadilan tinggi di Inggris pada tanggal 31 Januari 2020.

[4] *Ibid*
[5] And Ferdian. 2021. Konsep Deferred Prosecution Agreement (DPA) Dalam Pertanggung-Jawaban Pidana Korporasi Sebagai Bentuk Alternatif Penyelesaian Sengketa. *Jurnal Arena Hukum.* 14 (3) : 523 545
[6] I Made Santiawan, Gde Made Swardhana. 2021. Konsep *Deferred Prosecution Agreement* (DPA) Dalam Sistem Peradilan Pidana Di Indonesia. *Jurnal Kertha Semaya* 9 (6) : 1044 1052
[7] Ahmad Iqbal. 2020. Penerapan *Deferred Prosecution Agreement* (DPA) di Indonesia sebagai Alternatif Penyelesaian Tindak Pidana Ekonomi Yang Dilakukan oleh Korporasi. *Jurnal Yuridis* 7 (1) : 191-208

*Deferred Prosecution Agreement* atau dalam bahasa Indonesia dapat diartikan penuntutan yang ditangguhkan, merupakan salah satu bentuk alternatif penyelesaian sengketa yang dilakukan diluar pengadilan. Penuntutan yang ditangguhkan pada dasarnya adalah perjanjian informal antara pengacara/terdakwa dan jaksa penuntut umum untuk mengatur persyaratan yang wajib dipenuhi pelaku. Persyaratan yang dimaksud dalam *Schedule 17 of the Crime of Courts Act 2013* bisa bermacam-macam, seperti pelaku harus mengakui kesalahannya, membayar restitusi, membayar denda, membayar ganti rugi dan bisa juga pemecatan pihak-pihak yang terlibat dalam kejahatan korporasi. DPA dilakukan secara sukarela antara jaksa dan korporasi berdasarkan *self-reporting* dari pelaku atau temuan dari jaksa atas kejahatan. Mekanisme DPA selalu mensyaratkan program *compliance* (kepatuhan) bagi korporasi. Yang mana dalam penyelesaiannya, Airbus dapat dikenakan denda dalam jangka waktu 3 tahun. DPA menyediakan mekanisme di mana sebuah organisasi (badan hukum, kemitraan atau asosiasi yang tidak berhubungan, tetapi bukan individu) dapat menghindari penuntutan atas tindak pidana ekonomi tertentu melalui perjanjian dengan otoritas penuntutan. Penyelesaian sengketa pidana ini diselesaikan melalui DPA dikarenakan pada dasarnya DPA sudah berlaku cukup lama di Inggris untuk menyelesaikan permasalahan tingkat korporasi dan sudah disahkan sejak tahun 2014. Selain itu penggunaan DPA ini berfungsi untuk meminimalisasi kerugian pada korporasi maupun terhadap negara yang bersangkutan. Hal ini menjadi jawaban mengapa SFO dan Airbus menyepakati DPA sebagai penyelesaian kasus penyuapan dan korupsi tersebut.

Dalam proses SFO menyelidiki kasus suap yang dilakukan, Airbus akhirnya menyepakati beberapa persetujuan yang dicantumkan dalam DPA tersebut yang salah satunya yakni Airbus juga mencapai kesepakatan dengan otoritas Prancis dan AS. Secara global, Airbus harus membayar denda total €3,6 miliar (sekitar £3 miliar) ditambah bunga dan biaya. Airbus akan membayar sanksi keuangan kepada SFO sebesar €983,974.311, yang merupakan bagian dari total internasional sekitar €3,6 miliar. Hukuman finansial diberlakukan pengurangan sebesar 50% karena sikap Airbus yang kooperatif selama penyelidikan.[8] Selain itu, disepakati pula beberapa hal, yakni:

[8] *Ibid*

- mengeluarkan laba kotor sebesar €585.939.740 (sekitar £495 juta) yang dihasilkan dari perilaku yang tercakup dalam lima dakwaan dalam dakwaan
- membayar denda €398.034.571 (sekitar £336 juta)
- membayar biaya hukum dan investigasi SFO sebesar €6.989.401 (sekitar £6 juta)

Namun demikian, penerapan DPA bagi Airbus ini bukanlah akhir dari seluruh rangkaian penyelidikan proses penyuapan Airbus oleh beberapa perusahaan lintas negara.[9]

**2. Penerapan DPA di Indonesia**

Setelah menganalisis upaya penyelesaian sengketa pidana melalui *Deferred Prosecution Agreement* dalam yurisdiksi Inggris, pada dasarnya konsep dasar DPA sendiri dapat dilakukan di Indonesia. Akan tetapi, penerapan DPA di indonesia ini menimbulkan persoalan, DPA ini sudah sering dilakukan di negara Amerika dan Inggris, yang mana merupakan penganut sistem *common law*. Dengan melihat perbedaan sistem hukum yang berlaku di Indonesia sebagai penganut *civil law,* maka perlu diterapkan pendekatan konsep untuk mencari kejelasan DPA dan bagaimana apabila diterapkan di Indonesia. Apabila ketentuan dalam KUHP dikaitkan dengan DPA maka terdapat pranata hukum yang memiliki karakteristik serupa yakni :

a. *Restorative Justice*

Konsep pendekatan *restorative justice* merupakan suatu pendekatan yang lebih menitikberatkan pada terciptanya suatu keadilan dan keseimbangan pada pelaku tindak pidana dan korban. Mekanisme dalam peradilan yang memiliki titik berat pada pemidanaan dikonversi menjadi proses mediasi untuk mencapai sebuah kesepakatan atas penyelesaian sengketa pidana yang adil dan seimbang diantara kedua belah pihak. Di dalam proses peradilan pidana konvensional dikenal adanya restitusi atau ganti rugi terhadap korban, sedangkan restorasi memiliki makna yang lebih luas. Karena pada dasarnya restorasi menjadi sebuah pemulihan hubungan antara pelaku tindak pidana dan korban, bukan hanya

[9] *Ibid*

sebuah bentuk ganti rugi dan perjanjian.[10] Dilihat dari konsep ini maka tidak lain dengan konsep penyelesaian sistem DPA dimana keduanya memiliki persamaan dalam hal keseimbangan yang ingin dicapai dari pelaku tindak pidana dan juga korbannya. Perbedaan yang terletak diantara keduanya yakni DPA menitikberatkan pada tindak pidana yang menimbulkan kerugian ekonomi yang besar. [11]

Melihat dari beberapa contoh kasus di Inggris, DPA ini dilakukan dengan beberapa alasan, di antaranya ;

1. Penyidikan dan Persidangan yang dilakukan dimungkinkan akan memakan waktu yang lama, biaya yang sangat besar dan penanganan yang sulit;
2. Penegak hukum Inggris mengalami kesulitan dalam menentukan sanksi yang cocok kepada pelaku dalam tindak pidana yang diproses, pun disisi lain kebutuhan untuk menanggulangi kerugian korban terus meningkat;
3. Adanya kesulitan dalam melakukan penyidikan terhadap tindak pidana yang dilakukan korporasi yang menyangkut lintas batas yurisdiksi negara; dan
4. Penyidikan membutuhkan kerjasama antar penegak hukum yang komplek dan berbeda.

Beberapa contoh peristiwa di Inggris, sebuah kasus dapat dihentikan prosesnya melalui beberapa alasan diatas, sehingga hal yang paling utama disamping mengurangi beban keuangan negara, DPA ini bertujuan pula sebagai alternatif dalam menyelesaikan tindak pidana korporasi internasional, seperti halnya yang dilakukan oleh Airbus. [12]

Namun, Pasal 20 Undang-Undang Nomor Nomor 20 Tahun 2001 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi menjadikan korporasi sebagai subjek

[10] [s.n], 2014. Pendekatan Restorative Justice Dalam Sistem Pidana Indonesia.https://www.pn-sabang.go.id/?p=5457.9 Juli 2022 (12.35)
[11] Eka Lutfia dan Pudji Astuti, [s.a], Deferred Prosecution Agreement Sebagai Alternatif Penyelesaian Korupsi Oleh Korporasi Dalam Perspektif Transplantasi Sistem Hukum,Jurnal Fakultas Ilmu sosial dan hukum Universitas Negeri Surabaya:6-7.
[12] Azizur Rahman. What A Company Needs To Do To Obtain A Deferred Prosecution Agreement. https://www.rahmanravelli.co.uk/expertise/deferred-prosecution-agreements-dpa/what-a-company-needs-to-do-to-obtain-a-deferred-prosecution-agreement/ . Diakses 25 Juni 2022

tindak pidana. Artinya, terbuka peluang lebar untuk sebuah korporasi yang sedang dalam penyelidikan atas sebuah kasus tindak pidana untuk melakukan proses DPA di Indonesia. Di sisi lain, beberapa hal ini wajib diperhatikan saat pelaksanaan proses DPA guna membangun kepercayaan publik, kepastian hukum dan keadilan tetap terjamin, serta memberikan kemanfaatan bagi khalayak, di antaranya[13] :

1. Penerapan DPA di Indonesia wajib mempertimbangkan sistem peradilan Indonesia dalam susunan konstitusional dan tradisi hukum.
2. Kejahatan yang dapat menggunakan mekanisme DPA termasuk dan tidak terbatas terhadap kejahatan serius, sehingga dari segi pelaksanaannya diperlukan peraturan khusus yang mengatur hal tersebut.
3. DPA hanya diberlakukan bagi korporasi, sehingga terdapat kesempatan untuk memberikan efek pencegahan dan kemungkinan menuntut karyawan.
4. Peran pengadilan akan sangat penting bagi DPA, dikarenakan keterlibatan hakim akan meningkatkan kepercayaan publik terhadap proses DPA.
5. Pelaksanaan DPA harus dibuat seimbang antara kepentingan membangun kepercayaan publik dan juga kepentingan untuk mengejar korporasi yang diduga melakukan tindak pidana tersebut.
6. Untuk meningkatkan kepercayaan publik, skema DPA yang dilakukan di Indonesia dapat mensyaratkan kesepakatan untuk kepentingan publik dan bersikap adil, masuk akal dan proporsional.
7. Perlu adanya panduan khusus yang jelas mengenai bagaimana DPA dilakukan serta mekanisme pengawasan yang efektif.

[13] Febby Mutiara. Peradilan Sederhana, Cepat, dan Biaya Ringan: Menggagas Penanganan Tindak Pidana Korupsi Melalui Konsep Plea Bargaining dan Deferred Prosecution Agreement. Disertasi. (Depok:Universitas Indonesia, 2019)

b. Asas Oportunitas Milik Jaksa

Asas ini menerangkan bahwa Jaksa sebagai penuntut umum, memegang asas *domitus litis* yang berarti bahwa Jaksa sebagai penguasa perkara, serta asas oportunitas, di mana Jaksa memiliki hak prerogatif dalam menangani suatu perkara guna melanjutkan atau menghentikan proses dari sebuah perkara, yang artinya Jaksa dapat memberlakukan proses DPA walaupun teknis dari Hukum Acara Pidana belum mengaturnya.[14] Dalam Pasal 35 c Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia menyatakan bahwa "Jaksa Agung dapat mengenyampingkan perkara berdasarkan kepentingan umum". Artinya Jaksa dapat mengesampingkan suatu perkara untuk mementingkan kepentingan umum berdasarkan persetujuan badan negara yang ikut andil dalam perkara. Namun sejauh apa kepentingan umum ini masih memiliki banyak tafsiran, sehingga dalam hal ini dilihat dari perspektif Undang-Undang tersebut kepentingan umum adalah kepentingan bangsa dan negara dan/atau kepentingan masyarakat luas.[15] Maka hal ini sejalan dengan penerapan DPA di negara penganut sistem *common law* yang mementingkan kepentingan umum suatu negara dan masyarakat luas, dimana korporasi yang menjadi pelaku tindak pidana tidak mengalami kerugian dan dapat mengoperasikan perusahaan kembali normal dan kerugian terhadap negara pun terpenuhi dengan adanya biaya ganti rugi yang ditawarkan dalam perjanjian DPA. Melihat uraian di atas menjadi sebuah titik penting pendekatan konsep yang ada pada sistem hukum Indonesia dan DPA yang menjadi penyelesaian sengketa, sehingga di Indonesia memungkinkan untuk menerapkan penyelesaian pidana melalui DPA yang melibatkan antara Airbus dan Emirsyah Satar selaku mantan Direktur Utama PT Garuda Indonesia.



**KESIMPULAN**

- Dalam sebuah penyelidikan atas suatu tindak pidana oleh korporasi, sebuah proses penyelidikan dapat dihentikan apabila terjadi kesepakatan antara Jaksa ataupun

[14] *Op. Cit* hlm. 1045
[15] I Kadek Darma Santosa, Ni Putu Rai Yuliartini dan Dewa Gede Sudika Mangku, 2021. Pengaturan Asas Oportunitas Dalam Sistem Peradilan Pidana di Indonesia. *Jurnal Pendidikan Kewarganegaraan Undiksha Vol. 9 No. 1*:72-73.

Penyidik dengan Korporasi untuk menghentikan sementara proses penyidikan tersebut dengan melalui mekanisme *Deferred Prosecution Agreement.*

- Proses DPA ini pun dapat dilakukan di Indonesia, dimana jaksa mempunyai hak prerogatif dapat memberlakukan serta menghentikan sebuah proses penanganan kasus tindak pidana. Selain jaksa, hakim pun dapat memfasilitasi dengan tujuan untuk mengawasi kesepakatan tersebut.

**SARAN**

Penerapan sistem DPA di Indonesia ini menimbulkan persoalan, dimana sebagai penganut *civil law*, Indonesia harus memiliki hukum acara yang dituangkan dalam suatu undang-undang, peraturan pemerintah, maupun instrumen hukum lain sehingga pelaksanaan DPA ini tidak menimbulkan kerancuan kepada masyarakat luas.

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# Efektivitas Implementasi Rekomendasi *Financial Action Task Force* (FATF) dalam Pencegahan Pendanaan Terorisme

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## LATAR BELAKANG

Upaya penanggulangan pendanaan terorisme tidak akan berhasil seperti yang diharapkan tanpa memberantas sumber-sumber pendanaan terorisme, karena komponen pendanaan merupakan komponen penting dari kegiatan terorisme sebagaimana dinyatakan dalam Naskah RUU Pemberantasan Terorisme tahun 2012. Dalam hal ini negara berperan penting dalam mencegah aktivitas teroris dengan cara memblokir semua sumber pendanaan untuk teroris karena merupakan salah satu aspek terpenting dari setiap kelompok teroris.[16] Teknologi yang terus berkembang tidak luput digunakan sebagai media pengelolaan aset, bisnis serta mendukung kegiatan amal oleh organisasi teroris. Teknologi menjadi unsur utama yang merubah sistem pembiayaan terorisme yang semula tradisional menjadi media digital. Salah satunya adalah *Virtual Currency* sebagai media yang telah digunakan oleh organisasi terorisme seperti Hamas, Al Qaeda, dan Islamic State dalam sumber pendanaan terorisme bagi organisasi mereka. *Financial Action Task Force* (FATF) adalah organisasi internasional yang didirikan untuk menerapkan standar internasional dan mempromosikan tindakan yang efektif untuk memerangi kejahatan keuangan dalam rangka memerangi pencucian uang dan pendanaan teroris. Pada 14 Februari 2014, Indonesia masuk daftar hitam FATF bersama delapan negara (Algeria, Ekuador, Ethiopia, Myanmar, Pakistan, Suriah, Turki, dan Yaman), sebagai negara yang tidak mematuhi rekomendasi FATF. Untuk menangani dan menghilangkan pendanaan teroris, keputusan FATF terhadap Indonesia terkait dengan pelanggaran rekomendasi untuk segera membekukan aset pihak yang diduga terlibat pendanaan terorisme.

[16] Yuliana Andhika Risang Putri, Marten Hanura, dan Reni Windiani, "Peran Rekomendasi Financial Action Task Force (FATF) Dalam Penanganan Pendanaan Terorisme Di Indonesia", *Journal of International Relations*, Vol.1 No.2 (2015), hlm. 88-89.

**FAKTA HUKUM**

- Rekomendasi FATF pertama kali disiapkan dan diterbitkan pada Februari 2012. Namun, berdasarkan perkembangan dan kebutuhan, FATF terus memperbarui Rekomendasi FATF.[17]
- Rekomendasi FATF *on Money Laundering* diperbarui pada Juni 2019 dengan penambahan *glossary* terkait penanggulangan pendanaan terorisme menggunakan *virtual currency* "*to mitigate money laundering and terrorist financing risks emerging from virtual assets* "yang diatur pada poin rekomendasi ke-15.[18]
- Sistem sanksi PBB pertama kali diperkenalkan oleh UNSCR Resolution 1267 (1999). Dewan Keamanan PBB telah memberlakukan serangkaian tindakan terhadap individu dan kelompok yang terkait dengan Al Qaeda.[19] Al Qaeda adalah gerakan militan Muslim yang didirikan oleh Osama bin Laden pada tahun 1988 di bawah gagasan Abdullah Azzam dan dianggap sebagai gerakan teroris internasional.
- Sistem sanksi semakin diperkuat dan diubah dengan serangkaian resolusi berikutnya. Langkah-langkah yang diterapkan oleh Negara di bawah resolusi tersebut termasuk pembekuan aset, larangan bepergian, dan embargo senjata terhadap negara-negara yang ditunjuk oleh Komite Sanksi PBB.
- Pada tanggal 11 September tahun 2001 telah terjadi serangan terorisme oleh kelompok ekstremis Islam Al Qaeda dengan membajak empat pesawat dan melakukan serangan bunuh diri yang berjumlah 19 militan menargetkan menara kembar WTC di New York, Amerika Serikat. Setelah kejadian tersebut, PBB mengadopsi UNSCR 1373 (2001), yang mewajibkan negara-negara untuk menempatkan mekanisme penunjukan teroris dan orang-orang yang terkait dengan terorisme di tingkat nasional serta penerapan konsekuensinya dari

[17] Otoritas Jasa Keuangan RI. 2020. *FATF Recommendation Updated October 2020.* https://www.ojk.go.id/apu-ppt/id/berita-dan-kegiatan/publikasi/Pages/rekomendasi-FATF-updated-oktober-2020.aspx diakses pada 8 Juli 2022
[18] The FATF Recommendations 15
[19] The FATF Recommendations. 2012. International Best Practices: Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (Recommendation 6). FATF Recommendations 2012.

tindakan pembekuan.[20] Prosedur yang diperkenalkan juga harus mampu menangani permintaan dari luar negeri.

- Standar FATF mengharuskan negara-negara untuk menerapkan UNSCR di atas sehubungan dengan pembentukan mekanisme yang memungkinkan penerapan tindakan pembekuan aset yang terkait dengan orang-orang yang terlibat dalam terorisme atau penyebaran atau pembiayaannya. Oleh karena itu, FATF menetapkan standar internasional yang wajib diterapkan oleh semua negara melalui tindakan yang menyesuaikan dengan keadaan khusus mereka.[21]

## RUMUSAN MASALAH

1. Mengapa *virtual currency* dijadikan sebagai *platform* pendanaan terorisme?
2. Bagaimana pembuktian virtual currency ini dijadikan tempat pendanaan terorisme?

## ANALISIS

### 1. *Virtual Currency* Sebagai Platform Pendanaan Terorisme

Rekomendasi FATF adalah kerangka langkah-langkah yang komprehensif dan yang harus diterapkan oleh negara-negara untuk memerangi pencucian uang dan pendanaan teroris, serta pembiayaan proliferasi senjata pemusnah massal. Terorisme adalah tindak pidana yang berasaskan universal dan menjadi perhatian dunia sejak lama, kejahatan golongan ini masuk ke dalam golongan kejahatan terhadap manusia. Di berbagai negara di dunia telah terjadi kejahatan terorisme baik di negara maju maupun negara-negara berkembang, aksi-aksi teror yang dilakukan telah memakan banyak korban dari berbagai kalangan. Kemunculan *Virtual Currency* atau mata uang virtual tentunya mempunyai banyak kelebihan namun juga kemunculan *Virtual Currency* ini menimbulkan celah bagi mereka yang menggunakan sarana ini sebagai salah satu jalan untuk mendanai organisasi terorisme. Media ini dinilai cukup mudah dan efektif karena dapat melindungi identitas mereka guna mengurangi atensi dari pihak berwenang, sifatnya yang

[20] Ibid.
[21] The FATF Recommendations. 2020. *International Standards On Combating Money Laundering and the Financing Of Terrorism and Proliferation.* FATF Recommendation 2012 Updated October 2020. https://www.ojk.go.id/apu-ppt/id/berita-dan-kegiatan/publikasi/Pages/rekomendasi-FATF-updated-oktober-2020.asp diakses pada 2 Juni 2022

anonim dan nilai tukar mata uang ini cukup stabil di pasar global menjadi hal pendukung lain dipilihnya *Virtual Currency* sebagai alat pendanaan terorisme bagi beberapa kelompok terorisme yang masih aktif hingga saat ini.

Seiring berkembangnya zaman dan kemajuan teknologi kegiatan pendanaan terorisme yang dilakukan oleh organisasi terorisme dan para sponsor kegiatan terorisme di dunia sudah semakin canggih dan mengikuti perkembangan zaman. Terorisme merupakan musuh bagi seluruh negara di dunia dan menjadi ancaman berskala nasional maupun internasional, adapun pencegahan dan langkah-langkah yang harus diterapkan oleh setiap negara untuk memerangi kegiatan terorisme dan memotong rantai pendanaan terorisme sudah tertuang dalam Rekomendasi ke-15 FATF yang berbunyi:

> *" Lembaga keuangan harus mengembangkan program tentang pencucian uang dan pendanaan teroris. Program ini harus meliputi: a) pengembangan kebijakan, prosedur dan pengawasan internal, termasuk pengaturan manajemen kepatuhan yang tepat, dan prosedur screening yang memadai guna menjamin standar yang tinggi dalam merekrut karyawan. b) program pelatihan untuk karyawan yang ada. c) fungsi audit untuk menguji sistem".*

Menurut teori konstruktivisme (pendekatan *International Society Centric Constructivism* dari John Hobson, yang didukung oleh Martha Finnemore) dan teori organisasi internasional (pendekatan rezim oleh Barkin), Finnemore (1996) menyatakan bahwa norma yang ditawarkan organisasi internasional dapat mempengaruhi negara dengan memaksa negara untuk mengadopsi norma tersebut sebagai kebijakan nasional. Rezim memfasilitasi kesepakatan melalui penyediaan aturan, norma, prinsip, dan prosedur yang membuat aktor mampu menghadapi hambatan dan halangan.[22]

### 2. Pembuktian *Virtual Currency* Sebagai Platform Pendanaan Terorisme

Perkembangan zaman dan kemajuan teknologi dimanfaatkan oleh organisasi terorisme untuk tujuan kegiatan pendanaan mereka terlebih *virtual currency*

[22] Putri, Yuliana Andhika Risang, *"Peran Rekomendasi Financial Action Task Force (FATF) Dalam Penanganan Pendanaan Terorisme Di Indonesia"*,Journal of International Relations,Vol.1 No. 2 (2015),90. diakses pada 2 Juni 2022

menjadi salah satu sarana bagi mereka dalam kegiatan pendanaan terorisme karena sifatnya yang samar-samar atau anonim sehingga menimbulkan ketertarikan bagi mereka untuk menjadikan *virtual currency* ini sebagai alat untuk mendanai kegiatan terorisme mereka.[23] Perkembangan zaman dan kemajuan teknologi dimanfaatkan oleh organisasi terorisme untuk tujuan kegiatan pendanaan mereka terlebih *virtual currency* menjadi salah satu sarana bagi mereka dalam kegiatan pendanaan terorisme karena sifatnya yang samar-samar atau anonim sehingga menimbulkan ketertarikan bagi mereka untuk menjadikan *virtual currency* ini sebagai alat untuk mendanai kegiatan terorisme mereka. Karena sifatnya yang anonim *cryptocurrency* ini mempunyai kemampuan dalam menghindari kebijakan kontrol identitas sehingga mampu digunakan oleh mereka yang ingin mendanai terorisme sebagai alat untuk mendanai kegiatan ilegal. Pendanaan terorisme melalui *cryptocurrency* sudah banyak dilakukan mulai dari tahun 2014 di mana pada salah satu halaman *Deepweb* yang berjudul "*Fund the Islamic Struggle without Leaving a Trace*" (Pendanaan Perjuangan Islam tanpa Meninggalkan Jejak) yang mempromosikan donasi untuk jihad dengan menggunakan *cryptocurrency*. Pada tahun yang sama juga terdapat unggahan dalam salah satu halam situs *Dark Web* oleh Amreeki Witness yang berjudul "*Bitcoin wa Sadaqat al Jihad*". Peran negara dan pemerintahan sebagai alat utama untuk memutus tali pendanaan bagi organisasi terorisme harus memiliki regulasi terkait virtual currency dan kerjasama dengan platform pertukaran *cryptocurrency*, sehingga pendanaan terorisme itu bisa dihindari dalam negara. Cara pendanaan kegiatan terorisme terbagi menjadi tiga yaitu ; Publikasi alamat *cryptocurrency,* cara pendanaan dengan publikasi alamat *cryptocurrency* ini biasanya dilakukan oleh organisasi teroris dan para afiliasinya dengan menyebarkan narasi propaganda dan diakhiri dengan penggalangan dana untuk amal yang dilakukan di media konvensional dan internet yang jangkauannya luas; Penggalangan dana yang dilakukan menyertakan *QR code* dari cryptocurrency dan biasanya pengirim dana ini terdiri dari anggota organisasi, afiliasi, dan simpatisan; kedua, teknik Hawala yang sistematikanya menggunakan video yang

[23] Prasetya, Adhitya Yuda et al.,"*Model Pendanaan Terorisme Melalui Media Cryptocurrency*", Journal of Terrorism Studies, Vol.3 No.1(Mei, 2021),3.

ditujukan kepada para simpatisan sehingga para simpatisan diberi petunjuk dalam video itu untuk memberi donasi dengan Bitcoin secara anonim lalu Bitcoin ini diserahkan kepada Hawala (broker) selanjutnya Hawaladar (broker) meneruskan dana donasi dengan Bitcoin yang nilainya sesuai dengan donasi yang diberikan oleh para donatur ke organisasi terorisme, teknik ini pada intinya hanya menggunakan orang ketiga sehingga *cryptocurrency* pada metode ini hanya sebagai alat pemindahan saja; ketiga adalah *cryptocurrency* diubah dalam bentuk "kupon" yang selanjutnya dikirim dengan menggunakan aplikasi pesan aman (secure messaging) kepada organisasi terorisme.

FATF sendiri telah mengatur dalam point rekomendasi kedua yakni "*Countries should have national AML/CFT policies, informed by the risks identified, which should be regularly reviewed, and should designate an authority or have a coordination or other mechanism that is responsible for such policies.*"[24] Oleh sebab itu, sebagai lembaga yang mempunyai peran dalam pengawasan pencucian uang dan pendanaan terorisme harus menjadi acuan bagi beberapa negara anggotanya, namun masih banyak negara negara yang belum memenuhi standarisasi terkait pencegahan pendanaan terorisme seperti yang telah diatur tersebut sehingga bagi negara negara yang tidak patuh jatuhkan sanksi ekonomi dan dikategorikan sebagai negara *blacklist* FATF seperti iran dan korea utara.

Iran sendiri telah masuk ke zona hitam sejak tahun 2016 - 2020, pendanaan terorisme yang dilakukan oleh Iran kepada beberapa kelompok terorisme di Timur Tengah telah menimbulkan dampak yang besar bagi keamanan internasional dan menjadi fokus utama bagi Amerika Serikat karena dinilai dapat membahayakan keamanan negara mereka dan negara sekutu AS. Ketika Pemerintah Iran terbukti oleh pengadilan Amerika Serikat mendanai dan memberikan pelatihan khusus terkait perencanaan kegiatan terorisme kepada organisasi terorisme yang ada di Timur Tengah, contohnya seperti kasus serangan terorisme 11 September 2001 yang dilakukan oleh kelompok al-Qaidah hal ini didukung oleh putusan pengadilan amerika serikat. Maka sesuai dalam rekomendasi ke 6 yakni;

[24] Lihat FATF 40 Recommendations United Nations Anti-Terrorism Instruments point ke 2

> " *Countries should implement targeted financial sanctions regimes to comply with United Nations Security Council resolutions relating to the prevention and suppression of terrorism and terrorist financing. The resolutions require countries to freeze without delay the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either (i) designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267 (1999) and its successortions; or (ii) designated by that country pursuant to resolution 13* ".[25]

Oleh sebab itu, maka tindakan Departemen Kehakiman AS pada tahun 2021 dalam menyita dua gudang senjata Iran, termasuk: 171 rudal permukaan ke udara, delapan rudal antitank, dan sekitar 1,1 juta barel produk minyak Iran.[26] dinilai sudah tepat karena Iran tidak menerapkan poin rekomendasi FATF terkait pendanaan terorisme dan dikenakan sanksi ekonomi langsung oleh Amerika Serikat.

Iran telah berkomitmen untuk mengatasi kekurangan strategisnya pada Juni 2016. Rencana aksi Iran terhenti pada Januari 2018. Pada Februari 2020, FATF mencatat Iran belum menyelesaikan rencana aksi tersebut mengingat kegagalan Iran dalam menerapkan Konvensi Palermo dan pendanaan teroris sesuai dengan standar FATF. FATF telah sepenuhnya mencabut penangguhan tindakan pencegahan dan efektif sesuai dengan Rekomendasi 19 yang mewajibkan penerapan tindakan pencegahan pendanaan terorisme dengan meningkatkan uji tuntas untuk hubungan bisnis dan transaksi untuk Negara Anggota dan semua yurisdiksi meminta agar berbagai tindakan pencegahan dilaksanakan. Dalam melawan pendanaan teroris yang diidentifikasi dalam Rencana Aksi, FATF akan terus memperhatikan risiko pendanaan teroris yang ditimbulkan oleh Iran dan ancaman yang ditimbulkannya terhadap sistem keuangan internasional.

[25] Lihat FATF 40 Recommendations United Nations Anti-Terrorism Instruments point ke 6.
[26] Department of Justice THE UNITED STATES. 2021. *Missiles and Petroleum Products were Property of Islamic Revolutionary Guard Corps or a Source of Influence over Terror Organization*. Department of Justice. Office of Public Affairs. Washington DC.

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**KESIMPULAN**

Dalam langkah pencegahan Tindak Pidana Pencucian Uang dan Tindak Pidana Pendanaan Terorisme, Rekomendasi FATF sangat membantu negara-negara anggotanya karena FATF menetapkan standar internasional tentang *Virtual Asset* yang berupa *Virtual Currency* seperti bitcoin, crypto, dan *cryptocurrency* lainnya. Standarisasi pengaturan tentang aset virtual maupun *Virtual Asset Service Providers* (VASP) telah diatur di dalam rekomendasi FATF ke-15. Penggunaan *Virtual currency* sebagai wadah pendanaan terorisme untuk kegiatan teroris belum terselesaikan, tetapi kemajuan masa depan dalam teknologi *cryptocurrency* dapat memiliki implikasi jangka panjang yang signifikan untuk pendanaan teroris. Hal ini menunjukkan bahwa pengaturan dan pengelolaan *cryptocurrency*, serta kerjasama internasional antara lembaga penegak hukum dan komunitas intelijen, dapat menjadi langkah penting bagi setiap negara untuk menerapkan Rekomendasi ke-15 FATF dalam mencegah kelompok teroris menggunakan *virtual asset* untuk mendukung aktivitas mereka. Sejauh ini sanksi ekonomi yang dijatuhkan oleh FATF terhadap negara negara daftar hitam yang tidak menerapkan rekomendasinya dinilai telah efektif dalam memberikan jera bagi para negara anggota dan FATF Sendiri dan berimplikasi terhadap peningkatan kualitas peraturan nasional negaranya untuk mengadposi peraturan AML/CFT-nya



**SARAN**

- Bagi negara-negara yang diidentifikasi berisiko tinggi, FATF meminta semua anggota dan semua yurisdiksi untuk melakukan uji tuntas yang lebih baik khususnya dalam kasus yang paling parah, negara-negara dianjurkan untuk segera mengambil tindakan pencegahan untuk melindungi sistem keuangan internasional dari pencucian uang yang sedang berlangsung. Beberapa contoh kasus yang harus diperhatikan seperti risiko pencucian uang, pendanaan terorisme, dan pendanaan distribusi senjata ke luar negeri.
- FATF perlu memantau tindakan Iran dan negara-negara *high risk*/negara yang termasuk dalam daftar hitam FATF untuk mengatasi kegagalan dalam sistem AML/CFT-nya.

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- Negara-negara harus dapat mengambil tindakan pencegahan yang tepat dan penanggulangan harus efektif dan proporsional sesuai dengan risiko jika diminta oleh FATF.

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# TESLA WAS HIT BY ANOTHER LAWSUIT OVER RACISM BY AN EX-WORKER VIEWED FROM A BUSINESS ETHICS PERSPECTIVE

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## Issue

Business can be described as an organised economic activity that provides mutual benefits to the parties involved in the trading. A good business is a business that focuses on morals and includes respect for all of the individuals involved in the activities. Business activities can also be considered good if companies' action standards follow the moral norms–all of those standards and moral norms are based on business ethics.[1]

Business ethics itself can be defined as rules, standards, codes, or principles which provide guidelines for morally right behaviour and righteousness in specific situations.[2] Definition of business ethics can also be clarified in terms of a business's social and ecological responsibility. As stated by the two definitions before, business ethics requires that business decisions should not only be for economic purposes but must be concerned about social and ecological.[3]

Regarding racism itself, it can be connected to business ethics from the point of view of organisational culture. Among gender, religion, socio-economic background and age, ethnic inequality and racism become the main issues of minority diversity in business organisations. [4] An anti-organization culture from the point of view of business ethics will affect enterprises' ability to carry their communal responsibility where the society resides. Thus, racism issues that happen in business

[1] Edwin Basmar, dkk.(2021). *Ekonomi Bisnis Indonesia*. Cetakan Pertama. Yayasan Kita Menulis.
[2] Lewis, P. V. (1985). Defining "Business Ethics": Like Nailing Jello to a Wall. *Journal of Business Ethics*, *4*(5), 377–383. http://www.jstor.org/stable/25071521
[3] Kopperi, M. (2007). Business Ethics in the Global Economy. *Electronic Journal of Business Ethics and Organization Studies* Vol 12, No. 2.
[4] George, Jennifer M. & Gareth R. Jones. (2000). Essentials of Managing Organizational Behavior. http://ejbo.jyu.fi/articles/0501_4.html

activity negatively influence the general well-being of people. [5] Examples of racism issues that occurred in enterprises' are a lawsuit over Tesla and an ex-worker that will be explained below.

A lawsuit hits Tesla due to racism towards their ex-coworker. A former Tesla construction manager has filed a lawsuit against the electric car company, alleging he was fired for reporting widespread safety violations and race discrimination at Tesla's factories.[6] A California civil rights agency sued Tesla, alleging racist harassment and discrimination against Black workers that has persisted for years at the company's car assembly plant and other facilities in the state. The company warned it faced this lawsuit in its annual financial filing Monday. In its complaint, which became public on Thursday, California's Department of Fair Employment and Housing says it conducted a three-year-long investigation and received hundreds of complaints from Tesla workers.[7]

For black employees at Tesla's flagship California plant, coming into work could mean being harassed, bullied by a supervisor, or finding racist graffiti sprayed on factory walls. According to a new lawsuit filed by California's Department of Fair Employment and Housing (DFEH), which alleges that Black workers in the company's Fremont factory experienced "rampant racism" that the company left "unchecked for years". In the suit filed on 9 February 2020 in an Alameda county court in California, the agency says Black workers reported being subjected to racist slurs and drawings and being assigned the most physically demanding jobs. "Workers referred to the factory as the 'slave ship' or 'the plantation', where defendants' production leads 'crack the whip'," the agency said in the complaint.[8]



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[5] Sintonen, T. (2000). Racism and Business Ethics. *Electronic Journal of Business Ethics and Organization Studies* Vol. 12, No. 2.

[6] Jin, H. (2022). *Tesla was hit by another lawsuit over racism by an ex-worker*. Reuters. https://www.reuters.com/business/tesla-hit-by-another-lawsuit-over-racism-by-ex-worker-2022-02-22/ diakses 20 Maret 2022

[7] Kolodny, L. (2022). *Tesla is being sued by a California civil rights agency, which alleges racist treatment of Black employees*. CNBC. https://www.cnbc.com/2022/02/10/tesla-sued-by-california-which-alleges-racist-treatment-of-black-workers.html. Accessed 20 Mar 2022

[8] Paul, K. (2022). *Black workers accused Tesla of racism for years. Now California is stepping in*. The Guardian. https://www.theguardian.com/technology/2022/feb/18/tesla-california-racial-harassment-discrimination-lawsuit Accessed 22 Mar. 2022.

The Tesla company's internal regulations are problematic, and because of that, it is violating the business ethics of the corporation. Even though the company statement said that "Tesla is committed to ensuring all supply chain practices are safe and humane, that workers are treated with respect and dignity, and that manufacturing processes are environmentally responsible,". Owen Diaz, the former coworker who got racism, was hired in 2015 through a staffing agency. Lawrence Organ, an attorney for Diaz, said that a federal jury in San Francisco found Tesla guilty. The ruling could not immediately be confirmed in electronic court records. Diaz stated that he survived being a victim of racism and being in a factory. He even conveyed this to the company's management, but Tesla did not take any action. It is said that many of his colleagues insult him rationally every day and tell Diaz to return to Africa.

**Facts**

According to the suit, the claims centre around allegations in Tesla's Fremont factory in the San Francisco Bay Area. Black workers at the facility were subjected to "offensive racial harassing conduct so severe and pervasive that it created a hostile work environment", according to the 39-page complaint from the Department of Fair Employment and Housing (DFEH). The agency writes that many workers reported derogatory comments directly from their superiors. According to the complaint, one Black worker reported hearing racial slurs as often as 50-100 times a day, being called the "N-word" and "hood rats". Other workers told of racist graffiti found in the factory's common areas, including swastikas, KKK, the N-word, and other racist writing that Tesla did not remove for months. Black workers reported being assigned difficult, menial jobs in segregated factory areas known as "the dark side", DFEH also says, and are less likely to be promoted to management positions[9].

San Francisco Court in California, United States of America, fined Tesla Inc. Over US$137 million or equal to Rp1,95 trillion (Rp14.250 per dollar AS) on Monday (4/10). This charge is for the compensation due to the corporate 'blinded'

[9]Paul, K. (2022). *Black workers accused Tesla of racism for years. Now California is stepping in*. The Guardian. https://www.theguardian.com/technology/2022/feb/18/tesla-california-racial-harassment-discrimination-lawsuit Accessed 22 Mar. 2022.

about the Owen Diaz racism case of the ex-coworker in Tesla. The fine consists of compensation of US$130 million or Rp. 1.85 trillion. The rest is in the form of compensation costs for the emotional stress he has received so far.[10] The Diaz case marks a rare example where Tesla usually uses mandatory arbitration to resolve employee disputes and has had to defend itself in a public trial. The company rarely loses a workplace arbitration, despite paying a $1 million fine in May 2020 in a case brought by another former worker who looks like Diaz.[11]

**Regulation**

- ILO Declaration on Fundamental Principles and Rights at Works.
- Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
- United Nations Guiding Principles on Business and Human Rights (UNGPs) 2011.

**Analysis**

**Conceptual relevance of Racism with Business Ethics based on Organization Culture**

Prior, it already explained that racism is connected with business ethics from the point of view of an organisation. Thus, to examine the connection between organisational culture and ethnic discrimination. The reader needs to understand the basic concept of organisational culture and racism. The concept of organisational culture in the business world refers to a combination of conventional courses such as action, values, norms, behaviour, and symbols born and developed in a particular corporation. That kind of conventional course influenced the function of a corporation as a whole. On the other hand, the concept of racism is more focused on particular conventions to understand specific issues and phenomena. From that explanation, it

[10]CNN Indonesia (2021). *Tesla Kena Denda Rp1,95 T Karena Kasus Rasis Karyawan*. ekonomi. https://www.cnnindonesia.com/ekonomi/20211005180119-92-703744/tesla-kena-denda-rp195-t-karena-kasus-rasis-karyawan diakses 20 maret 2022.
[11]Nindya Aldila (2021). Tesla Fines IDR 1.9 Trillion Due to Racism Cases in Factory Environment. Bisnis.com.https://ekonomi.bisnis.com/read/20211005/620/1450509/tesla-kena-denda-rp19-triliun-akibat-kasus-rasisme-di-lingkungan-pabrik diakses 21 Maret. 2022.

can be noticed that there is a similarity between the concepts of organisational culture and racism. Both concepts emphasise symbolising an ideological level instead of material objects or overt behaviour and action. Aside from that relevance, there is also a point why racism can be connected with business ethics, where racist ideology can produce such discriminating practices that isolate ethnic minorities from the resources provided by society and the economy. [12]

**Legal Basis Regarding Racism viewed by Discrimination in Business Ethics.**

Business ethics consist of many kinds of regulations that provide guidelines for morally right behaviour so that enterprises can conduct their business activity with righteousness. Therefore, the legal basis used in business ethics can be viewed from the legal product that provides rights for workers as individuals in enterprises that are by morals that exist in society. The various legal basis are:

1. **ILO Declaration on Fundamental Principles and Rights at Works**

   The ILO Declaration on Fundamental Principles and Rights at Works is a declaration adopted in 1998 that promoted four principles and rights in four categories for all people in all states. The categories are freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination regarding employment and occupation.[13] The morals regarding racism in business ethics in this declaration can be found in the elimination of discrimination in respect of employment and occupation categories. That guidance in that category manifested through the Discrimination (Employment and Occupation) Convention (No. 111), adopted on 25 June 1958 and entered into force on 15 June 1960.

2. **Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy**

[12] Sintonen, T & Takala, T. (2002). Racism and Ethics in the Globalized Business World. *The International Journal of Social Economics,* Vol. 29, No. 11.
[13] *ILO Declaration on Fundamental Principles and Rights at Work*. (n.d.). Ilo.org. Retrieved March 25, 2002, from https://www.ilo.org/declaration/lang--en/index.htm

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, or can be called as MNE Declaration, is an ILO instrument for enterprises (multinational or national) that provides direct guidance on social policy, inclusive, responsible, and sustainable workplace practices. Some principles can be found regarding discrimination that cannot be enforced in enterprises, such as:

1) Paragraph 10 word C:

"*The corporate responsibility to respect human rights requires that enterprises, including multinational enterprises wherever they operate: (i) avoid causing or contributing to adverse impacts through their own activities, and address such impacts, when they occur; and (ii) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."*[14]

2) Paragraph 30:

"*Multinational enterprises should be guided by the principle of non-discrimination throughout their operations without prejudice to the measures envisaged in paragraph 18 or to government policies designed to correct historical patterns of discrimination and thereby to extend equality of opportunity and treatment in employment. Multinational enterprises should accordingly make qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels."* [15]

### 3. United Nations Guiding Principles on Business and Human Rights (UNGPs) 2011

The United Nations Guiding Principles on Business and Human Rights or UNGPS were guidelines developed by the Special Representative of the

[14] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*.
[15] Ibid.

Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The contents promoted by UNGPS are divided into three: (1) the state duty to protect human rights, (2) the corporate responsibility to respect human rights (3) access to remedy. The principles for no discrimination in this guidance can be found on:[16]

1) Paragraph 11:

   "*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*"

2) Paragraph 12:

   "*The responsibility of business enterprises to respect human rights refers to internationally recognized human rights - understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.*"

3) Paragraph 13:

   "*The responsibility to respect human rights requires that business enterprises:*

   *(a) Avoid causing or contributing to adverse human rights impacts through their activities, and address such impacts when they occur;*

   *(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*"

4) Paragraph 14:

[16] *United Nations Guiding Principles on Business and Human Rights (UNGPs) 2011.*

> "*The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership, and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.*"

**How Tesla Lawsuit unlawful in Business Ethics.**

Now from the legal basis explained on top, the problem that occurred in Tesla can be seen as unlawful in Business Ethics. That can be said because Tesla as an enterprise has deviated from several things in Business Ethics legal products, such as:

1. **ILO Declaration on Fundamental Principles and Rights at Works**

   Tesla didn't follow the principle of the ILO Declaration on Fundamental Principles and Rights at Works and conflicted with Article 1 Number 1 in the Discrimination (Employment and Occupation) Convention (No. 111) that explained about definition of "discrimination" that cannot be done in the work environment. It can be said that Tesla doesn't take discriminatory actions such as being harassed, bullied by a supervisor, or finding racist graffiti sprayed on factory walls that happened to its former employer as a serious matter. Instead of solving the problem, Tesla decided to fire that former employer.

2. **Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.**

   Not only conflicted with the principles in ILO Declaration on Fundamental Principles and Rights at Works. Tesla opposed some paragraphs found in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, like Paragraph 10, word C and Paragraph 30. Tesla opposed that article because, as a Business enterprise, Tesla didn't respect someone's human rights and decided to discriminate against their race. Those things that occurred mean that

Tesla didn't implement non-discrimination principles in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

3. **United Nations Guiding Principles on Business and Human Rights (UNGPs) 2011.**

   Tesla also contradicts some of the paragraphs in UNGPS 2011; the reason remains the same: as a business enterprise, Tesla did not try to be responsible for the discrimination against its former employer.

**Conclusion**

In this conclusion, a business can be described as an organised economic activity that provides mutual benefits to the parties involved in the trade. Significant transactions focus on morality and include respect for everyone involved in the activity. Business ethics itself can be defined as rules, standards, norms, or principles that provide ethical behaviour and integrity guidelines in specific situations. Business ethics can also be defined as the concept of corporate social and ecological responsibility. As for racism itself, it can be linked to business ethics in terms of organisational culture. Ethnic inequality and racism, gender, religion, socio-economic background, and age, are becoming the main issues of minority diversity in corporate organisations. An anti-organizational culture from a business ethics perspective influences a company's ability to fulfil the responsibilities of the underlying community.

Tesla company getting fined and sued due to racism in their company. The innocent Owen Diaz, a former worker at Tesla, is being bullied and racist due to his skin colour by his other coworkers. He got unfortunate and heartbroken. The Tesla company had to pay Owen Diaz was not a little. It was Over US$137 million or equal to Rp1,95 trillion (Kurs Rp14.250 per dollar AS). Tesla's internal regulations are problematic because they violate the company's business ethics. "Tesla is committed to ensuring that all supply chain practices are safe and humane, workers are treated with respect and dignity, and the manufacturing process is environmentally sound,"

the company said in a statement. "He shared this with the company's management. But Tesla took no action.

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Bisnis.com.https://ekonomi.bisnis.com/read/20211005/620/1450509/tesla-kena-denda-rp 19-triliun-akibat-kasus-rasisme-di-lingkungan-pabrik diakses 21 Maret. 2022.

Paul, K. (2022). *Black workers accused Tesla of racism for years. Now California is stepping in*. [online] the Guardian. https://www.theguardian.com/technology/2022/feb/18/tesla-california-racial-harassment-discrimination-lawsuit Accessed 31 Mar. 2022.

Sintonen, T & Takala, T. (2002). Racism and Ethics in the Globalized Business World. *The International Journal of Social Economics,* Vol. 29, No. 11.

*Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*.

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Whoriskey, P. (2017). *Is a Tesla ethical? The company won't say how its batteries aren't tainted*. [online] Australian Financial Review. https://www.afr.com/technology/is-a-tesla-really-ethical-company-wont-say-how-its-batteries-arent-tainted-20170102-gtkjex#:~:text=%22Tesla%20is%20committed%20to%20ensuring,a%20statement%20from%20the%20company. Accessed 31 Mar. 2022.

# BEYONCE'S TRADEMARK BATTLE OVER BLUE IVY'S NAME

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## Issue

Trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It is how customers recognise you in the marketplace and distinguish you from your competitors.[1] Anyone can be a trademark owner as soon as you start using your trademark with your goods or services. You establish rights in your trademark by using it, but those rights are limited, and they only apply to the geographic area in which you are providing your goods or services. If you want nationwide rights, you can register your trademark.

Trademarks help build your reputation and goodwill in the eyes of the public, which will make your brand attractive and maintain consumer loyalty. A registered trademark could deter counterfeiters from copying your product or causing confusion in the marketplace with a similar trademark to yours. Without trademark protection for your goods or services, customers may be unable to distinguish your genuine product or service from a fake. Registered trademarks can also be a revenue source. Secure licensing or franchising agreements so that a third party can use your registered trademark in exchange for royalties or a percentage of all sales.[2]

However, the bad thing about trademarks is that this ease of creating trademark rights means that almost all businesses own trademarks, making it very easy to inadvertently violate or "infringe" on the trademark rights of others. Such trademark infringement can be very costly and even land your business in court.

An example of trademark infringement is the Blue Ivy Case. Beyoncé, named by *Forbes* as the Most Powerful Woman in Entertainment, has built a business empire

[1] USPTO. (2021). *What is a trademark?*. Uspto.gov https://docs.google.com/document/d/1753f-wjnnE9GShliBtHSqL85M6DbaFgcaM_neqQ26Nw/edit#. Accessed on March 29th, 2022.
[2] Canadian Intellectual Property Office. (2020). *Trademarks - Learn the basics to protect your brand and learn why trademarks matter*. Ic.gc.ca https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04708.html. Accessed on March 29th, 2022.

that stretches into entertainment, fashion, major product endorsements, as well as music production and streaming distribution. It should come as no surprise that Beyoncé is incredibly in-tune with personal branding and the importance of intellectual property rights. A case in point was how Beyoncé generated a lot of buzz in the trademark legal world when she filed to register her new daughter's name, BLUE IVY CARTER, as a trademark in January 2012, only a few weeks after the baby's birth.[3]

The BGK Trademark Holdings, LLC-a company that Beyonce Knowles-Carter owns, filed trademark applications including goods and services covering everything from books to pacifiers, shampoo, cosmetics, jewellery, video games, and online store services and entertainment services under the mark BLUE IVY CARTER.[4] As she is closer and closer to trademarking her daughter's name, the authorities dismissed a challenge to the application. The dismissal itself was caused by the Trademark Trial and Appeal Board (TTAB) having sided with the arguments of the existing company's name "Blue Ivy", which has been trademarked in its business operation name. Veronica Morales, who opposed Beyoncé's application, has had a wedding planning business called "Blue Ivy Events" since September 1, 2009 (as her USPTO registration claims), before Beyoncé's daughter was born. Morales received a trademark registration for her business from the U.S. Patent and Trademark Office (USPTO) for "BLUE IVY" in 2012.[5]

Based on those registered rights in her BLUE IVY mark, Morales filed a "notice of opposition" with the Trademark Trial and Appeal Board (TTAB), opposing the registration of the Beyoncé application because of an alleged likelihood of confusion with her registered BLUE IVY mark for special event planning services. Morales also claimed in her opposition that Beyoncé and Jay-Z had no actual intent to

[3] Bennet, D. (2020). *Beyonce Receives Big Win in "BLUE IVY CARTER" Opposition.* Jdsupra.com. https://www.jdsupra.com/legalnews/beyonce-receives-big-win-in-blue-ivy-34047/. Accessed on March 29th 2022.
[4] Montrose, A. (2020). *Beyonce Secures Trademarks for Blue Ivy's Name After Legal Battle.* Complex.com. https://www.complex.com/music/2020/07/beyonce-secures-trademarks-for-blue-ivy. Accessed on March 29th 2022.
[5] Premraj, A. (2020). *Blue Ivy Carter Mark in the Pink as TTAB Dismisses Opposition.* Finnegan.com. https://www.finnegan.com/en/insights/blogs/incontestable/beyonces-blue-ivy-carter-mark-in-the-pink-as-ttab-dismisses-opposition.html. Accessed on March 30th 2022.

use the name "Blue Ivy Carter" in commerce, but rather, filed for trademark protection simply to prevent others from using the name. U.S. trademark law, which aims to protect marks only for *bona fide* commercial use, frowns upon and outlaws registrations that lack this actual intent or actual use. Morales' assertion that Beyoncé had engaged in fraud by seeking a trademark for a name she never intended to use in commerce was even more surprising. Since Veronica Morales holds the legal rights to the name of Blue Ivy, she offered Beyonce her wedding planning business for 10 million dollars to claim the Blue Ivy trademark. However, Beyonce turned down her offer to claim the Blue Ivy trademark.

**Facts**

The American Trademark Trial and Appeal Board (TTAB) ruled in favour of Beyonce's quest to secure the intellectual property rights of her first daughter's name, Blue Ivy Carter. After Veronica Morales, a wedding planner from Massachusetts, attempted to block Beyonce's attempts over trademarking her daughter's name for BGK Trademark Holdings, LLC-a company owned by her. Veronica Morales is known as she owns a company named Blue Ivy Events - an establishment that she said to have been founded before Blue Ivy was born. As she registered Blue Ivy as her trademark in 2009.

In 2012, Beyonce and Jay-Z filed a trademark for Blue Ivy's name. However, they later found themselves in a legal battle against Veronica Morales. Beyonce and Jay-Z's legal team asserts that the idea that consumers are likely to be confused between a boutique wedding event planning business and Blue Ivy Carter, the daughter of cultural icons, Beyonce and Jay-Z is frivolous and should be refused in its entirety.[6] Morales also offered Beyonce to take over the Blue Ivy trademark for 10 million dollars since she holds the legal rights to the Blue Ivy trademark, yet Beyonce turned down her offer to claim the name.

According to Law and Crime, a platform reporting on high profile American court cases, TTAB stated that though the two names "Blue Ivy" and "Blue Ivy Carter"

[6] Tan Nu. (2021). *Beyonce and Jay-Z Trademarked Blue Ivy Name, But Not for the Reason You Think.* Cheatsheet.com. https://www.cheatsheet.com/entertainment/beyonce-and-jay-z-trademarked-blue-ivy-name-but-not-for-the-reason-you-think.html/. Accessed on March 30th 2022.

are somewhat similar, there's not much public confusion among the two names, so much that the public wouldn't be able to differentiate the name of an event organising firm from the daughter of a celebrity. TTAB also found that Veronica Morales presented no evidence that the two characters originated from the same sources that it may give rise to being mistaken for the same thing.[7]

Nevertheless, in 2020, the Trademark Trial and Appeal Board ruled in favour of Beyonce and Jay-Z. The TTAB quickly disposed of Morales's final argument that BGK committed fraud when it declared its bona fide intent to use its mark in connection with the identified goods and services.[8] Once it found that Morales had failed to prove BGK's lack of bona fide intent, the TTAB concluded that Morales's fraud argument also fell. Having rejected all of Morales's arguments, the TTAB dismissed her opposition.

The case is *Veronica Morales d/b/a Blue Ivy v. BGK Trademark Holdings, LLC,* Opposition No. 91234467 (TTAB June 30, 2020) (not precedential).

**Regulations**

- Lanham Act of 1946
- TMEP Trademark Manual of Examining Procedure 1301.02(b).



**Analysis**

In recent years, an assessment of the function of trademarks has become a direct doctrinal mechanism used by courts in the European Union to determine the scope of trademark protection in a number of contexts. In the United States, no equivalent doctrinal mechanism has developed, at least not in those precise terms; US courts do not speak the language of "functions" as the Court of Justice has now done for two decades. However, features of US trademark law have been shaped with a similar awareness of the importance of the functions of marks. In particular, US courts

[7] Nanos, E. (2020). *Trial and Appeal Board Smacks Down Challenge to Beyonce's Trademark Application for 'Blue Ivy Carter'.* Lawandcrime.com. https://lawandcrime.com/celebrity/trial-and-appeal-board-smacks-down-challenge-to-beyonces-trademark-application-for-blue-ivy-carter/. Accessed on March 30th 2022.

[8] Premraj, A. (2020). *Blue Ivy Carter Mark in the Pink as TTAB Dismisses Opposition.* Finnegan.com. https://www.finnegan.com/en/insights/blogs/incontestable/beyonces-blue-ivy-carter-mark-in-the-pink-as-ttab-dismisses-opposition.html. Accessed on March 30th 2022.

have referenced the core function of a trademark for over a century to identify the source or origin of the product on which it is affixed.[9] Further, litigants and scholars seeking to expand the scope of protection have emphasised that marks do much more than identify the sources, often tendering explanations that hint at the advertising and investment functions of marks (without using those terms). A trademark serves to identify the source or the origin of goods. Trademark performs the following four functions :

- It identifies the product and its origin.
- It proposes to guarantee its quality.
- It advertises the product. The trademark represents the product.
- It creates an image of the product in the public's minds, particularly the consumers or the prospective consumers of such goods.

The actual primary function of a trademark is used purely as a form of identification. Hence, Beyonce and Jay Z can trademark their daughter's name 'Blue Ivy Carter'. But due to America's attempt at broadening the functions of trademarks, secondary functions such as advertisement and commercialising purposes may hinder Beyonce and Jay Z from trademarking her daughter's name. Assuming that a trademark qualifies for protection, rights to a trademark can be acquired in one of two ways: (1) by being the first to use the mark in commerce; or (2) by being the first to register the mark with the U.S. Patent and Trademark Office ("PTO").[10] Please note, however, that descriptive marks qualify for protection (and can be registered) only after acquiring secondary meaning. Thus, for descriptive marks, there may be a period after the initial use of the mark in commerce and before it acquires secondary meaning, during which it is not entitled to trademark protection. Once it has achieved secondary meaning, trademark protection kicks in. The courts typically look at four factors when determining whether a trademark has acquired a secondary meaning:

[9] Dinwoodie, G. (2020). *The Function of Trademarks in the United States.* Cambridge.org. https://www.cambridge.org/core/books/abs/cambridge-handbook-of-international-and-comparative-trademark-law/function-of-trademarks-in-the-united-states/A11CD5EE22DA369842E33A0004D7D9DB. Accessed on April 5th 2022.

[10] Cyber Harvard. (2020). *Overview of Trademark.* https://cyber.harvard.edu/metaschool/fisher/domain/tm.htm. Accessed on April 9th 2022.

- Length of time and how the mark has been utilised;
- How much advertising and promotional work has been done for the owner's business;
- What efforts the mark's owners have made to create a conscious connection between the mark and its owner in the mind of a consumer; and
- The extent to which the public identifies the name with the mark's services or goods.[11]

These four criteria are not absolute. In other words, a mark's owner could fail one, but as long as the mark meets a majority of the criteria, it can still be declared to have secondary meaning.

Beyonce's plea may also be ruled out because registering personal names as a brand name requires the party's consent that has the name. Taking note that "Blue Ivy" is known as Beyonce's daughter who is- at the time- 5 years old, then she could not give proper consent because she is considered a minor, whereas America's law states that the age of consent is around 16 years old. The legal basis for consent in America is stated in the Fourth Amendment. The Fourth Amendment to the U.S. Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The ultimate purpose of this clause is to protect people's privacy and freedom from undue government interference. However, the Fourth Amendment does not guarantee protection from all searches and seizures, only those carried out by the government and deemed unreasonable by law.

Although not everyone will immediately know who "Blue Ivy" or "Blue Ivy Carter" is, the majority will recognise the name as Beyonce's daughter because Beyonce and Beyonce's daughter is a well-known public figure. The law does not require the "everybody" rule. Trademarking the name Blue Ivy or Blue Ivy Carter for

[11] Upcouncel. (2020). *Secondary Meaning Trademark: Everything You Want to Know.* https://www.upcounsel.com/secondary-meaning-trademark. Accessed on April 9th.

personal identification of an individual cannot be accepted, but using the name to represent or identify a service or goods fulfils the purpose of a trademark.

However, if Beyonce and Jay Z want to win this whole court thing, they need to concentrate on the Lanham Act of 1946. It is stated that "The Act provides for a national system of trademark registration and protects the owner of a federally registered mark against the use of similar marks if such use is likely to result in consumer confusion or the dilution of a famous mark is likely to occur. Denying trademark registration just for the similarity of name purposes or where the same is thought to offend other trademark functions are not good grounds for denying a trademark registration application. Beyonce can prove her daughter's name as proof of identification to appeal to the court since personal names can function as marks only if they identify and distinguish the services and not just the person. Trademark Manual of Examining Procedure (TMEP) 1301.02(b) stated that "A name or design of a character does not function as a service mark unless it identifies and distinguishes services in addition to identifying the character. If the name or design is used only to identify the character, it is not registrable as a service mark.". Similarly, personal names (actual names and pseudonyms) of individuals or groups function as marks only if they identify and distinguish the services recited and not merely the individual or group. *In re Mancino*, 219 USPQ 1047 (TTAB 1983) (holding that BOOM BOOM would be viewed by the public solely as the applicant's professional boxing nickname and not as an identifier of the service of conducting professional boxing exhibitions); *In re Lee Trevino Enters.*, 182 USPQ 253 (TTAB 1974) (LEE TREVINO used merely to identify a famous professional golfer rather than as a mark to identify and distinguish any services rendered by him); *In re Generation Gap Prods., Inc.*, 170 USPQ 423 (TTAB 1971) (GORDON ROSE used only to identify a particular individual and not as a service mark to identify the services of a singing group). The name of a character or person is registrable as a service mark if the record shows that it is used in a manner that purchasers would perceive as identifying the services in addition to the character or person.

**Conclusion**

To conclude, a trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It's how customers recognise you in the marketplace and distinguish you from your competitors. A registered trademark could deter counterfeiters from copying your product or causing confusion in the marketplace with a similar trademark to yours. Without trademark protection for your goods or services, customers may be unable to distinguish your genuine product or service from a fake. However, the bad thing about trademarks is that this ease of creating trademark rights means that almost all businesses own trademarks, making it very easy to inadvertently violate or "infringe" on the trademark rights of others.

In 2012, Beyonce and Jay-Z filed a trademark for Blue Ivy's name. They later found themselves in a legal battle against Veronica Morales. Beyonce and Jay-Z's legal team asserts that the idea that consumers are likely to be confused between a boutique wedding event planning business and Blue Ivy Carter, the daughter of cultural icons, Beyonce and Jay-Z is frivolous and should be refused in its entirety. Nevertheless, in 2020, the Trademark Trial and Appeal Board ruled in favour of Beyonce and Jay-Z. The TTAB quickly disposed of Morales's final argument that BGK committed fraud when it declared its bona fide intent to use its mark in connection with the identified goods and services.



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# BUSSINES IMPLICATIONS FOR U.S. COMPANIES FROM THE RUSSIA-UKRAINE CONFLICT

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## Issue

Russia's invasion of Ukraine will cause issues in both the U.S. and Ukrainian companies' obligations under agreements for stocks of goods and services in Ukraine. As the conflicts spread across the Ukrainian soil, parties in contracts that are governed by the United States in Ukraine should be wary of their rights and obligations to minimize their losses amidst the conflict.[1]

There are several private and state-owned oil and gas companies in Ukraine. According to the U.S. International Trade Administration, Ukraine has the second-largest natural gas reserves in Europe.[2] Inevitably, Ukraine's oil and natural gas reserves have led to a significant amount of interest from both US suppliers and service companies providing goods and services to oil and gas companies in Ukraine, as well as US companies that hold concessions for the exploration of oil and gas or exercise a controlling interest in a Ukrainian oil and gas company.

The issue is even bigger regarding US companies and Russian Companies' contracts. The United States took significant and unprecedented action to respond to Russia's further invasion of Ukraine by imposing severe economic costs that will have immediate and long-term effects on the Russian economy and financial system. The US Department of the Treasury's Office of Foreign Assets Control (OFAC) imposed wide economic measures, in partnership with allies and partners, that target the core infrastructure of the Russian financial system including all of Russia's largest financial institutions and the ability of state-owned and private entities to raise capital

1 Fontes et al. (2022) Russia-Ukraine Conflict Presents Business Issues and Concerns For US Companies. https://www.mondaq.com/unitedstates/contracts-and-commercial-law/1168072/russia-ukraine-conflict-presents-business-issues-and-concerns-for-us-companies
2 U.S International Trade Administration. (2021, Oct 24). Ukraine - Country Commercial Guide. https://www.trade.gov/country-commercial-guides/ukraine-energy

and further bars Russia from the global financial system.[3] The actions also target nearly 80 per cent of all banking assets in Russia and will have a profound and long-lasting effect on the Russian economy and financial system.

**Facts**

After the disbanding of the U.S.S.R on December 31st 1991, the new state called the Russian Federation was born with a market economy without any clear conception of how to complete such a transformation in the world's largest country. The Russian Federation has had multiple economic reforms, including privatization, market, and trade liberalization, due to the collapse of communism.[4] Upon independence, the Russian Federation faced an economic collapse. The new Russian government had to face past mistakes in the Gorbachev period's monetary policy and find ways to transform the entire Russian economy.

The Soviet Union had left an enormous debt after its collapse. Russia inherited the foreign property of the former USSR and all of its foreign debts. Paying debts was a big issue for Russia because the economy steadily declined at the beginning of the 1990s. Russia became financially indebted in 1993 when, in agreement with other countries of the former Soviet Union, Russia assumed responsibility for the external obligations of the Soviet Union in exchange for the sole claim on its assets. How large a burden Russia assumed is hard to say, but one of the motivations for the agreement was that a package of financial aid was being held up because creditors did not wish to provide additional funds to the region without clarification on who would ultimately be responsible for repaying the outstanding debts. However, it soon became clear that the fall in output and the fiscal costs of the transition made the scheduled debt service a significant burden. In the end, Russia largely did not pay the debts and creditors either granted restructurings or simply watched arrears accumulate.

It would, in hindsight, have been much more transparent to agree to upfront on a reasonable amount for Russia to repay on the Soviet-era debts. Still, there was no

3 U.S Department of the Treasury. (2022, Feb 24). U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs. https://home.treasury.gov/news/press-releases/jy0608
4 Richard Connolly, The Russian Economy: A Very Short Introduction (Oxford University Press, 2020).

political appetite to provide a massive write-off of debts to a superpower nor for the former superpower to ask. The choice of debt strategy (based on simple rescheduling at par) was odd given that at the time most indebted countries in arrears to commercial banks were conducting Brady operations, which greatly reduced the debt burden by granting debt reduction and postponing payments. Similarly, the Paris Club was considering debt reductions for other countries. However, it was politically expedient for the West to have the leverage on the direction of policies in Russia afforded by the ongoing debt issues. The actual Russian debt default in August 1998 was somewhat unique in modern economic history. The initial announcement did not include a formal declaration of default on external debts: this came later, although, given the poor record of payments, it can be argued that this is instead a moot point. Rather, the key element in the emergency package of measures was a restructuring of domestic (ruble) debt. No other country has pursued this approach; others simply printed large amounts of domestic currency to clear the domestic debt burden, effectively inflating away the issue.

The authorities did proceed to default on their external obligations but only on Soviet-era debts—the distinction made earlier between Soviet-era debts, which the authorities have frequently been negligent in paying, and Russian-era debts, on which they have not missed a single payment, was preserved. After protracted discussions, partly reflecting the time that it took to reach a domestic consensus on the macroeconomic policy package and subsequently reach a new agreement with the IMF, the authorities were able to obtain new restructuring agreements first with the Paris Club and subsequently with the London Club.

Aided by the strength of the external position and their determination to come to grips with the underlying fiscal weaknesses, the authorities have subsequently sought to regularize their debts with all creditor groups, using the Paris Club and London Club agreements as frameworks for the negotiations with other creditor groups. The strategy has been largely successful. The bulk of the Soviet-era debts has been restructured, placing the debt situation on a more transparent and sustainable footing. This has also served to move Russia away from its focus on constant rounds

of negotiations on its debts, enabling Russia to assume its position as a G-8 country more clearly; the Russian economy continues to grow until 2014

The 2014-2017 financial crisis in Russia results from the collapse of the Russian ruble beginning in the second half of 2014. A decline in confidence in the Russian economy caused investors to sell off their Russian assets, which led to a reduction in the value of the Russian ruble and sparked fears of a Russian financial crisis. The lack of confidence in the Russian economy stemmed from at least two primary sources. The first is the fall in the price of oil in 2014. Crude oil, a major export of Russia, declined in price by nearly 50% between its yearly high in June 2014 and 16 December 2014. The second is the result of international economic sanctions imposed on Russia following Russia's annexation of Crimea and the Russian military intervention in Ukraine.

The crisis has affected the Russian economy, both consumers and companies, and regional financial markets, as well as Putin's ambitions regarding the Eurasian Economic Union. The Russian stock market, in particular, experienced significant declines with a 30% drop in the RTS Index from the beginning of December through 16 December 2014; Russia’s decline and stagnation in the economy continue throughout the 2020s and being made worse by the current Russian Invasion of Ukraine

Because of this invasion, the US Treasury is taking unprecedented action against Russia’s two most prominent financial institutions, **Public Joint Stock Company Sberbank of Russia** (Sberbank) and **VTB Bank Public Joint Stock Company** (VTB Bank), drastically altering their fundamental ability to operate. Daily, Russian financial institutions conduct about $46 billion worth of foreign exchange transactions globally, 80 per cent of which are in U.S. dollars. The vast majority of those transactions will now be disrupted. By cutting off Russia’s two largest banks — which combined make up more than half of the total banking system in Russia by asset value from processing payments through the U.S. financial system. The Russian financial institutions subject to today’s action can no longer benefit from the remarkable reach, efficiency, and security of the U.S. financial system.

The US Treasury also prohibits transactions and dealings by U.S. persons or within the United States in new debt of longer than 14 days maturity and new equity of Russian state-owned enterprises, entities that operate in the financial services sector of the Russian Federation economy, and other entities determined to be subject to the prohibitions in this directive.

**Regulation**

- US Executive Order 14066
- Directive 2 under US Executive Order. 14024
- Directive 3 under US Executive Order. 14024

**Analysis**

A new Executive Order prohibits new investments in Russia by a person from the United States wherever located, with the purpose of isolating Russia from the global economy. This Executive Order was built on the decision made by more than 600 multinational businesses to exit from Russia. The withdrawal of the private sector includes manufacturers, energy companies, large retailers, financial institutions, as well as other service providers such as law and consulting firms. This executive order has also prohibited any U.S. person from making transactions with Russian state-owned enterprises and freezing any of their subjects to U.S. jurisdiction, which damaged the Kremlin's ability to use said enterprises to enable and fund its war on Ukrainian soil.[5]

To implement sanctions on Sberbank, OFAC issued Directive 2 under US Executive Order O. 14024, “Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions” (the “Russia-related CAPTA Directive”). This directive prohibits U.S. financial institutions from: (i) the opening or maintaining of a correspondent account or payable-through account for or on behalf of any entity determined to be subject to the prohibitions of the Russia-related CAPTA Directive,

5 White House (Washington, D.C.). (2022, April 6). FACT SHEET: United States, G7 and EU Impose Severe and Immediate Costs on Russia. https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/

or their property or interests in property; and (ii) the processing of transactions involving any such entities determined to be subject to the Russia-related CAPTA Directive, or their property or interests in property. Accordingly, U.S. financial institutions must reject such transactions unless exempt or authorized by OFAC.[6]

In a move to limit Russia's ability to finance its invasion of Ukraine or other priorities of President Putin, OFAC expanded Russia-related debt and equity restrictions to additional critical aspects of Russia's economy. To implement this action, OFAC issued Directive 3 under Executive Order. 14024, "Prohibitions Related to New Debt and Equity of Certain Russia-related Entities" (the "Russia-related Entities Directive") to prohibit transactions and dealings by U.S. persons or within the United States in new debt of longer than 14 days maturity and new equity of Russian state-owned enterprises, entities that operate in the financial services sector of the Russian Federation economy, and other entities determined to be subject to the prohibitions in this directive.

There are also several Jurisprudences of the outbreak of war leading to a contract being frustrated, particularly in cases where performance became unlawful as a result of government war regulations regulating or preventing the supply of goods and services (*Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32).

Sanctions imposed by governments globally have affected parties' legal obligations and drastically altered the commercial characteristic of pre-existing contracts. These concerns have businesses contemplating the viability of maintaining their presence in Russia. "Acts of War" is an event that is listed as a cause of a contractual force majeure. Even if it is not listed, the ongoing conflict between Russia and Ukraine will likely meet the threshold test of many force majeure provisions.

Parties relying on a force majeure clause will have to demonstrate that the relevant events are the effective cause of the non-performance. This is more likely to be the case in contracts with a direct nexus to Ukraine, where performance is more

6 U.S Department of the Treasury. (2022, Feb 24). U.S. Treasury Announces Unprecedented & Expansive Sanction. https://home.treasury.gov/news/press-releases/jy0608

likely to be directly affected by the conflict but ultimately will depend on the causal relationship between the events and obligations in question. [7]

The necessary conditions to trigger a force majeure clause can be condensed down to the following points:[8]

- An unexpected or unforeseen event has occurred.
- The performance of the contractual obligations has been rendered impossible or unperformable.
- The opposite party in a contract has been duly notified of the effect of a force majeure event.
- All possible measures have been undertaken by the parties to mitigate the effect of such an event (including employing an alternate means for performance, if available)
- The unforeseen event would have to satisfy the conditions precedent established in the contract if any.

**Conclusion**

In Conclusion, it's pretty clear that the conflict between Russia and Ukraine prove to be very challenging for the business world, especially to the companies that conduct many business between Russia, Ukraine and the United States of America, Russia invasion of Ukraine and various sanctions that are being imposed by United States of America is a *Force Majeure* that would not be over soon, We already see the impact of this economic war, the fuel prices in US and Europe are getting more expensive, certain commodities, like sunflower oil and various vegetables are getting rarer and more costly, Russia also suffering as well, many companies, especially from those of western Europe and America has already close its operation in Russia,

7 Jones Day (March, 2022) Conflict in Ukraine: Liability for Non-Performance Under English LawConflict in Ukraine: Liability for Non-Performance Under English Law https://www.jonesday.com/en/insights/2022/03/conflict-in-ukraine-force-majeure-and-english-lawhttps://www.jonesday.com/en/insights/2022/03/conflict-in-ukraine-force-majeure-and-english-law

8 The Legal 500 (March 11,2022). Force Majeure In Times of War. https://www.legal500.com/developments/thought-leadership/force-majeure-in-times-of-war

affecting its economy and consumer class, United States of America also already blocking Russian company and banks from accessing US Financial sectors, blocking Russian banks and companies from taking loans and accessing US First-rate Financial sector, not only that Visa and Mastercard already stop their operation in Russia, very much limiting the economic capabilities for the Russians to conduct foreign transaction. Only time will tell the ultimate end to all of this economic war, and the question now is who would get the shorter end of the stick?

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# NOTION OF FICTITIOUS INVESTMENT BINARY OPTION TRADING AS THE NEW CRIMINAL ACT OF MONEY LAUNDERING

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## Issue

Digitalization has developed to the new extent in this era of 20s and it is still an on-going process. The development of technology and information has impacted every aspect in society, including the economics sector. The impacts of digitalization itself has brought up the advantages for economic activities, and thus in this modern era people could possibly gain profit through their own devices.

Digitalization offers us unlimited opportunities so therefore innovation has always been popping up each year with various kinds of concepts. This phenomenon is particularly prominent in the economics sector, for instance investment nowadays has gone uplifted where economic activities could be conducted through online. Recently, the concept of investment method has developed into a concept of trading system which is called “binary option”. This has become a trend among society because it is simply easy money where people could make a profit by instant process.

Investment of so called Binary Option trading is later on found out to be risky and problematic. Since the affiliators of binary option trading application being policed after becoming suspects by the authority regarding the notion of conducting criminal acts of money laundering through this binary option trading investment system. This new method of investment system is then being questioned about its legal aspects. Hence, the whole content of this paper is about analyzing and reviewing how the binary option trading system resulted in criminal acts of money laundering from the perspective of law.

Basically, binary option do not have a license in Indonesia. Mainly because the trading system of binary option works like a gambling game, thus it doesn't give certainty to the investors where also the affiliators have a tendency to abuse this state of affairs among investors by exploiting them. Besides the method of binary option system trading that works like a gambling game, binary option also meets the element of fraud, where the affiliators should have given the profit to the investors but on the contrary, the affiliators had never complied with this obligation.

Binary option trading is then claimed to be illegal. The cash flow resulting from the activity of binary option is very much related with money laundering as regulated in Law No.8 of 2010 about Prevention and Eradication of The Crime of Money Laundering. However, the government had undergone some supervisions by authorities such as Otoritas Jasa Keuangan (OJK), Badan Pengawas Perdagangan Berjangka Komoditi (Bappebti) and even Pusat dan Pelaporan Analisis Transaksi Keuangan (PPATK) to overcome this phenomenon of fictitious investment method by binary option trading system.

**Facts**

Binary option is defined as a financial product where the parties involved in the transaction are assigned one of two outcomes based on whether the option expires in the money. Binary Option depends on the outcomes of a "yes or no" proposition, hence the name "binary". Traders receive a payout if the binary option expires in the money and incur a loss if it expires out of the money.[1] For example, the yes or no proposition connected to the binary option might be something as straightforward as whether the stock price of ABC company will be above $8.25 per share at 1:40 pm on a particular day, or whether the price of gold will be above $26.37 per ounce at 09:15 am on a particular day. Once the option holder acquires a binary option, there is no further decision for the traders to make because binary options exercise automatically.[2]

[1]Lucas Downey. 2021. *Binary Option.* Retrieved from https://www.investopedia.com/terms/b/binary-option.asp. Accessed on May 25th 2022.

[2]U.S SEC Office of Investor. *Binary Options and Fraud.* Retrieved from https://www.sec.gov/files/ia_binary.pdf. Accessed on May 25th 2022.

This binary options industry has grown over the last decade, although legitimate companies exist many of the actions in this realm of some companies are underhanded or violate numerous jurisdictions the investment industry rules in which they accumulate business. Residents of jurisdictions around the world are solicited online through pop-up ads, fake news stories, fake testimonials, and mailing campaigns. Boiler rooms are often used to follow up on leads generated through these online channels and make unsolicited cold calls with information obtained from other sources. This is a form of mass marketing scam and it is fertile.

**Regulations**

- Criminal Code
- Law No.8 of 2010 about Prevention and Eradication of The Crime of Money Laundering
- Law No. 11 of 2008 concerning Information and Electronic Transactions
- Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions



**Analysis**

Binary options are one type of online trading in which a trader would choose between a "yes or no" proposition based on their analysis. Traders or also called 'investors' would get their profits contingent on the outcome of the proposition. This type of online trading is often considered as a form of gambling rather than a real investment as they are said to require little or no knowledge of the markets. Binary options are advertised and/or promoted by an affiliate which is someone who promotes online trading through their social media platforms or certain links.[3] Usually, they promoted it by showing the profits of trading on their social media which is part of their gimmick to attract consumers attention. Affiliators would get their commissions from traders who lose which is why their actions could be said as frauds.

[3] Ratih Ika Wijayanti. 2022. *Mengenal Apa itu Affiliator dan Perannya dalam Bisinis Binary Option yang Harus Diwaspadai.* Retrieved from idxchannel.com/economics/mengenal-apa-itu-affiliator-dan-perannya-dalam-bisnis-binary-option-yang-harus-diwaspadai. Accessed on June 3rd 2022.

Money laundering is defined as "Term used to describe investments or other transfer of money flowing from racketeering, drug transaction, and other illegal sources to legal channels so that the original source cannot be traced" according to Henry Campbell Black's Law Dictionary (1990). Sutan Remi Sjahdeini underlined, today the term money laundering is commonly used to describe the efforts carried out by a person or legal entity to legalize "dirty" money, which is obtained from the proceeds of a crime.[4]

The criminal act of money laundering is regulated in Law No.8 of 2010 about Prevention and Eradication of the Crime of Money Laundering. It is stated in Article 3 that "Everyone who places, transfers, diverts, spends, pays, grants, entrusts, takes abroad, changes form, exchanges for currency or securities or other actions on Assets which he knows or reasonably suspects is the result of criminal acts as referred to in Article 2 paragraph (1) with the aim of hiding or disguising the origin of the Assets shall be punished for the crime of Money Laundering with a maximum imprisonment of 20 (twenty) years and a maximum fine of Rp. 10,000,000,000.00 (ten billion rupiah)." Which means that the actions of binary options' affiliates could possibly be a criminal act of money laundering because the origin of money the affiliators' received was proceeds from a criminal act in which fraudulence occurred.

Fraud using binary options is widely reported. The complaints fall into at least three categories :

1. Refusal to credit customer accounts or refund customers,
2. Identity theft,
3. Software manipulation to generate trading losses.[5][5]

The problem of binary options arouse as complaints emerging, the customer had deposited money into their binary options trading account which was then prompted by the "broker" over the phone to deposit additional funds into the customer's account. When the customer then tries to withdraw their original deposit or promised return, the

[4] Aziz Syamsuddin, *Tindak Pidana Khusus*, (Jakarta: Sinar Grafika, 2011) Page 17.
[5] Kompas. 2022.Mengenal Binary Option, *Alasan Mengapa Disebut Judi dan Bahayanya*. Retrieved from https://www.kompas.com/tren/read/2022/02/03/173000065/mengenal-binary-option-alasan-mengapa-disebut-judi-dan-bahayanya?page=all. Accessed on June 23rd 2022

trading platform allegedly cancels the customer's withdrawal request, refuses to credit their account, or ignores their phone calls and emails. Second, there are internet-based binary options that collect customer information (including credit cards, passports, and driver's licenses) for irresponsible use. Additionally in the third complaint, internet-based binary options manipulated the trading software to distort binary options prices and payouts. For example, when a customer's trade "wins", the countdown to expiration is arbitrarily extended until the trade becomes a loss. These schemes of how the binary option works are full of fraudulence and totally unfair to the investors or traders.

Binary options are said to be illegal because The Commodity Futures Trading Supervisory Agency (Bappebti) of the Ministry of Trade as a commodity trading supervisor does not recognize binary options as a part of trading. The scheme of how binary option trading works is similar to a gambling game because the investors or traders put on bets in order to gain profit with uncertain opportunity. Gambling is included as an illegal activity as prohibited by applicable law. Regulated in Article 303 of Criminal Code and Article 45 verse (2) jo. Article 27 verse (2) Law No. 11 of 2008 concerning Information and Electronic Transactions which contained regulation of gambling activities that is conducted online are threatened with a maximum of imprisonment of six years and/or a maximum fine of one billion rupiah. According to this regulation it can be concluded that the binary option is against the law because it has met the element of illegal activity[6] that has been prohibited by law.

Besides the scheme of binary option that has met the element of gambling, it also has met the element of fraudulence as mentioned before. The affiliators always abandoned their obligation to assign the profit that should be received by the investors or traders. Regulated in Article 45A verse (1) as amended by Article 28 verse (1) Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions which regulates that an act of a person who can mislead others so that the consumer suffers a loss in an electronic transaction is punishable by a maximum imprisonment of six years and/or a maximum fine of one billion rupiah.

[6] Tuwo Christy P.C. 2016. Penerapan Pasal 303 Kitab Undang-undang Hukum Pidana Tentang Perjudian. Lex Crimen, vol. 5, no.1. Retrieved from https://media.neliti.com/media/publications/3402-ID-penerapan-pasal-303-kitab-undang-undang-hukum-pidana-tentang-perjudian.pdf. Accessed on June 30th 2022

According to these regulations, it can be inferred that binary option trading is classified as a fictitious investment.

As elaborated in the last paragraphs, it is obvious that binary option trading definitely is illegal. The affiliators are not only conducting a massive scam, fraudulence, and online gambling which is impersonated as an investment, they also conduct money laundering through money which they received from the investors/traders' loss. It is clear that those money originated from an illegal activity, even a criminal act which is fraud and an online gambling provider. Thus, every wealth belonging to the affiliators is unlawful and is considered for performing a layering of money laundering. Layering means the perpetrator of money laundering assigns the money to another form of assets such as properties in order to obscure the money which originated from an illegal activity, so all the wealth that comes from an illegal activity seems to be legal. Therefore it all can be concluded for the notion of money laundering from fictitious investment method by the binary option trading system is emphasized on the affiliators as the provider of binary option trading.

**Conclusion**

Binary option is defined as a financial product where the parties involved in the transaction are assigned one of two outcomes based on whether the option expires in the money. Binary Option depends on the outcomes of a "yes or no" proposition, in which traders would get their profits contingent on the outcome of the proposition.

The scheme of how binary option trading works is very similar to gambling game, therefore is illegal because gambling is prohibited by law. It also has met the elements of fraudulence since the affiliator is more likely abusing the investors or traders by exploiting their loss of money. Therefore, the affiliators are not only conducting criminal acts such as fraud and being an online gambling provider impersonated as an investment system, they are also performing a criminal act of money laundering because all the assets of their wealth originated from an illegal activity.

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# MURDER CASES BY MENTALLY IMPAIRED PERSONS ACCORDING TO INDONESIAN CRIMINAL LAW: THE HOMICIDE CASE BY A MOTHER IN BREBES

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## Issues

Murder cases perpetrated by someone with mental illnesses are difficult and take a long time to resolve. According to Indonesian Criminal Law, a person who commits a criminal act in violation of the prescribed laws should face punishment, unless doing so would be unfair due to the individual's lack of mental capacity. As a result, to ensure a person's mental abilities in criminal law, a thorough psychological evaluation is required. Because of the need for a mental health examination of the perpetrator, the process of giving and enforcing the sentence would be far more difficult than in regular murder cases. Several conditions are outlined in the Criminal Code that allow a person who commits a crime to avoid punishment if certain conditions are met, as outlined in Articles 44, 48, 49, 50, and 51 of the Criminal Code.[1]

According to the Ministry of Health, mental problems have increased significantly during the COVID-19 pandemic.[2] Many economic failures have occurred as a result of the pandemic causing people to stress and negatively impacting their mental health. One of the cases that recently occur is the case of the murder of three children by their mother named Kanti Utami who is a 35-year-old woman in Brebes due to economic pressure from Covid. Up to this point, the police have been unable to identify a suspect in the child murder. Due to mental disorders on the mother's side, the police are still coordinating with numerous parties to determine the legal status.

[1] E.Y. Kanter dan S.R. Sianturi. Asas-Asas Hukum Pidana di Indonesia dan Penerapannya. Jakarta: Penerbit Storia Grafika, 2012, page 164.
[2] SehatNegeriku. 2022. Pandemi COVID-19 Memperparah Kondisi Kesehatan Jiwa Masyarakat. https://sehatnegeriku.kemkes.go.id/baca/rilis-media/20220513/2739835/pandemi-covid-19-memperparah-kondisi-kesehatan-jiwa-masyarakat/. 6 Juli 2022 (17:13).

As a result, Kanti Utami underwent a one-month examination at the RSUD Dr. Soeselo Slawi. The results of the examination revealed that the mother of three children suffered from a severe mental disorder. Because of that, the alleged perpetrator's daily activities have been hindered by this mental disorder. This mental disorder has also reduced her functional ability, including social function, economic function, and even her function as a mother. According to the RSUD, the alleged perpetrator's murder is the culmination of the mental disorder she has previously experienced.[3]

**Facts**

On Sunday, March 20th, 2022 at 04.00 a.m. in Brebes, Central Java, Kanti Utami (KU), a 35-year-old mother of three children with the initials KS (girl), AR (boy), and EM (boy), assaulted and murdered all of her children.[4] The incident took place after the morning prayer. The crime scene (TKP) is in the perpetrator's house in Sokawera Hamlet, Tonjong Village/Sub-district, Brebes. One of her children, namely AR, was declared dead on the spot from a cutter knife wound on the neck from this assault and murder, while the other two suffered serious injuries.[5] KS and EM managed to pass the critical condition as a result of injuries on the chest (KS) and neck (EM) due to their mother's action. KU used a sharp weapon in her action, namely a cutter knife. The police had confiscated the evidence used by KU, such as a knife cutter, bed sheets, pillows, and cell phones from the scene.[6] The psychiatrist who treats KU, dr. Glorio Sp. Kj, stated her mental condition was at the level of a severe mental disorder, one of which KU experienced hallucinations, where she heard a whisper and it had been going

[3] D. A. Ningrum, 2022. Fakta Baru Kasus Ibu Bunuh Anak di Brebes, Ada Kisah Kelam di Masa Lalu. *https://www.merdeka.com/trending/fakta-baru-kasus-ibu-bunuh-anak-di-brebes-ada-kisah-kelam-di-masa-lalu.html*. 7 Juni 2022 (14:32)

[4] A. H. Manggol, 2022. Setelah Bantai Tiga Anaknya, Kanti Utami Takut Ketika Lihat Sosok ini, Ini Penjelasan Lengkap Dokter. *https://bali.tribunnews.com/2022/03/22/setelah-bantai-tiga-anaknya-kanti-utami-takut-ketika-lihat-sosok-ini-ini-penjelasan-lengkap-dokter*. 7 Juni 2022 (14:10).

[5] R. F. Firdaus, 2022. Bukan Faktor Ekonomi, Ibu Coba Bunuh 3 Anaknya di Brebes Diduga Gangguan Jiwa. *https://www.merdeka.com/peristiwa/bukan-faktor-ekonomi-ibu-coba-bunuh-3-anaknya-di-brebes-diduga-gangguan-jiwa.html*. 7 Juni 2022 (14:44).

[6] M. Salis, 2022. Pengakuan Ibu di Brebes yang Bunuh Anak Kandung: Tertekan karena Usaha Bangkrut sejak Pandemi. *https://www.tribunnews.com/regional/2022/03/22/pengakuan-ibu-di-brebes-yang-bunuh-anak-kandung-tertekan-karena-usaha-bangkrut-sejak-pandemi?page=4*. 7 Juni 2022 (14:20).

for a month.[7] According to the results of the examination of the mental health condition of KU and referring to Article 44 of the Indonesian Criminal Code, KU cannot be sentenced for having a mental disorder.[8]

**Regulations**

- Article 44 of the Criminal Code
- Article 53 of the Criminal Code
- Article 338 of the Criminal Code
- Article 354 of the Criminal Code

**Analysis**

According to Article 338 of the Criminal Code, anyone who intentionally takes the life of another person is charged with murder and faces a maximum sentence of 15 years in prison. To be charged with murder, the element of "deliberately taking another person's life" must be present. The element of intentionality is considered to exist if the perpetrator has certain expectations (*stellige verwachting*) that someone would be dead as a result of their actions. If the perpetrator has known that a stab endangers a person's life and is very likely to result in that person's death, deliberation has been stated.[9] Utami's murder of her three children did not result in all of her children dead, but just one. However, even though the other two children are still alive, Utami can still be punished with a criminal offense under Article 354 Paragraph 1 of the Criminal Code "Any person who intentionally injures another person is punished for grievous abuse, with a maximum imprisonment of eight years.", where she seriously injured her two

[7] D. N. Muthia, 2022. Hasil Observasi Kejiwaan Kanti Utami Akhirnya Terungkap! Dokter Jiwa Ungkap Kondisi Kejiwaan Ibu Yang Bunuh Ketiga Anaknya Karena Depresi Berat. https://suar.grid.id/read/203245268/hasil-observasi-kejiwaan-kanti-utami-akhirnya-terungkap-dokter-jiwa-ungkap-kondisi-kejiwaan-ibu-yang-bunuh-ketiga-anaknya-karena-depresi-berat?page=all. 7 Juni 2022 (14:00).

[8] TVOneNews.com. 2022. Kanti Utami Tidak Dipidana Akibat Gangguan Jiwa Berat, Pakar: Hak Asuh Harus Dicabut dan Jika Sembuh Kasus Dilanjutkan. https://www.tvonenews.com/berita/nasional/37349-kanti-utami-tidak-dipidana-akibat-gangguan-jiwa-berat-pakar-hak-asuh-harus-dicabut-dan-jika-sembuh-kasus-dilanjutkan?page=all. 7 Juni 2022 (15:10).

[9] E.Y. Kanter dan S.R. Sianturi. 2012. *Asas-Asas Hukum Pidana di Indonesia dan Penerapannya*. Penerbit Storia Grafika. Jakarta.

children, KS and EM, and can be sentenced to a maximum imprisonment of eight years. The fact that her two other children are not dead, but only suffered serious injuries does not exempt her from being punished, according to Article 53 of the Criminal Code "(1) Attempting to commit a crime shall be punished, if the intention for that is evident from the beginning of the execution, and the non-completion of the execution, is not solely due to his own will. (2) The maximum principal penalty for crimes, in the case of probation, is reduced by one-third." Utami can still be punished for what she has not finished but has started.

According to Sudarto, a person can be convicted if one fulfills the conditions of punishment, namely the perpetrator commits an act that meets the formulation of the law, the act is unlawful where there is no reason to justify the act, and the perpetrator is able to hold accountable for their actions, and there is no reason that can forgive the perpetrator.[10] In this case, the mother, Kanti Utami, has a severe mental disorder with hallucinations as the psychiatrist has stated. Indeed, a psychiatrist is required to determine whether or not the perpetrator has a mental disorder, but it is still up to a judge to decide whether or not the person can be convicted. A judge making a decision regarding the Utami case needs to consider in detail the decision to impose a criminal sentence on the perpetrator, which must consider her psychological state and whether the decision is appropriate and fair. Sudarto stated in his book, *Hukum Pidana 1 Edisi Revisi*, that the judge should bear in mind that if the mental disorder has no relation or causes no harm to the action of the perpetrator then the perpetrator is accountable to be punished. If the judge has reached the conclusion that the perpetrator cannot be convicted due to their mental illness, then the perpetrator is acquitted of charges as an excuse for forgiveness. The term "excuse for forgiveness" is well-known in the Criminal Code (KUHP) as the grounds of impunity. The excuse for forgiveness is a reason that excuses a criminal while their actions remain illegal. Furthermore, Utami's mental state is categorized as being unable to be held accountable for her actions. As a result, the reason for forgiveness is seen through the eyes of the victim or perpetrator (subjective) in accordance with Article 44 of the Criminal Code. As emphasized in Article 44 paragraph (1) of the Criminal Code "Whoever commits an act that cannot be

[10] Sudarto. 2018. *Hukum Pidana 1*. Edisi Revisi. Cetakan Kelima. Yayasan Sudarto. Semarang.

insured against them because their soul is disabled in growth or is disrupted due to illness will not be punished.", one of the conditions that cause a person to be unable to be held criminally responsible is that their soul is disabled in growth or is impaired due to disease. [11]

Quoted from R. Soesilo book entitled *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (page 60-61), the defendant could not be sentenced because their actions could not be held accountable to them, because:

a. Has an imperfect mind. What is meant by the word "mind" here is the power of the mind and the intelligence of the mind. People can be considered to have imperfect minds. For example, idiots, deaf-blind, and mute since birth. However, such people are not really sick, but because of their birth defects, their minds remain as children.
b. Pain that causes disruption of one's mind. For example, madness, hysteria (a type of neurological disease, especially in women), epilepsy, and various other mental illnesses.[12]

**The Psychological Effects of the Pandemic**

Mental disorders make it difficult for people to distinguish between what is real and what is imaginative. For people with mental disorders, they consider their thoughts, imagination, and whispers that they hear as reality. According to Komnas Perempuan's research, one of the effects of the Covid-19 pandemic is restricted mobility and economic capacity, which causes many people to feel stressed and depressed.[13] Not only that, but family relations become tenser, families with violence intensify, and economic pressure increases due to lost or reduced sources of income.

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[11] E. Permatasari, 2022. Ibu Bunuh Anak di Brebes, Bagaimana Hukumnya? https://www.hukumonline.com/klinik/a/ibu-bunuh-anak-di-brebes-bagaimana-hukumnya-lt624aabd504185. 7 Juni 2022 (14:10).

[12] T. J. A. Pramesti, 2013. Apakah Seorang yang Gila Bisa Dipidana? https://www.hukumonline.com/klinik/a/apakah-seorang-yang-gila-bisa-dipidana-lt515e437b33751. 29 Juni 2022 (19:39).

[13] Kompas.com. 2022. Kasus Ibu Bunuh Anak di Brebes, Komnas Perempuan: Ada Dimensi sebagai Korban yang Melatarbelakangi. https://www.kompas.com/tren/read/2022/03/22/140000765/kasus-ibu-bunuh-anak-di-brebes-komnas-perempuan--ada-dimensi-sebagai-korban?page=all. 7 Juli 2022 (15:25).

In this case, the cause of the murder, KU, was a rift in the perpetrator's relationship with her husband and the husband's family, which caused her to believe that she had to bear all of the burdens in his life journey alone. Every individual needs a support system, and so does Kanti. But the problem is that her main support system, which is her husband, has to live far away from her. Meanwhile, she has to struggle to take care of the children and work, with no place to share. Furthermore, there are concerns that if she abandons her children, they will face a period of violent adolescence because as a child, the perpetrator was attached to the experience of violence. As a result, Kanti Utami attempted to end the lives of all of her children.

**The Role of Judges in Murder Cases by People with Mental Disorders**

Psychiatrists are considered important in decision-making. However, it is the judge who is ultimately responsible for determining whether or not the perpetrators' actions can be justified. Because psychiatrists can only provide descriptive information about the perpetrator's actions, the judge has the authority to decide whether or not the perpetrator can be sentenced. Therefore, in order for the judge to determine the mental state of the perpetrator without solely relying on psychiatrists, it is essential for the judge to comprehend and pay close attention to the characteristics of a person who has a mental disorder.[14] Human behavior is approached differently by psychiatry and law. The judge considers behavior based on data and circumstances in order to determine criminal liability. Meanwhile, in psychiatry, behavior is influenced by two types of factors: conscious and unconscious factors. Unconscious factors have a significant impact on human behavior. As a result, psychiatry believes that law-breaking behavior may be the result of both conscious and unconscious factors, as well as a manifestation of psychological disorders. (Ramadhanita, 2018)

If the judge is of the opinion that the person is not responsible for their actions, then that person is acquitted of all criminal charges (*ontslag van alle rechtsvervolgin*). However, in order to prevent a similar thing from happening that endangers both the safety of the insane person and the public, the judge may order that the person be

[14] P. A. P. Dewi, 2019. Proving The Insanity Defense in The Enforcement of Criminal Law in Indonesia. *Jurnal Dinamika Hukum* 19(3): 684.

admitted to a psychiatric hospital for a maximum of one year's probation period for protection and examination in accordance with Article 44 paragraph 2 of the Criminal Code “If it is evident that the act cannot be accounted for due to his lack of perfect intellect or mental illness, then the judge may change his admission to the hospital for a maximum of one year for examination".

**Conclusions**

According to Articles 53, 338, and 354 of the Indonesian Criminal Law, Utami can be convicted of assault and murder if she is in good mental health and is able to be held accountable for her actions. However, due to Utami's severe mental condition which includes hallucinations, it becomes the ground of impunity for Utami. Article 44 paragraph (1) of the Criminal Code is able to exempt her from her punishment as one of the requirements for someone to be convicted is to be categorized as someone able to be held accountable for their actions. After undergoing several examinations, Utami’s psychiatrist has revealed that Utami is suffering from a severe mental disorder. According to Article 44 of the Criminal Code, we know that people with mental disorders cannot be imprisoned. However, the judge in charge of this case should investigate thoroughly whether Utami’s mental condition is related to her actions. In this case, Utami’s mental condition affected her actions which resulted in killing one of her children and the other two having to suffer serious injuries. Thus, Utami is exempted from her punishment but has to undergo probation in a psychiatric hospital for one year at most.

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# CAPITAL PUNISHMENT FOR THE CONVICTED RAPIST: HERRY WIRAWAN

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## Issue

The capital punishment or also known as the death penalty is the most severe punishment that can be imposed on a human being. The methods used for the capital punishment vary in each country. For example, in Texas, USA uses the lethal injection as a primary method used by the state[1] and in Singapore, it is carried out by hanging.[2] Meanwhile in Indonesia, the convicted will be placed on the ground in a secret location with their eyes closed, before being shot in the heart from a range of 5-10 meters by a firing squad. If the convicted are still alive after the execution, the commander will allow the squad to shoot them in the head.[3]

Based on Indonesia's Criminal Code (KUHP), the capital punishment is regulated for crimes involving murdering the president, asking other countries to attack Indonesia, giving help to the enemy during a war, planned murder, and theft and violence done by two or more people that results in someone's serious injury or death. Meanwhile, in Indonesia's Law, the capital punishment is regulated by several laws, including Corruption Law, Human Rights Court Law, and Child Protection Law in which the most severe punishment for the offender is the death penalty.

The majority of the death penalty in Indonesia is given to drug offenders. In January 2022, more than 300 convicts in Indonesia are on death row, this includes 206 drug offenders, 118 for homicide, nine for robbery, eight for drug abuse, five for

[1] National Conference of State Legislatures. 2021. *"States and Capital Punishment"*. https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx#Methods%20of%20Execution

[2] Agense France-Presse. 2005. *"Singapore stands by hanging"*. ABC News. https://www.abc.net.au/news/2005-11-21/singapore-stands-by-hanging/745506

[3] Cormack, Lucy. 2015. The Sydney Morning Herald. *"Drug traffickers in Indonesia face firing squad of 12 in first execution of 2015."* http://www.smh.com.au/world/drug-traffickers-in-indonesia-face-firing-squad-of-12-in-first-executions-of-2015-20150117-12sbid.html

terrorism, and two for theft.[4] Previously, Indonesia has not convicted a rapist to death sentence but this changed when the raping case of several female students at the Madani Islamic Boarding School located in the Yayasan Margasatwa Complex, Cibiru Sub-district, Bandung began to unveil when one of the victims returned home during Eid al-Fitr in 2021. Suspicions arise after one of the parents realized that there was something wrong with their child. Eventually, it was discovered that their child was pregnant.

As soon as the victim's parents discovered the pregnancy, they reported it to the Regional Police of West Java and the Garut Integrated Service Center for Women's Empowerment and Child (P2TP2A). The Police first received a report about the case in May 2021, but the case was not published publicly until 8 December 2021 considering its victims' psychological state. The police then conducted both preliminary and final investigations until it was proven that Herry Wirawan, the chairman of the Islamic boarding school, is the perpetrator.[5] Herry was sentenced to life by the District Court of Bandung. But after an appeal filed by the public prosecutor is granted, Herry is then sentenced to death.

**Facts**

The case was first reported to the authorities in May 2021, after a parent found out their daughter was pregnant after returning home from the boarding school. Soon, an investigation was held. On 16 December 2021, a total of six trials were held with 21 witnesses. During the trial, it was proved that Wirawan has been committing his crimes from 2016 to 2021 and they occurred in several places including rooms in the boarding school, hotels, and apartments. In carrying out his actions, Wirawan manipulated the victims into believing that he would pay for their school and college tuition as well as

[4] Hutasoit, Lia. 2022. *"Komnas HAM: Terpidana Mati Tersiksa Sambil Menunggu Waktu Eksekusi"* IDN Times. https://www.idntimes.com/news/indonesia/lia-hutasoit-1/komnas-ham-terpidana-mati-tersiksa-sambil-menunggu-waktu-eksekusi?page=all

[5] Budi, C. S. 2022. *"Perjalanan Kasus Pemerkosaan 13 Santri oleh Herry Wirawan, Kronologi hingga Vonis Mati"*. https://bandung.kompas.com/read/2022/04/04/225025378/perjalanan-kasus-pemerkosaan-13-santri-oleh-herry-wirawan-kronologi-hingga?page=all

for the female police academy (Polwan). He also promised to take care of their career in the future.[6]

Based on the case file, a total of thirteen students were victims of Wirawan's actions. Twelve students were raped, while one was sexually assaulted. However, at least 21 underage girls are believed to be Wirawan's victims.[7] Eight of the raped victims gave birth to nine babies; the ninth baby was born a day before Herry is arrested. The first victim was raped in 2016 when Wirawan entered her room while she was asleep and forced himself on her. She was raped again in 2017, 2019, 2020, and 2021, which resulted in a pregnancy, and gave birth on 7 January 2021. One of the victims gave birth twice as a result of Wirawan's repeated actions. It was also revealed that one of the victims is a cousin of Wirawan's wife and the assault took place when his wife was pregnant, thus the Head of the West Java Court of Appeals, Asep N. Mulyana, considered this a serious crime.[8] Wirawan is also accused of embezzling the Indonesia Smart Program or *Program Indonesia Pintar* (PIP) aid funds that should have been given to the students who were his victims. It is also suspected that he used the money from School Operational Assistance or *Bantuan Operasional Sekolah* (BOS) for personal uses, including renting hotels and apartments to carry out his actions. According to his victims, they were asked to make proposals to attract donors to donate to the boarding school. He also used the child conceived by his victims, calling the babies "orphans", to gain sympathy from the community to get donations.

The public prosecutor asked to impose the death penalty and chemical castration on Wirawan in January 2022, but Wirawan asked for leniency to raise his children from his victims. As a result, Wirawan was sentenced to life imprisonment on 15 February 2022 by the judges of Bandung District Court for his actions. However, prosecutors from the Court of Appeals of West Java filed an appeal against the decision. Prosecutors

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[6] Wiyono, Bambang. 2021. *"10 Lokasi Rudapaksa Santriwati Korban Kebejatan Herry Wirawan, 5 Hotel, 4 Pesantren, dan 1 Apartemen."* Tribun News. https://bali.tribunnews.com/amp/2021/12/22/10-lokasi-rudapaksa-santriwati-korban-kebejatan-herry-wirawan-5-hotel-4-pesantren-dan-1-apartemen

[7] Suryawan, Widyarta. 2021.*"Jumlah Korban Aksi Bejat Herry Wirawan Mencapai 21 Orang, Kenapa Tercatat Hanya 12 Orang?"* Tribun News. https://bali.tribunnews.com/amp/2021/12/13/jumlah-korban-aksi-bejat-herry-wirawan-mencapai-21-orang-kenapa-tercatat-hanya-12-orang?

[8] Maliana, I. 2021. *"6 FAKTA Baru Kasus Herry Wirawan: Kejahatan Luar Biasa, Rudapaksa Sepupu saat Istri Hamil Besar*". https://m.tribunnews.com/amp/regional/2021/12/31/6-fakta-baru-kasus-herry-wirawan-kejahatan-luar-biasa-rudapaksa-sepupu-saat-istri-hamil-besar

assessed that Herry's crime of raping 13 students that resulted in pregnancy is very serious. The Chief Justice of Bandung Court of Appeals (*Pengadilan Tinggi*) then granted the prosecutors' appeal and Herry Wirawan was sentenced to death on Monday, 4 April 2022. The sentence is in accordance with Article 21, Article 27, Article 153 Section (3) and (4), Article 193, Article 222 Section (1) and (2), Article 241, and Article 242 of the Criminal Procedure Code, as well as Government Regulation Number 27 of 1983 on the Implementation of the Criminal Procedure Code. The sentence is also in accordance with Article 81 Section (1), Section (3), and Section (5) of Law Number 17 of 2016 regarding Enactment of Government Regulation in Lieu of Law Number 1 of 2016 regarding Second Amendment to Law Number 23 of 2002 regarding Child Protection into Law.[9]

Wirawan, in addition to his capital punishment is also required to pay compensation or restitution of around Rp300 million to 12 of the 13 victims and the nominal received by each victim will be adjusted accordingly.[10] He also receives an additional penalty, in which he will be chemically castrated and his identity will be publicized. The Islamic boarding school in which he taught will also be closed and his assets will be confiscated. This case is still proceeding as this content is being written and as of now, the defense team is currently formulating a cassation request for the verdict of capital punishment and restitution charged to Herry Wirawan that will later be sent to the Supreme Court of the Republic of Indonesia (*Mahkamah Agung*)[11]

**Regulations**

- Article 28A and 28I of The 1945 Constitution
- Article 65 of The Indonesian Penal Code
- Article 285 of The Indonesian Penal Code

[9] CNN Indonesia. 2022. *"Kronologi Herry Wirawan Divonis Mati Usai Terbukti Perkosa Santriwati"*. https://www.cnnindonesia.com/nasional/20220404145739-12-780056/kronologi-herry-wirawan-divonis-mati-usai-terbukti-perkosa-santriwati/amp

[10] Verdict No. 989/Pid.Sus/2022/PN Bdg

[11] Tim Detik.com. 2022. *"Divonis Hukuman Mati, Herry Wirawan Ajukan Kasasi"*. https://news.detik.com/berita/d-6051764/divonis-hukuman-mati-herry-wirawan-ajukan-kasasi

- Law Number 17 of 2016 regarding Enactment of Government Regulation in Lieu of Law Number 1 of 2016 regarding Second Amendment to Law Number 23 of 2002 regarding Child Protection into Law

**Analysis**

In 2013, due to the outdated and narrow definition of "rape", the Federal Bureau of Investigation's Uniform Crime Report (FBI's UCR) revised it into a new definition. According to the FBI's UCR Program, rape is "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." For the first time, the new definition includes any gender of victim and perpetrator, not just women being raped by men. It also recognizes that rape with an object can be as traumatic as penile/vaginal rape. This definition also includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity. Furthermore, because many rapes are facilitated by drugs or alcohol, the new definition recognizes that a victim can be incapacitated and thus unable to consent because of ingestion of drugs or alcohol. Similarly, a victim may be legally incapable of consent because of age. According to Article 285 of the Indonesian Penal Code (KUHP), the act of "rape" is defined as "Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage" and is punishable with a maximum imprisonment of twelve years and has since been the primary law to regulate the criminal act of "rape".

The public prosecutor in this particular case, charged the defendant, Herry Wirawan, with Article 81 Section (1), (3), and (5) j.o. Article 76D of Law Number 17 of 2016 regarding Enactment of Government Regulation in Lieu of Law Number 1 of 2016 regarding Second Amendment to Law Number 23 of 2002 regarding Child Protection into Law j.o. Article 65 of The Indonesian Penal Code. The article states that the defendant has committed several criminal acts, as an educator has been committing acts of violence or the threat of violence by forcing a child to commit intercourse with them or another person, which results in multiple victims. As regulated in Article 76D, committing the aforementioned act that results in multiple victims, causing serious injury, mental disorders, infectious diseases, impaired or loss of reproductive function,

and/or the death of the victims, is punishable by capital punishment, life imprisonment, or a minimum imprisonment of 10 (ten) years and a maximum of 20 (twenty) years.

The Chief Justice of the Bandung Court of Appeals granted the public prosecutor's appeal for the capital punishment (maximum punishment) and restitution as the final sentence for Herry Wirawan, with the consideration that the criminal acts of the defendant have been classified as "the most serious crimes" as stated in The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition to the capital punishment, the Bandung Court of Appeals also required the defendant to pay restitution to 12 of the victims amounted to around Rp300 million. The defendant's actions also resulted in the pregnancy of 8 out of the 13 victims, who have received less attention and care from their parents since birth. The defendant's actions caused trauma and suffering to the victims and their parents, and the assaults were carried out in various places using religious symbols, including in Islamic boarding schools which can defame the institution of the Islamic boarding schools and the image of Islam.

More than 100 countries in 2022 have abolished the capital punishment for all crimes, while seven countries still have the punishment for certain circumstances such as war crimes. Aside from being considered inhumane, there is no credible evidence that sentencing criminals to death will reduce crimes more effectively, including sexual assault. According to Online Information System for the Protection of Women and Children Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia (Simfoni PPA Kementerian PPPA) in 2018, most sexual assault cases are conducted by people the victims know personally, such as family members, neighbors, and significant others. This can cause the victims to not report the incidents, as they can face pressure and/or threats from their families or the perpetrators' families to keep the matter to themselves.[12]

Regarding the issue of capital punishment which is considered inhumane and violates basic human rights, the Constitutional Court of the Republic of Indonesia *(Mahkamah Konstitusi*) has contested the existence of capital punishment against

[12] Sen, Hahnavi. 2021. *"Seven Reasons Why We Shouldn't Demand the Death Penalty for Rape"* The Wire. https://m.thewire.in/article/women/rape-death-penalty/amp

Articles 28A and 28I of The 1945 Constitution in 2007 with Verdict No. 2-3/PUUV/2007, which stated that the Constitutional Court believes that the capital punishment does not conflict with the 1945 Constitution of the Republic of Indonesia, the Universal Declaration of Human Rights, and still applies for the cases that exist today. The National Human Rights Commission of The Republic of Indonesia opposes the death penalty, as Article 28I of The 1945 Constitution declares that "the right to live is the right that cannot be reduced or limited under any circumstances".

The death penalty for sexual offenders is also considered ineffective since the focus of the government and society will be subjected to the offender who is on death row, instead of focusing on the victims and their recovery. The condition of the victims has to be the focus in this case, even if we sentenced the defendant to death, is it fair enough for the victims? For the record, all the victims of rape cases virtually live in terror of trauma, and the health of the victim is one of the things that we should care too. If the government just held the case and ended it with money it's not making it better for the victims' condition. Deputy Femmy explained that the handling of victims of sexual violence should be a priority. This relates to the future and in the long term to recover from psychosocial trauma. The Coordinating Ministry for Human Development and Culture coordinates with Ministries, Institutions, and Local Governments so that children as victims (under 18 years old) are ensured to immediately receive: 1) psychosocial support services to recover from trauma; 2) Social Rehabilitation Assistance (ATENSI); 3) health checks; 4) legal assistance; 5) fulfillment of the right to education to be able to return to school; 6) fulfillment of the civil rights of children/babies who have been born, in the form of birth certificates, Kartu Identitas Anak (KIA), and Family Cards; 7) capital assistance for creative economy business tools, as well as assistance for the *Program Keluarga Harapan* (PKH).

Femmy stated that the Coordinating Ministry for Human Development and Culture will ensure that children as victims who have had babies as a result of heinous acts need education regarding basic parenting so that they remain enthusiastic and optimistic about nurturing and realizing the growth and development of their children. "For the baby, they will certainly receive social protection, assistance in fulfilling their

population administration, and service assistance to optimize their growth and development," Femmy said.[13]

**Conclusion**

The capital punishment for Herry Wirawan is not contradicting with laws that apply in Indonesia. Though it is considered to be inhumane by many, The Constitutional Court of The Republic of Indonesia states otherwise, in which capital punishment is permitted according to The 1945 Constitution and The Universal Declaration of Human Rights. In the matter of its effectiveness in reducing crimes, it is still a debate about whether the capital punishment is a deterrent. In Wirawan's case, the capital punishment is given not without a reasonable reason. Wirawan had raped thirteen young girls for years and caused nine pregnancies amongst the victims. The girls are faced with fears and trauma for years as they're students at his boarding school, thus the crime is categorized as a "serious crime" and the capital punishment is allowed, given that the damages Wirawan caused not only impact the lives of his victims but also their respective families as well.



[13] Retno, H. 2022. "*Femmy, Hukum Seberat-beratnya Pelaku Kekerasan Seksual*". Portal Bandung Timur. https://portalbandungtimur.pikiran-rakyat.com/nasional/pr-943397197/femmy-hukum-seberat-beratnya-pelaku-kekerasan-seksual?page=2

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