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JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate and graduate students from any major to contribute in scientific research and writing in regards to Business Law, Public International Law, Private International Law and Comparative Studies. The Editorial Board receives any research paper and conceptual article that has never been published in any other media. The submission requirement is available at the inside back cover of this journal.

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

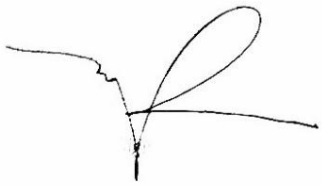
Legal publication has been influential in the development of law, as it communicates ideas about a particular legal issue, followed by possible solutions. In countries that adopt the common law system, legal reviews are frequently cited as a persuasive authority since it offers intriguing perspectives concerning the discussed legal matter. Yet in Indonesia, the importance of legal reviews is not as recognized and materialized. This is perhaps due to the lack of interest and awareness of its benefits.

This is where the Juris Gentium Law Review **("JGLR")** steps in: it is the first medium in Indonesia – run solely by students – that encourages and provides an opportunity for law students from any institution to both enhance their legal research and writing skills and express their views through legal articles regarding issues on the topics of public international law, private international law and even comparative law.

The submitted articles that are written by students will undergo a blind-review process by a handful of Executive Reviewers to ensure its quality. But more importantly, the insights and suggestions will lead to the exchange of ideas that offers new or different perspectives concerning the chosen fields of law.

In this line, I would like to congratulate JGLR and the Community of International Moot Court for publishing another remarkable edition. Hopefully, with the work of the Editorial Board, JGLR can become one of the most renowned legal journals in not only Indonesia, but also worldwide in the future.

Prof. Dr. Sigit Riyanto, S.H., LL.M.



Dean
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE PRESIDENT COMMUNITY OF INTERNATIONAL MOOT COURT FACULTY OF LAW, UNIVERSITAS GADJAH MADA

With the ever evolving issues that arise every day and the borderless world that we live in now, it is essential that we equip ourselves with the knowledge to critically dissect both national and international issues in order to better respond to them. It is my belief that as students, especially, we have the moral obligation to always be aware and educated on everything that occurs all over the world, for it would be our turn to run it someday.

Up to this day, Juris Gentium Law Review (JGLR) has been serving as a platform for students globally to express their views through writing. Through this art and tool that every student should come to master and use to their advantage and the benefit of others, JGLR upholds the value that with it, we would yield the power to listen and be listened to.

We are delighted to present to you this year's edition of JGLR. Each year's journal promotes and analyzes different issues. Through the years, the high expectations continuously set for this publication remains: to find a solution and answers to current issues. CIMC hopes that the publication would reach out to all types of students; from any major, background, with the pursuit of any degree in hopes that it would create awareness and promote further discussion on the plethora of selected issues particular to this edition and beyond. Furthermore, it is also within our expectation that this year's publication would inspire law students to write and submit their own articles in order to apply their knowledge and polish their skills while simultaneously contribute to the public.

As President of CIMC, i would like to express my deepest and sincerest gratitude to the JGLR Editorial Board, Technical Team, and Administrative Team that have dedicated their time and effort to make this year's edition the best it could be. To Editor in Chief, Kukuh Herlangga, and Team - this would not be possible without you all.

Audrey Kurnia

President of the Community of International Moot Court
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE EDITOR IN CHIEF JURIS GENTIUM LAW REVIEW FACULTY OF LAW, UNIVERSITAS GADJAH MADA

JGLR publishes student-written pieces twice every year with the main goal of precisely addressing specific issues that are arguably recent within the areas of law. As of now, I am delighted to welcome the publication of the first issue on the seventh volume of Juris Gentium Law Review. Juris Gentium Law Review, since its establishment, has always become a platform to express the perspective of law students on recent legal issues. All of articles published in this issue have undergone a long review process conducted both by our Editorial Board and executive reviewers that are experts on the relevant fields related to the articles' topic. This was done in order to maintain the quality of articles published by JGLR.

On this specific issue, JGLR features five articles ranging from comparative studies on personal data protection in Indonesia and Europe, employment system, particularly on worker protection both in Malaysia and Indonesia, cultural property seen from Turkey and International Perspective, European Refugee Regulation (in relation to International Settlement of Shanghai) and lastly, issues regarding a same person siting as arbitrator and mediator in Indonesia (along with its international perspective).

Lastly, I would like to express my sincere gratitude to JGLR team for their dedication and hard-work that made Volume 7(1) possible: Clarissa Intania, Kaysha Ainayya, Adinda Lakshmi, Aldeenea Cristabel, Grady Ginting, Balqis Fauziah and to Muhammad Dwistaraifa that has written an editorial piece in this issue. Allow me to also take this opportunity to thank Universitas Gadjah Mada's Faculty of Law, the Authors and Executive Reviewers. This current issue would not be possible without the support and help received from them.

Kukuh Dwi herlangga

Editor in Chief of the *Juris Gentium Law Review*
Faculty of Law, Universitas Gadjah Mada

JURIS GENTIUM LAW REVIEW

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PERSONAL DATA: COMPARATIVE STUDY BETWEEN INDONESIAN MINISTERIAL REGULATION AND EUROPEAN UNION'S GENERAL DATA PROTECTION REGULATION

Muhammad Dwistaraifa Rasendriya[1]

Abstract

The ubiquity of personal data online triggers the need to regulate the processing, storage and the deletion of such data. Within the territory of the European Union, its transfer (even past its boundaries) and processing of personal data are subject to the General Data Protection Regulation (GDPR) and its jurisprudence. Article 45(1) of the GDPR empowers the European Commission to issue an Adequacy Decision, which compares the regime of a third country against the GDPR and its jurisprudence. Its issuance would allow seamless transfer of personal data to third country. This provision begs the question if Indonesian legal landscape on data protection meets the yardsticks contained in GDPR.

This editorial will introduce the regimes in European Union and Indonesia, analyse the pertinent Indonesian legislation on the subject, in light of the GDPR, along with the jurisprudence of the Court of Justice of the European Union on the matter. This paper concludes that the Indonesian present data protection regime is extremely lacking, notably due to its narrow scope of application, weak watchdog authority, and its feeble punishment for its violation.

Intisari

Merebaknya penyebaran data pribadi di dunia daring melahirkan kebutuhan untuk meregulasi penggunaan, penyimpanan dan penghapusan data ini. Di dalam kawasan Uni Eropa, transfer (bahkan melewati batas-batasnya) dan pengolahan data pribadi diatur oleh Regulasi Umum Perlindungan Data Pribadi (GDPR). Pasal 45(1) dari GDPR memberikan kuasa kepada Komisi Uni Eropa untuk menerbitkan Keputusan Kecukupan, yang berisikan perbandingan kerangka kerja perlindungan data pribadi di negara ketiga terhadap GDPR dan yurisprudensinya. Penerbitan Keputusan ini akan mengizinkan perpindahan data pribadi tanpa batas ke negara ketiga itu. Pasal ini menimbulkan pertanyaan, sekiranya iklim hukum Indonesia di ranah perlindungan data pribadi memenuhi persyaratan yang terkandung dalam GDPR.

Editorial ini akan memperkenalkan rezim-rezim Uni Eropa dan Indonesia, menganalisa hukum Indonesia di ranah ini dengan sudut pandang GDPR, bersamaan dengan yurisprudensi Mahkamah Keadilan Uni Eropa di topik ini. Artikel ini menemukan berbagai kelemahan di rezim perlindungan data pribadi Indonesia, dikarenakan sempitnya ranah aplikasi, lemahnya kekuatan badan pengawas dan lemahnya hukuman atas pelanggarannya.

Keywords: data protection, Indonesia, GDPR, European Union, Ministry of Communication and Informatics

Kata Kunci: perlindungan data, Indonesia, GDPR, Uni Eropa, Kementerian Komunikasi dan Informatika

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A. Introduction

The Internet has transformed much of the society for the past 20 years. It brings access to once-secluded knowledge, it connects one person to another in different continents instantaneously. Recital 6 of the General Data Protection Regulation ("**GDPR**") of the European Union ("**EU**") sums the situation best:[1] "Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally." However, it must be noted that it is not as easy for these natural persons to take down their personal information offline. As a popular saying goes, "internet does not forget."

This pervasiveness of personal data put online also possesses enormous economic value, as found by the European Union Agency for Cyber Security in 2017.[2] It would facilitate a targeted advertisement to 3.8 billion internet users, who would raise around US$59/user in revenue that year. This targeted advertisement was also the crux of the Cambridge Analytica scandal, which saw the personal data of 87 million Facebook users harvested by a political consulting firm,[3] and utilised to the benefit of an American presidential candidate. Next to the economic value that personal data possesses, the example of Cambridge Analytica shows the potential political impact which collection of personal data has.

Next to the aforementioned points, the connectivity of the internet exposes a risk where a personal data could be transferred to a country whose data protection law is much weaker or non-existent in order to circumvent the application of a stringent data protection legal regime. This surely defeats the purpose of legislating on the processing and disposal of personal data within the boundary of one country. These three factors show the need for the government to regulate the collection, processing, disposal and transfer of personal data beyond its own boundary.

This article will introduce each legal regime briefly, and compare among themselves provisions regarding the scopes of application, collection, processing, and transfer of personal data to a third country. It will conclude with pointers and suggestions on where can Indonesia improve its data protection regime.

a. *The European Union's GDPR*

The GDPR[4] is the result of the European Commission's Proposal 2012/0011.[5] It was intended to overcome the shortcomings of the previous legislation, Directive 95/46/EC (Directive

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1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 2. (Accessed: https://eur-lex.europa.eu/eli/reg/2016/679/oj on 01/01/2020).

2 The Value of Personal Online Data. (2018, April 23). Accessed: https://www.enisa.europa.eu/publications/info-notes/the-value-of-personal-online-data on 01/01/2020).

3 Kang, C., & Frenkel, S. (2018, April 4). Facebook Says Cambridge Analytica Harvested Data of Up to 87 Million Users. Retrieved January 1, 2020, from https://www.nytimes.com/2018/04/04/technology/mark-zuckerberg-testify-congress.html?action=Click&contentCollection=BreakingNews&contentID=66776835&pgtype=Homepage.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L

95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data).[6] Based on Article 16 of the Treaty on the Functioning of the European Union, everyone within the territory of the European Union has the right to have their personal data protected.[7] The GDPR introduces the general rule that processing personal data is illegal, unless the data subjects consent to the processing (Article paragraph 6(1)). Article 7 of the GDPR describes the standard of a lawful expression of consent. The GDPR also enumerates data subjects with a variety of rights which they can directly exercise *vis-à-vis* the data processors and controllers. For these reasons, many have applauded the GPDR to be the gold-standard of data protection legislation.[8]

A national Data Protection Authority ("**DPA**"), who may also be the lead authority within the territory of a member state, enforces the GDPR (Article 51). The authority also works on European-level as a part of the European Data Protection Board (Article 68), whose task is ensuring the uniform enforcement of the GDPR throughout the EU (Article 70). The GDPR grants these national DPAs power to impose steep fine for its infringement. Depending on the violations, it may either impose a fine as high as 10 million Euros or 2% of the amount of annual turnover (Article 83(4)), or a fine capped at 20 million Euros or 4% of the annual global turnover (Article 83(5)).

It must be noted that a European Union Regulation is distinct from a European Union Directive. A Regulation is directly enforceable the moment it comes into force;[9] unlike a Directive which contains mere goal for the policy and must first be transposed into the domestic legislation of respective member states.[10]

Therefore, the GDPR is directly enforceable as a source of law before the courts of member states of the EU; this is different from a Directive which must first be transposed. However, it leaves some room for discretion for respective member states to introduce deviations. This article will only keep to GDPR itself, and not its disparate domestic implementation acts in the member states of the EU.

119, 4.5.2016, p. OJ L 119, 4.5.2016, p. 1–88. Accessible via: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1578453414390&uri=CELEX:32016R0679; accessed on 17/12/2019.

5 Proposal for a Regulation of Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 - C7-0025/12; accessible via http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM(2012)0011_EN.pdf; accessed on 01/01/2020.

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

7 Treaty on the Functioning of European Union, accessible via: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT; accessed on 31/12/2019.

8 Safari, B. A. (2017). Intangible Privacy Rights: How Europe's GDPR Will Set a New Global Standard for Personal Data Protection. Seton Hall L. Review, 47, 809, p.813.

9 Judgment of the Court of 17 September 2002, *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*, Reference for a preliminary ruling: Court of Appeal (England & Wales) (Civil Division) - United Kingdom, ECLI:EU:C:2002:497, par. 27; Article 288 of Treaty on the Functioning of European Union, accessible via: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT; accessed on 31/12/2019.

10 Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, Reference for a preliminary ruling: High Court of Justice, Chancery Division - United Kingdom, Case 41-74, ECLI:EU:C:1974:133, par 12; Judgment of the Court of 5 April 1979, Reference for a preliminary ruling: Pretura di Milano – Italy, Case 148/78, ECLI:EU:C:1979:110, par 24.

b. ***Indonesian Legal Landscape***

Indonesia has yet to legislate an all-encompassing general statute on data protection at the same extent as the GDPR. However, this does not mean that the concept of personal data protection is a foreign one. Article 28G of Amended Indonesian 1945 Constitution provides that everyone is entitled to protection *inter alia* their dignity and property.[11] It must be noted that there are various provisions for data protection in different legislations and regulations. Most of these legislations and regulations deal with very specific subject-matter. Presently, the following regulations and legislations mentioned the need for data protection in passing, without much elaboration:[12]

1) Law No. 7/1992 regarding Banking as amended by Law No. 10/1998 (the Banking Law);
2) Law No. 39/1999 regarding Human Rights;
3) Law No. 23/2006 regarding Resident Administration as amended by Law No. 24/2013 (the Resident Law);
4) Law No. 36/1999 regarding Telecommunications (Telecommunications Law);
5) Law No. 14/2008 regarding Transparency of Public Information;
6) Law No. 36/2009 regarding Health (the Health Law);
7) Law No 11 of 2008 regarding Electronic Information and Transactions (21 April 2008), as amended by Law No 19 of 2016 (Electronic Transactions & Information Law; the "ETI" law)
8) Minister of Health Regulation No. 269/Menkes/Per/III.2008 on Medical Records (MoH Regulation 269);
9) Minister of Communication and Informatics ("MoCI") Regulation 36/2014 on the Registration Procedure of Electronic System Operator;
10) MoCI Regulation 20/2016 on Protection of Personal Data of MoCI;
11) MoCI Regulation 04/2016 on the Information Security Management System (MoCI Regulation 4);
12) Financial Services Authority (Otoritas Jasa Keuangan or "OJK") Regulation No. 1/POJK.07/2013 regarding financial consumer protection;
13) Government Regulation 82/2012 on Provision of Electronic System and Transaction

From this list, MoCI Regulation 20/2016 on Protection of Personal Data of the Ministry of Communications and Informatics ("The Regulation") is of interest. Article 26 of the ETI Law merely defines what is considered "privacy", and establishes that any usage of a personal data must be done with consent.[13] The Government Regulation 82/2012,[14] being the

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[11] Amended Indonesian Constitution. (n.d.). Retrieved January 1, 2020, from http://www.dpr.go.id/jdih/uu1945. Unofficial English translation accessible via: http://www.unesco.org/education/edurights/media/docs/b1ba8608010ce0c48966911957392ea8cda405d8.pdf.

[12] Tisnadisastra, A. A., Prasetyo, P. S., & Adwani, F. (2019). *Indonesia*. Data Protection & Privacy 2020. (A. P. Simpson & L. J. Sotto, Eds.). London: Law Business Research Ltd, p.119.

[13] Law No 11 of 2008 regarding Electronic Information and Transactions (21 April 2008), as amended by Law No 19 of 2016, accessible via: http://www.gmf-aeroasia.co.id/wp-content/uploads/bsk-pdf-manager/11_UU_NO_11_TAHUN_2008_TENTANG_INFORMASI_DAN_TRANSAKSI_ELEKTRONIK.PDF and https://web.kominfo.go.id/sites/default/files/users/4761/UU%2019%20Tahun%202016.pdf ; accessed on 31/12/2019.

[14] Indonesian State Journal no. 189, 2012; accessible via: (http://ditjenpp.kemenkumham.go.id/arsip/ln/2012/pp82-2012bt.pdf

implementation act of the Law, defines what is personal data and imposed obligations on the service provider *vis-a-vis* the owner of the personal data.

The Ministerial Regulation is the relevant Indonesian regulation in force at the moment given its specificity and prevalence of electronic storing and processing of personal data, given that the general Data Protection Bill was only transmitted to the Indonesian Parliament in December 2019.[15] As the implementing act for Law 11/2008 on Electronic Transaction, and Government Regulation 82/2012 on Provision of Electronic System and Transaction, its main purpose is to establish the details for protection of personal data within electronic environment.

The MoCI Regulation does so by identifying the personal scope, material scope, as well as principles and general rules of digital storage and processing of personal data. Next to this, it also sets up a dispute resolution process for infringement of the Regulation or data leaks. The following sections will elaborate on these points. Application.

c. *Material & Territorial Scope of the GDPR*

Territorial application of the GDPR is contained in Article 3: it applies where the processor or controller is established in the territory of EU, or if they offer goods and services to data subjects in the EU; regardless if payment is required. In *Google Spain*,[16] it was found that a mere business activity in an EU member state suffices for the GDPR to apply; no need for a fully-established subsidiary.

Materially, the GDPR applies whenever a processing of personal data is involved (Article 2). It contains a broad definition of personal data; if it can directly, or indirectly, identify a person, be it an ID number, or any reference to their specific factors, it will be considered as a personal data. Next to defining what is personal data, the GDPR also prohibits processing special category of personal data.[17] This is the data which may reveal sensitive data such as political leaning, trade union membership or one's sexual orientation or sex life. Exception to this general prohibition exists in an exhaustive list in Article 9 paragraph (2).

It defines "processing" broadly; it is whenever an operation, or set of operations, is done on the personal data, or a set of it; automated or manually done (Article 4(2)). The Article mentions examples of processing, such as: collection, recording, organisation of such data, storage, or even destruction. The legislator intended such expansive definition to preclude any attempt to evade its application, and to preempt any technological advances (cf. Recital 15). Regarding manual processing, the GDPR applies when the following criteria are fulfilled:[18] the data must be placed in a filing system, and that it is sorted according to a specific criterion.

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[15] Information and Telecommunications Minister: Draft Data Protection Bill soon handed to Parliament(Rahma, A. (2019, December 19). Menkominfo: Draf RUU Perlindungan Data Pribadi Segera ke DPR. Retrieved January 1, 2020, from https://nasional.tempo.co/read/1285533/menkominfo-draf-ruu-perlindungan-data-pribadi-segera-ke-dpr/full&view=ok);.

[16] Judgment of the Court (Grand Chamber), 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, ECLI:EU:C:2014:317, par 55.

[17] Article 9(1) of the General Data Protection Regulation, n.4.

[18] Judgment of the Court (Grand Chamber) of 10 July 2018, Proceedings brought by Tietosuojavaltuutettu, C-25/17, ECLI:EU:C:2018:551, paras. 56 & 58.

Based on this definition, processing could be as simple as taking down personal contact information by hand and classify it into different sections,[19] pointing CCTV in direction of a public space,[20] or even displaying one's data on the internet.[21]

The GDPR contains list of exceptions from its application, as contained in Art 2(2). The relevant exception for most people is processing that is purely for personal or household use.[22] The Court of Justice of the European Union in *Ryneš v Úřad pro ochranu osobních údajů*[23] has found that if a processing intrudes into, or visible from, public space, then it is not personal use. It also does not apply to anonymised data,[24] *i.e.* data which does not identify a specific natural person.[25] Processing of pseudonymised *i.e.* data which may not identify without the use of additional information,[26] is allowed; provided that the personal data and the identifying information are kept separately, and that the identifying information are subject to organisational and technical measures.[27] It is a way to for the controllers and processors to meet their data protection obligation,[28] not a mean to preclude its application.

d. ***Material & Territorial Scope of Indonesian MoCI Regulation***

MoCI Regulation applies to collection, processing, storage, display, dissemination as well as destruction of personal data within an electronic environment (Article 3). There is no further elaboration on this point. It makes no mention of its territorial scope, although its parent legislation, the ETI Law has extraterritorial application.[29] Thus it has been argued that the Regulation, being derived from ETI Law, also possesses extraterritorial character.[30]

It defines Personal Data ("*Data Pribadi*") being a data which are kept, maintained, kept up to date and kept secret (Article 1). It also defines Certain Personal Data ("*Data Perseorangan Tertentu*"): data which are real, and true, which relates to a person and may identify them indirectly or directly (Article 1 paragraph (2)). This definition, does not diverge from GDPR's definition; the two definitions pertain to a data which may directly, or indirectly, single out a person. However, it lacks the definition of special personal data in sense of Article 9 of the GDPR. Indonesia should consider defining and regulating such type of data in its future data protection legislation, given its diversity of peoples.

Regarding the material scope of MoCI Regulation, it is pretty much similar to the GDPR and its jurisprudence, one clear weakness is that it does not apply to manually-collected and -kept

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19 *Supra*, para 36.

20 Judgment of the Court (Fourth Chamber), 11 December 2014, *František Ryneš v Úřad pro ochranu osobních údajů*, Case C-212/13, ECLI:EU:C:2014:2428, par 33.

21 Judgment of the Court of 6 November 2003, Criminal proceedings against Bodil Lindqvist, Case C-101/01, ECLI:EU:C:2003:596, par 23.

22 Article 2 paragraph (2) letter (c) of the General Data Protection Regulation, n.4.

23 Judgment of the Court (Fourth Chamber), 11 December 2014, *František Ryneš v Úřad pro ochranu osobních údajů*, Case C-212/13, ECLI:EU:C:2014:2428, par 33.

24 Article 3 & 4 paragraph (1) of the General Data Protection Regulation, n.4.

25 Voigt page 13;

26 Article 4 paragraph (5) of the General Data Protection Regulation, n.4

27 *Ibid*.

28 Recital 28 of the General Data Protection Regulation, n.4

29 Article 2 of Law No 11 of 2008 regarding Electronic Information and Transactions (21 April 2008), as amended by Law No 19 of 2016, n.13.

30 Zacky Zainal Husein & Muhammad Iqsan Sirie (Assegaf Hamzah & Partners), Indonesia: Data Protection 2019, accessible via: https://iclg.com/practice-areas/data-protection-laws-and-regulations/indonesia; accessed on 02/01/2020.

personal data. One may argue that it is the product of the Ministry of Communication and Informatics, who is the authority in things digital and electronic in the country. However, this weakness makes the MoCI Regulation considered not equally-effective to the GDPR since it will not provide a complete protection which the GDPR and European Law sought to provide to personal data:[31] the MoCI Regulation would be easily circumventable by writing the information down manually and kept in a written form.

e. ***Personal Scope of the GDPR***

It applies to anyone processing or controlling personal data. A processor is a party which processes the data on its own behalf, or the controller's (Art 4 paragraph (7)). Meanwhile, the controller is the party which determines the purpose of processing (Art 4 paragraph (8)). A controller may be a natural or legal person, alone or jointly determines the purpose of processing. A processor must be a separate party from the controller, and processes the personal data on the *behalf* of the controller. Such cooperation must be put in a contract.[32] This contract should be specific to each relationship to best protect the parties involved.[33] In the jurisprudence of the Court of Justice of the European Union, both the controller and processor are responsible to protect the personal data of the Data Subjects.[34]

f. ***Personal Scope of Indonesian MoCI Regulation***

The MoCI does not explicitly mention it. However, the Regulation names User ("*Pengguna*"),[35] Provider of Service ("*Penyelenggara Sistem Elektronik*"), and Owner of Personal Data ("*Pemilik Data Pribadi*"). These terms are comparable to "Processor", "Controller", and "Data Subjects" in the terms of the GDPR, based on the respective role and responsibility of each actors. In the MoCI Regulation, only the User (i.e. Processor) who is responsible to protect the personal data (Article 27). This point diverges heavily with that of the GDPR's jurisprudence, where both controller and processor bear the responsibility to protect the data; not only the latter. Asdqwe

B. <u>Collection of Personal Data</u>

a. ***GDPR's Collection***

Article 5 of the GDPR contains the six principles which must be followed in collecting (*i*.e. processing) the personal data. These principles are: lawfulness, fairness, and transparency,[36]

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[31] Lindroos-Hovinheimo, S. (2018). Who controls our data? The legal reasoning of the European Court of Justice in Wirtschaftsakademie Schleswig-Holstein and Tietosuojavaltuutettu v Jehovan todistajat. Information & Communications Technology Law, 28(2), 225–238, p.230.

[32] Article 28 paragraph (3) of the GDPR, n.4.

[33] Fielding, R. (2018). The Concept of Controller and Processor Data Entities. Int'l J. Data Protection Officer, Privacy Officer & Privacy Couns, 2, 1–13. p.9.

[34] Judgment of the Court (Grand Chamber) of 5 June 2018, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, Case C-210/16, ECLI:EU:C:2018:388, paras. 32 & 35.

[35] Article 1 paragraph (7) of MoCI Regulation 20/2016 ("The MoCI Regulation"), Indonesian State Journal no 1829/2016. Accessible via https://jdih.kominfo.go.id/produk_hukum/view/id/553/t/peraturan+menteri+komunikasi+dan+informatika+nomor+20+tahun+2016+tanggal+1+desember+2016; accessed 10/11/2019.

[36] Article 5 paragraph (1) letter (a) of the GDPR, n.4

purpose limitation[37], data minimisation[38], accuracy[39], storage limitation[40], integrity and confidentiality.[41]

1. **Principles**

i. Lawfulness, fairness and transparency

These principles combined make up one principle. Lawfulness & fairness principles demand that a legal permission allows the processing done fairly, or that it was consented by the data subject.[42] Transparency principle demands that the data subject knows who the controller is, the purpose of the processing, their right to confirmation and communication on the processing done to their data. Next to this, the data subject should also be notified of the risk, rule, safeguard and their right regarding to the processing. Any information on the last point must be in accessible, easily comprehensible, in clear and plain language.[43]

These principles are reflected in Articles 13 and 14 of the GDPR regarding the obligation of the controller to inform the data subjects when their data is being collected. The controllers must provide information listed in the articles, depending on the circumstance of the collection, collected directly from the data subjects (Article 13) or indirectly (Article 14). The Recitals 60-62 of the GDPR help elaborating what information must be present as well as an option how to fulfill it.

ii. Purpose limitation

Data should only be processed for a specific, explicit, and legitimate purpose.[44] No further processing which goes against that purpose is allowed. This is important to determine the lawfulness of the processor's or controller's activities.

iii. Data minimisation

Only relevant and adequate personal data which are limited to the purpose of the processing is used during processing.[45] The parties themselves should enquire what data is required for the processing.[46] This is an obligation of minimal data collection *vis-a-vis* the processing purpose, *i.e.* the collected data must be adequate for the processing purpose, and not further.[47]

iv. Accuracy

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[37] Article 5 paragraph (1) letter (b) of the GDPR, n.4
[38] Article 5 paragraph (1) letter (c) of the GDPR, n.4
[39] Article 5 paragraph (1) letter (d) of the GDPR, n.4
[40] Article 5 paragraph (1) letter (e) of the GDPR, n.4
[41] Article 5 paragraph (1) letter (f) of the GDPR, n.4
[42] Recital 39 of the GDPR, n.4.
[43] Recital 58 of the GDPR, n.4.
[44] Recital 23 of the GDPR, n.4.
[45] Recital 39 of the GDPR, n.4
[46] VOIGT, PAUL. VON DEM BUSSCHE, AXEL. (2018). Eu General Data Protection Regulation (Gdpr): a practical guide. S.l.: SPRINGER INTERNATIONAL PU. P.90.
[47] *Ibid.*

Every reasonable step must be taken to ensure that data that is inaccurate, having regard to the purposes of the processing, is erased or rectified without delay.[48] This principle is reinforced by the right to rectification and erasure of the personal data of the data subjects, contained in Articles 16 and 17 paragraph (1) of the GDPR. The Right to be Forgotten is now contained in Article 17 paragraph (2) of the GDPR, it has been recognised as a fundamental right under Articles 7 and 8 of Charter of Human Rights of the European Union.[49]

v. Storage limitation

Personal data should be kept in such form and manner that which allow identification of data subjects for as long as it is necessary for the processing.[50] The storage period shall be limited to a strict minimum,[51] i.e. only as long as it is necessary for processing.

vi. Integrity and Confidentiality

The personal data must be processed in a manner which assures its security from risks such as unauthorised or unlawful processing and against accidental loss, destruction or damage, by deploying appropriate technical and organisational measures. The GDPR elaborated at length on the organisational measures in its provisions.

b. *The MoCI Regulation Collection - principles*

The Second Section of the MoCI Regulation elaborates on the principles applicable to the collection and gathering of personal data. These principles are data minimisation, relevance, accuracy[52] private[53] and consensual & legitimate.[54]

It is lamented that the MoCI Regulation does not elaborate these principles at length, to the extent of the GDPR does. This circumstance makes these principles unsuitable to enforce since it is unclear what the yardstick for compliance is. The Data Protection Bill should cover this loophole by elaborating on what these principles actually mean.

Regarding the different collection circumstances, the MoCI Regulation merely demands that if the data was collected directly from the Owner of Personal Data, it must be immediately verified;[55] if it was collected indirectly, it must be verified based on different data sources.[56]

C. Processing of Personal Data

a. *The GDPR's processing*

As elaborated *supra* in section B.a., the GDPR adopts a broad definition to the term "processing". The legislator intended the definition to preempt future technological developments, thus ensuring its far-reaching application. Article 5 of the GDPR contains the

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48 Article 5(1)(d) of the GDPR, n.4.
49 Judgment of the Court (Grand Chamber), 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, ECLI:EU:C:2014:317, par 97.
50 Article 5 paragraph (1) letter (e) of the GDPR, n.4.
51 Recital 39 of the GDPR, n.4.
52 Article 7 paragraph (1) of the MoCI Regulation
53 Article 8 paragraph (1) of The MoCI Regulation
54 Article 9 paragraph (1) of The MoCI Regulation
55 Article 10 paragraph (1) of MoCI Regulation
56 Article 10 paragraph (2) of MoCI Regulation

principles which must be followed in processing of personal data. Having elaborated that, it must be borne in mind that the GDPR introduces the general prohibition on processing, unless it was consented by the data subject. In this regard, the GDPR provides an exhaustive list for conditions to legitimate consent. It is contained in Article 7. The *onus* that the data subject consented lies with the controller.[57]

Regarding consent, it must be mentioned that there is a specific provision for consent provided by minors under 16 years old in the GDPR. This provision stipulates that the minor's guardian or parental consent take the place that of the minor's until they attain the age of 16.[58] In this regard, the MoCI Regulation does not differ much from the GDPR, aside from the fact that it does not lay a specific age for one to be considered "minor" but rather conceding that to other statutory limit.[59]

b. ***The MoCI Regulation's processing***

The Section Three of the MoCI Regulation provides for processing ("Processing and Analysis of Personal Data"), processing of personal data according to MoCI Regulation follows different principles from those which apply during collection. Succeeding section deals with storage ("Storage of Personal Data"). The following principles are those which apply during processing:

Purpose limitation[60] Consensual[61] Accurate[62]

Aside from explaining that purpose limitation principle is an obligation, where the Provider of Service (*i.e.* Controller) is to determine the extent and purpose of the collected data, the MoCI Regulation does not elaborate how or what these principles apply in practice.

An exception to consensual principle is contained in Article 13 of the MoCI Regulation: it states that data shown publicly *on* the Electronic System or declared as public *by* the Electronic System (i.e. any electronic device which does the processing, storage, displaying etc).[63] This could be an attempt to emulate an exception in the GDPR regarding the Right to be Forgotten under Article 17(2), but it lacks such context. To allow this exception to stand as it is, may lead to a situation where no data could be protected, since it was displayed publicly on a website (e.g. a Facebook profile name). The upcoming bill on Data Protection should provide recitals to better interpret and elaborate this provision.

D. <u>Deletion of Personal Data</u>

a. ***The GDPR's Deletion***

Given the broad definition of "processing" which thus includes deletion of personal data, the GDPR principles on processing regulate the deletion personal data. See section C.a.i for

[57] Article 7 paragraph (1) of the GDPR, n.4.
[58] Article 8 paragraph (1) of the GDPR, n.4.
[59] Article 37 of the MoCI Regulation.
[60] Article 12 paragraph (1) of the MoCI Regulation
[61] Article 12 paragraph (2) of the MoCI Regulation
[62] Article 14 of the MoCI Regulation
[63] Article 1 paragraph (5) of the MoCI Regulation

elaboration on these principles. The Right to Erasure will be addressed by Section G of this article, as a part which deals on the right of data subject.

b. *The MoCI's Deletion*

Section Six of the MoCI Regulation regulates the destruction of the personal data which the Provider of Service (*i.e.* Controller) or User *(i.e.* Processor) manage. Erasure can only be done only if the Owner of Personal Data (*i.e.* Data Subject) specifically requests deletion of their personal data,[64] or if the storage has exceeded the time limit stipulated within the MoCI Regulation or any other regulations or statute[65] (the MoCI Regulation does not stipulate a time limit itself; it merely wrote in the provision on data storage, that the data must be kept for at least five years[66]). Interestingly, despite laying down that personal data protection only occurs in an electronic/digital environment, the disposal of personal data must also entail destruction of *all* documents in electronic as well as non-electronic forms.[67]

This could be an editorial oversight that the MoCI Regulation does not lay down a specific deadline. Regardless, this issue better be addressed in the upcoming Data Protection Bill in order to ensure its strong enforcement, since such deadline would give a clear yardstick.

E. A Third Country Transfer of Personal Data

a. *The GDPR's transfer*

The GDPR provides general principle of data transfer to a third country (any country outside the European Union) in Article 44. It also governs onward transfer (*i.e.* transfer from that third country to another third country).[68] The data can only be transferred provided that the controller and processor comply with the conditions contained in the provisions of the section. There are different modalities for a seamless transfer of data to happen:[69]

1. **Adequacy decision**

Article 45 paragraph (1) of the GDPR confers authority on the European Commission to determine and issue an Adequacy Decision, which would certify the data protection regime of a third country is adequate according to the GDPR standard. This would allow an impeded data transfer between an EU member state with that third country. Article 45 paragraph (2) describes the different aspects of the third country's data protection regime which will be assessed against the GDPR.

In order for a regime to attain an "adequate" level of protection, it must not necessarily be identical with the GDPR.[70] However, it must be equally-effective.[71] In other words, the level of

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64 Artcile 25 paragraph (1) letter (b) of the MoCI Regulation
65 Article 25 paragraph (1) letter (a) of the MoCI Regulation
66 Article 15 paragraph (b) letter (2) of the MoCI Regulation.
67 Article 25 paragraph (2) of the MoCI Regulation
68 Recital 110 of the GDPR, n.4.
69 The EU Transfers of data to UK post-Brexit: The GDPR perspective. (2018). International Journal for the Data Protection Officer, Privacy Officer and Privacy Counsel, , 1., pp.8-12.
70 Recital 10, Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) OJ L 207, 1.8.2016, p. 1–112, p. 2. Accessible via: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1578552837162&uri=CELEX:32016D1250; accessed on 05/01/2020.

protection must be effective, *i.e.* the data subjects must be able to rely on the mechanism to enforce their claims.[72]

Given the scope of this paper, the remaining modalities which are: 1) appropriate safeguards and 2) binding corporate rules will not be elaborated. Nonetheless, the reader must know that other bases for a third country transfer exist.

2. **Exceptions**

The GDPR contains a strict, and exhaustive list of exceptions to the general rule contained in Article 44. In Article 49 paragraph (1) of the GDPR, it provides certain circumstances where such rule is negated. Among these circumstances is an express & specific consent of the data subject, in light of all appropriate and necessary information that the data may not be enjoying the same level of protection in the third country.[73]

b. ***The MoCI Regulation's transfer***

The MoCI Regulation covers overseas transfer in Article 22. It stipulates that any overseas transfer of data must be: 1) coordinated with the Minister or relevant authority/official,[74] and it must adhere to the statute pertaining overseas transfer of personal data.[75] In coordinating with the authorities, the notification must contain the destination, the purpose of transfer, the date of transfer as well as clear identity of the recipient.[76]

The MoCI Regulation does not regulate a standard for that destination country, neither does it address the matter further. The Data Protection Bill must address this loophole, otherwise personal data of Indonesians could be sent to a country where data protection regime is non-existent.

F. <u>Rights of Data Subject</u>

a. ***Catalogue of rights***

As elaborated *supra*, the GDPR enumerates data subject with numerous rights which they may then exercise *vis-a-vis* controller and processor. In its Chapter III, the GDPR contains various rights intended for the data subjects to exercise. These rights, as contained in Articles 12-22 include the right to receive information regarding the purpose of processing, the contact information of the data protection officer of the controller and processor, to right to not be subjected to automated decision-making. This section will focus on those rights as contained in the MoCI Regulation. It must be noted, that the GDPR's catalogue of rights is much more extensive and more-elaborated than the MoCI Regulation's.

According to the MoCI Regulation, an Owner of Personal Data has right to the secrecy to their personal data,[77] to report an infringement by Provider of Service's failure to protect their

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71 *Ibid.*
72 *Maximillian Schrems v Data Protection Commissioner*, Judgment of the Court (Grand Chamber) of 6 October 2015, C-362/14, ECLI:EU:C:2015:650, paras. 73-74.
73 Article 49 paragraph (1) letter (a) of the GDPR, n.4.
74 Article 22 paragraph (1) letter (a) of the MoCI Regulation
75 Article 22 paragraph (1) letter (b) of the MoCI Regulation
76 Article 22 paragraph (2) of the MoCI Regulation
77 Article 26 letter (a) of the MoCI Regulation

data to the Minister,[78] to access or update their data without disturbing the Electronic System, subject to prevailing law,[79] to access their historical data,[80] subject to prevailing law, and lastly demand destruction of their data which are managed by Provider of Services, subject to prevailing law.[81] But this catalogue does not make clear the recipient of the claims of the Data Subjects. The closest thing is the right to report breach to the Minister. This provision renders the Regulation to be much weaker than the GDPR, which grants Data Subjects a list of rights enforceable towards either the processor or controller.

One may argue that the obligation to maintain a compatibility and interoperability of the Electronic System contained in Article 11 could be comparable as the right to data portability contained in the GDPR's Article 20, however, considering it addresses the User (i.e. Processor) and the Provider of Services (i.e. controller), this is not comparable to GDPR's Right to Data Portability which explicitly endowed the data subject such right.

Another deviation is the GDPR does not endow this explicit right to data secrecy to data subject. Instead it was an obligation imposed on the processor and controller.[82] The remaining rights listed prior are comparable to: the right to effective judicial remedy (against the processor, controller or the supervisory authority),[83] right to access[84] & right to rectification[85] and right to erasure in Article 17 of the GDPR.

Regarding the right to erasure, this right must be proven to exist by the requesting data subject, based on the different circumstances as listed in Article 17 paragraph (1) letters (a) to (f). Next to the right to erasure, the data subject can also exercise their right to be forgotten under Article 17 paragraph (2) of the GDPR, that it has been recognised as a fundamental right under Articles 7 and 8 of Charter of Human Rights of the European Union.[86] It must be noted that this right as contained in the GDPR is much more far-reaching than the one contained in *Google Spain* judgment.

It demands the controller to notify the processor (and anyone who receives the data concerned) within reasonable steps, bearing in mind available technology and technical cost, of request of erasure from the data subject. The processor must then delete any link, any information, original or replication, of that data.

At the moment, the MoCI Regulation has no comparable right to right to be forgotten, or other rights beyond those mentioned *supra*. Future Data Protection Bill must expand these rights in order to provide a more complete protection of one's personal data.

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78 Article 26 letter (b) of the MoCI Regulation
79 Article 26 letter (c) of the MoCI Regulation
80 Article 26 letter (d) of the MoCI Regulation
81 Article 26 letter (e) of the MoCI Regulation
82 Article 90 of the GDPR, n.4.
83 Articles 78-79 of the GDPR, n.4.
84 Article 15 paragraph (1) of the GDPR, n.4.
85 Article 16 of the GDPR, n.4.
86 Judgment of the Court (Grand Chamber), 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, ECLI:EU:C:2014:317, par 97.

b. ***Supervisory authority***

1. **In GDPR**

As stipulated *supra*, the GDPR is enforced on the national level by a national data protection authority (the DPA) (Article 51). Coherence of the enforcement is coordinated on European-level by European Data Protection Board (Article 68). This national DPA must maintain a total independence, with regards to its staff, finance, and exercise of its power.[87] Its list of authority is contained in Article 58 of the GDPR, and that includes the power to investigate,[88] issue warnings,[89] orders,[90] or fine (depending on the provisions of Article 83 and 84).[91] It can also act as a party to a judicial proceeding to enforce the GDPR.[92]

2. **In the MoCI Regulation**

According to the MoCI Regulation Article 35 paragraph (1), the monitoring and enforcement of the Regulation is done by the Minister of Communication and Informatics, and/or the chief of supervisory authority and sector regulator. There is no further elaboration on who could these chief or sector regulator be. On this point, the MoCI Regulation highly diverges from the GDPR. Its supervisory authority is not independent of the government. However, it must be borne in mind that the MoCI Regulation could only go so far in establishing new powers and entity. In enforcing MoCI Regulation, the Minister cannot go further than it may listing the violators on a list as a form of administrative sanction (Article 36). Other forms of sanction include verbal warning, written warning, or an order to stop its activities temporarily.[93]

With that being said, the Data Protection Bill must provide for an independent supervisory authority, and make it the lead authority in issues pertaining to data protection. Next to this, it must also confer this lead authority the authority to investigate, impose fine, issue reprimand, order as well as notice for violations. This is to ensure a stringent and uniform application of the data protection regime, and avoid overlaps and inconsistent enforcement.

c. ***Dispute Resolution Mechanism***

Under the GDPR, the data subjects can address the processor and controller of their data in order to enforce their rights under the GDPR. With that being said, they can either lodge a complaint with the supervisory authority,[94] who will then investigate if an infringement had occurred, or lodge it with the judicial authority.[95]

The MoCI Regulation, on the other hand, only stipulates that a Director-General under the Minister to have jurisdiction to "receive the complaints of Data Subjects" (Article 30 paragraph (1)) and to create a dispute resolution panel.[96] The Owners of Personal Data can only bring complaint for failure of the Provider of Service (i.e. controller) to notify them or

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87 Articles 52 paragraph (2) and 52 paragraph (4) of the GDPR, n.4.
88 Article 58 paragraph (1) of the GDPR, n.4.
89 Article 58 paragraph (2) letter (a) of the GDPR, n.4.
90 Article 58 paragraph (2) letter (c) of the GPDR, n.4.
91 Article 58 paragraph (2) letter (i) of the GDPR, n.4.
92 Article 58 paragraph (4) of the GDPR, n.4.
93 Article 36 paragraph (1) letter (c) of the MoCI Regulation.
94 Article 77 paragraph (1) of the GDPR, n.4.
95 Article 79 paragraph (1) of the GDPR, n.4.
96 Article 30 paragraph (2) of the MoCI Regulation

other Providers about security failure which may or may not cause damages,[97] or a tardy notification of such failure which caused damages.[98] The Owners may only bring judicial civil claim after the mandatory dispute settlement mechanism failed to bring about a peaceful resolution.[99]

This mandatory method of dispute settlement, a dependent supervisory authority, a very weak power granted to the Directorate-General and non-automatic right to judicial complaint make it very likely that the rights of the Owners will be effective, *vis-a-vis* big Providers of Service (i.e. controller), such as Facebook or Google who may have the capacity to fight a judicial complaint before a court. On this end, the Data Protection Bill should confer such right on the Owners of Personal Data so that they might exercise the rights endowed therein effectively, preferably with the help of a supervisory authority.

d. ***Organisational Measures - the GDPR's Data Protection Officer***

The MoCI Regulation also merely obliges the Providers (i.e. Controller) to nominate a contact person whom the Owners of Personal Data (i.e. data subjects) may reach out regarding management of their personal data. This role seems to imitate that of Data Protection Officers ("**DPO**") which the GDPR mandates every Processor and Controller to nominate in Article 37; however, it must be noted that the role of the DPO is much more extensive than that of this contact person.

A DPO is supposed to monitor the implementation of the GDPR within the environment of their employer, counsel their implementation, and coordinate with the supervisory authority. They are to be the first contact for the data subjects.[100] To fulfill these duties, they are to be independent from instruction pertaining to their task in this field,[101] but they may also perform other duties granted it does not conflict with ones which pertain to data protection.[102]

As elaborated, the DPO does much more than a contact person. Consequently, it is highly recommended that the Data Protection Bill include a provision for such provision, in order to make an effective exercise of the rights of the Owners of Personal Data.

G. Conclusion

This article sets out to identify the different weaknesses within Indonesia's prevailing data protection regime. In doing so, it identified the different regulatory approach and solutions which the two entities followed.

This paper concludes that the Indonesian regime is severely wanting when compared to the GDPR. Next to this conclusion, this paper also offers its piece on the solution to these shortcomings, e.g. independent supervisory lead authority, a more expansive material scope, as well as a more structured approach to the enumeration of the rights and obligations of each player (i.a. the User, the Provider, and the Owner) to make identification of the rights and obligations of these players more easily identifies.

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97 Article 29 paragraph (3) letter (a) of the MoCI Regulation
98 Article 29 paragraph (3) letter (b) of the MoCI Regulation
99 Articles 32 paragraph (1) & 32 paragraph (2) of the MoCI Regulation
100 Article 38 paragraph (4) of the GDPR, n.4.
101 Article 38 paragraph (3) of the GDPR, n.4.
102 Article 38 paragraph (6) of the GDPR, n.4.

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EXCLUSIVE RIGHT ON PROPERTY OF HUMANITY (!)

STATE OWNERSHIP OF CULTURAL PROPERTY IN TURKEY AND THE INTERNATIONAL DIMENSION

Etka Atak[1]

Abstract

Turkey is a country that is rich in terms of cultural property. It is regarded as a source country for cultural property. Turkey endeavours to keep its cultural properties within its borders and to claim the restitution of its cultural properties which are located abroad. A successful claim of restitution or repatriation requires clear and precise laws that could be interpreted by foreign courts where the concerned object might be. Turkish law has witnessed changes which created confusions in the last decades. Whilst examining the Turkish laws, cultural internationalism and cultural nationalism are to be borne in mind. For the adherence of the State to either of the concepts would have clear impacts on how the concerned laws and regulations are to be interpreted and understood.

Intisari

Republik Turki merupakan negara yang kaya dengan benda budaya. Negara ini dianggap sebagai negara sumber benda budaya. Turki mencoba untuk menjaga benda budayanya di dalam negeri dan mengklaim restitusi untuk benda budayanya di luar negeri. Keberhasilan klaim restitusi atau repatriasi benda budaya ini membutuhkan undang-undang yang jelas dan presisi untuk diinterpretasikan oleh peradilan asing di mana benda itu berada. Hukum Turki telah menjalani perubahan yang membingungkan selama beberapa decade ke belakang. Selagi memeriksa hukum Turki, internasionalisme dan nasionalisme budaya harus diingat. Hal ini dikarenakan penganutan sebuah negara terhadap konsep ini akan berefek terhadap pengertian dan interpretasi undang-undang dan regulasi yang terkait.

Keyword: *Cultural property, protection, State ownership, cultural internationalism/nationalism, repatriation, blanket legislation*

Kata Kunci: *benda budaya, perlindungan, kepemilikan negara, internasionalisme/nasionalisme budaya, repatriasi, legislasi umum*

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A. Introduction

Cultural heritage that date from early ages constitute the heritage of all human beings. Reservation of this heritage for the next generations now stands as a highly important principle to be honoured.[1] Whilst the need for this protection is becoming clear among the peoples, the question of 'who' is going to be the protector of 'which' property still begs a definitive answer. The countries which are rich in terms of cultural property, generally adopt such legislation that designate the owner of certain cultural property as the State itself.[2] This measure allows these countries to claim the restitution of concerned properties by means of their claimed ownership.[3] Had those countries not possessed the ownership of such property, their claim for restitution could easily be rejected on the ground that the State in question is seeking the unfair enforcement of its laws in another sovereign State. Notwithstanding the exclusive right of ownership, a successful claim for restitution requires clear laws that set the ownership of the State on such objects.

Turkey is considered a rich country in terms of cultural property. Turkey has sought the repatriation of many objects that it deems to belong to itself by claiming ownership, in an attempt to establish itself as a cultural powerhouse.[4] However, proving ownership has been a controversial issue in some cases due to changes in Turkish law and because the Turkish laws on the matter were found not to be clear by foreign courts. Consequently, this paper aims at shedding light on the Turkish law on the State ownership of cultural property. The paper also seeks to determine if the Turkish law on State ownership adopts a cultural nationalist or a cultural internationalist approach.

Doctrinal research method will be employed in this paper.[5] Through this method, relevant legislation will be determined and examined, also identifying problems via the case law at hand. Due to the history of the mentioned legislation being indispensable in this assessment, a historical analysis of the legislation will also be provided.

In elaborating the Turkish law on State ownership, chapter B will start by giving a general overview of what is cultural property. Chapter C will examine the cultural internationalism and nationalism. Chapter D is then going to delve into how Turkey seeks to protect cultural property by claiming ownership. The following chapter will provide the relevant Ottoman and Turkish legislation on State ownership. Chapter F is going to cover what constitutes a cultural property that requires protection. Chapter G will finally determine when the Turkish State actually owns the cultural property, followed by the assessment of Turkey between cultural nationalism and internationalism. Finally, chapter I will conclude.

B. Defining Cultural Property

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1 Merryman, J. H. (1985) *Thinking about the Elgin Marbles*. Michigan Law Review, 83(8), pp.1880, 1916. (Merryman I).

2 Merryman, J. H. (1988). *The Retention of Cultural Property*. University of California, Davis Law Review, 21, p. 477. (Merryman II).

3 Scovazzi, T. (2014). R*epatriation and Restitution of Cultural Property: Relevant Rules of International Law in Smith, C. (eds)*. Encyclopedia of global archaeology. New York, NY: Springer.

4 Bilefsky, D. (2012). *Seeking Return of Art, Turkey Jolts Museums*. Retrieved from https://www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html. Accessed on 14 April 2019.

5 McConville, M., & Chui, W. H. (2017). *Research methods for law*. Edinburgh: Edinburgh University Press, p.21.

There is no unified universal definition that could qualify as the exact and comprise *de facto* definition of cultural property. These varied definitions of cultural property by nations and international instruments also contribute to the lack of uniformity in cultural property protection laws. For the difference in defining what to protect in turn brings uncertainty on what is being protected by each State or entity.[6] Nonetheless, the 1954 Hague Convention[7] and UNESCO Convention 1970[8], to each Turkey is a party,[9] provide good oversight of how cultural property is defined. Article 1 of 1954 Hague Convention defines cultural property as 'movable or immovable property of great importance to the cultural heritage of every people…' followed by a list of cultural property.

The 1954 Hague Convention is concerned with the protection of cultural property at times of war. On the other hand, UNESCO Convention is concerned with the illicit trade of cultural property which has shown its effect on the wording of its definition of cultural property. To that end, Article 1 of UNESCO Convention seemingly focuses on movable cultural property, albeit not necessarily only movable cultural property. Examples given in Article 1 are for example; rare collections and specimens of fauna, flora, minerals and anatomy, objects of ethnological interest, parts of dismembered archaeological sites and products of archaeological excavations.[10] The two Conventions give an insight on how the definition of cultural property can be altered to the aim pursued by the legal instrument at hand.

From a national perspective, the Turkish law defines cultural property in the Law number 2863 on the Conservation of Cultural and Natural Property (hereinafter 1983 Law) Article 3(a)(1) as:

> "*All movable and immovable properties above and under the ground or under the water, of prehistoric and historic periods that are related to science, culture, religion and fine arts or has been the subject of social life that has unique scientific or cultural values in prehistoric and historic periods.*"[11]

Definition of cultural property is crucial, for it is an important factor in determining which objects will be protected. Withal, not every cultural property is protected by law which would require further assessment that will be provided in chapter F. However, prior to the substance of what is protected, the motives behind protection will be examined in the following chapter.

C. Cultural Property from Two Perspective

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6 Forbes, S. (1996). *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*. Transnational Lawyer, pp. 9, 235. 239.

7 Convention for the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1954) ["1954 Hague Convention"] Art. 1.

8 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Nov. 14, 1970) ["UNESCO Convention"] Art. 1.

9 Turkey has ratified UNESCO Convention in 1983, see <https://whc.unesco.org/en/statesparties/> accessed 14 March 2019; Turkey has acceded to the 1954 Hague Convention in 1965, see <https://en.unesco.org/countries/turkey/conventions> accessed 14 March 2019.

10 Article 2 of the Convention on Stolen or Illegally Exported Cultural Objects [UNIDROIT Convention] broadens this definition of cultural property by changing the word property to objects. UNIDROIT Convention will not be used in this paper because Turkey is not a party to this Convention. See: <https://www.unidroit.org/status-cp> accessed 14 March 2019.

11 See for the amendments in 1987 and 2004 of article 3(a)(1): Murat Volkan Dülger, (2014), *Legal Protection of Cultural Property and Work of Arts,* 1 (1) Journal of İstanbul Medipol University School of Law, pp. 107, 109.

There are two general motives behind cultural property protection. One views the cultural property as the 'components of a common human culture'[12] which is called 'cultural internationalism'. The other view is 'cultural nationalism' which regards cultural property as 'part of a national cultural heritage'.[13] The two perspectives have legitimate expectations and they are not mutually exclusive.[14] Nevertheless, they prove to be contentious at times due to opposite outcomes that derive from the choice made between the two concepts by legislatures.[15]

Countries have varying acceptances of the two concepts, stemming from how and where they find the protection of cultural property more suitable. The countries are divided into two groups in the literature on this topic.[16] First category is the 'source nations' where the internal demand for cultural property is less than the supply of the cultural property. These countries tend to keep the cultural property within their borders by opposing to its exportations.[17] The second category is consisted of the 'market nations' where the demand for cultural property exceeds the supply of valuable cultural property.[18] Belonging to either the market or source nations impact countries' inclination towards differing protection regulations.

Cultural internationalism suggests that cultural property belongs to the global community as a whole and that its conservation and enjoyment are of interest for everyone. Hence, the cultural property is to stay where its preservation and care would be rendered better,[19] regardless of the concerned cultural property's provenance, mired past, or to whom it originally belonged.[20]

Cultural nationalism on the other hand awards nations a special interest by which they may imply the attribution of the objects' national character independently from where the object is located or by whom it is owned. This conception of cultural property legitimizes the national export controls and enables states to legitimately claim the repatriation of the cultural property that they deem belong to their state.[21] This view emphasizes national interests, values, and pride.[22]

The 1954 Hague and 1970 UNESCO Conventions differ in their approach. While the former emphasizes the cultural heritage to be the heritage of all mankind, the latter focuses on the interests of the states in their national cultural heritage. 1954 Hague Convention seeks to protect cultural property from destruction and harm, whilst 1970 UNESCO Convention supports retention of cultural property by source nations.[23] It must be acknowledged that the times when the two treaties formed had a strong impact on their approach towards the

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12 Merryman, J. H. (1986). *Two Ways of Thinking About Cultural Property*. The American Journal of International Law, 80(4), p. 831. ("Merryman III")

13 *Ibid, p.* 832.

14 Sljivic, A. (1997). *Why Do You Think It's Yours?: An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*. The George Washington Journal of International Law and Economics 31. 393.

15 Roehrenbeck, C. (2010). *Repatriation of Cultural Property- Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*. International Journal of Legal Information 38(2). 185, 190.

16 *Ibid, p.* 189. ("Roehrenbeck").

17 Merryman I, pp.1880, 1916.

18 *Ibid.*

19 Roehrenbeck, p.393.

20 Collado, K. (2014). *A Step Back for Turkey, Two Steps forward in the Repatriation Efforts of Its Cultural Property*. Journal of Law Technology & the Internet (5). 5.

21 Merryman, 'Two Ways of Thinking about Cultural Property' (n 10) 832.

22 Roehrenbeck, p. 190.

23 Merryman III, p. 846.

protection of cultural property. 1954 Hague Convention was signed after the massive destructions that have occurred during the Second World War and was an attempt at reaching a worldwide conception that such destruction would never re-occur. Consequently, the two treaties view the cultural property protection from somewhat different angles considering their aspiration and times of adoption.

Turkey is a party to both of the treaties.[24] However, it would be shallow and hard to generalize a country as a cultural nationalist or a cultural internationalist. Rather, a statement to that end may be reached on specific actions or measures pursued by a country. Therefore, the upcoming chapter will introduce the cultural property protection in Turkey followed by the specific protection measures, all of which combined will determine Turkey's place on either of the sides.

D. Cultural Property in Turkey

The protection of cultural property has long been recognized as a principle which is of great significance for the humankind as a whole.[25] Principles are to be honoured, which would otherwise deem them useless instruments without practical relevance. The question of who is more suitable for the protection of cultural property arises out of the pursuit in honouring the protection principle. The preference of source countries is generally to take the ownership of the cultural property that is found within their boundaries by means of an umbrella or blanket legislation.[26] Due to these countries' perception that they are better suited to protect and keep the concerned cultural properties. By means of such a general blanket legislation, states seek to achieve the restitution of cultural property that they consider as wrongfully exported from their respective countries.[27] The claim of ownership which is acquired *ipso iure*, by the operation of law, renders no need for further act of acquisition of the States. Hence, the State might not have had possession of the object, but this does not bar a claim of ownership.[28]

The crucial issue at this point is whether the state in question has 'clearly' prescribed by its laws that the cultural property in question has been under the state ownership. Because, in case the concerned state has merely prescribed export ban on such cultural properties instead of attaching it to state ownership, the foreign courts may refuse restitution of the objects on the ground that the state is seeking the enforcement of its public laws at the host country.[29] This was the issue with the *Türkische Republic v Kanton Basel-Stadt und Prof. Dr. Peter Ludwig* (hereinafter *Basel Decisions*)[30] where Turkey claimed that five gravestones that were being exhibited at the Antiquities museum in Basel was owned by Turkish Republic pursuant to Turkish

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[24] Turkey has ratified UNESCO Convention in 1983, see <https://whc.unesco.org/en/statesparties/> accessed 14 March 2019; Turkey has acceded to the 1954 Hague Convention in 1965, see <https://en.unesco.org/countries/turkey/conventions> accessed 14 March 2019.

[25] Merryman I, pp.1880, 1916).

[26] See for the Turkish Blanket legislation: Sibel Özel, 'The Basel Decisions: Recognition of the Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Country of Origin' 9 (2000) International Journal of Cultural Property 315 and Sibel Özel, 'Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey' 38 (2010) International Journal of Legal Information 177; for the blanket legislation and examples of its recognition see: Paul M. Bator, 'An Essay on the International Trade in Art' 34(2) (1982) Stanford Law Review 275.

[27] Özel, S. (2018). *The Ownership of Cultural Property in Turkish Laws Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.* 24(1), pp. 215, 216. ("Özel I")

[28] Özel, S. (2010). Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey. International Journal of Legal Information. 31, pp. 177, 179. ("Özel II")

[29] Özel I, p.220.

[30] The decisions are not published, hence a reference to their exact sources cannot be provided.

laws that grant *ipso iure* ownership to Turkish state. The Swiss courts have accepted to recognize and apply Turkish law. However, the claim for restitution was rejected by the argument, among the others, that the Turkish law did not provide Turkey with ownership of the objects.

Turkey has adopted a new law after *Basel decisions* in 1983 which has brought new complications due to its rather confusing wording on when Turkey would have the ownership of the cultural properties. The difference in the wording of the 1983 Law has been put forward in *Turkey v OKS Partners* (hereinafter *Elmali Hoard* case) where the restitution of around 2000 coins which were unearthed in Turkey in 1984 was at stake.[31] The defendant argued that Turkey was not entitled to the ownership of the coins since the 1983 Law has prescribed that protection requiring cultural properties '*qualify as state property*'. Differently from the 1973 Law which stated that the cultural properties that are to be protected '*are state property*'. The case was settled outside the court at the end and the coins have been returned to Turkey. However, the US courts had difficulty determining the Turkish law on the issue of state ownership of cultural property.[32] These cases are only the tip of the iceberg, similar cases have arisen before Swiss courts as well which has raised the importance of clarifying the stance of the Turkish law on the matter.[33]

An attempt at clarifying the Turkish law of cultural property ownership would require a short historical assessment for the illustration of some disputes. In order to provide a clearer picture, the Turkish approach to the state ownership will be examined briefly from the first Decree on Antiquities in 1869 to the current day.

E. State Ownership of Cultural Property

a. *During Ottoman Empire*

When the Ottoman Empire seized its existence in 1923, the Republic of Turkey was formed. The protection of cultural objects was also of concern for the Ottoman Empire. The first relevant law[34] was the 1869 Decree on Antiquities,[35] prior to which the cultural property was regulated by the Islamic Jurisprudence.[36]

1869 decree[37] allowed the free trade of antiquities within the Ottoman Empire, however has prohibited their exportation by giving the state pre-emption right.[38] 1869 decree established

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31 *The Republic of Turkey v OKS Partners* 797 F. Supp. 64 (D. Mass. 1992).

32 Özel, 'The Ownership of Cultural Property in Turkish Laws' (n 27) 221.

33 See for example: *Republic of Turkey v The Metropolitan Museum of* Art 762 F. Supp. 44 (N.Y 1990). For the detailed examination: Christopher Roosevelt and Christina Luke, 'Looting Lydia: The Destruction of an Archaeological Landscape in Western Turkey' in Neil Brodie (eds), *Archaeology, Cultural Heritage and the Antiquities Trade* (University Press of Florida 2006) 173.

34 See for detail: Sibel Özel, *Uluslararası Alanda Kültür Varlıklarının Korunması* (Alkim Yayınları, 1998) and Sibel Özel and Ayhan Karadayi, 'Laws regarding the Protection of the Cultural Heritage of Turkey' in Marilyn Phelan, *The Law of Cultural Property and Natural Heritage: Protection, Transfer And Access* 20 (Kalos Kapp Press 1998).

35 Published in 'Takvimi Vekayi, tertibi evvel 1285' (corresponding to year 1869 in the Gregorian calendar).

36 Mumcu, A. (1969). Eski Eserler Hukuku ve Türkiye. Ankara Universitesi Hukuk Fakültesi Dergisi. 26(3-4). 41, 66.

37 In the 1869 Decree, the Arabic rooted phrase 'Âsâr-ı Atika' was used for the first-time meaning antiquities. See: Mustafa Önge, 'Kültür Mirasini Tanimlamak İçin Türkiye'de Kullanilan İlk Özgün Terim: Âsâr-I Atîka' 6 (1) Avrasya Terim Dergisi 8, 10.

38 Articles 1-2 of 1869 Decree on Antiquities.

that antiquities that are found within the private land of individuals would belong to them.[39] Consequently, recognizing private ownership of antiquities within the Ottoman Empire.[40] 1869 Decree was considered to be insufficient in terms of ownership, which paved the way for the 1874 Decree.[41] The new decree entitled the Empire to be the owner of all antiquities which were undiscovered. 1874 Decree has banned excavations without the permission of the Ministry of Education and the landowner. Non-obedience with these requirements led to imprisonment or fines and the found antiquities would be seized by the state.[42] With the legal excavations; the finder, owner of the land and the Empire would get one third of the findings, in case the finder is also the owner of the land s/he would get two third and the rest would be the Empire's.[43]

In 1884, the Empire has enacted a new Decree[44] which has expanded its ownership of the antiquities found or discovered within the territory of the Ottoman Empire including the lakes, rivers, and sea.[45] The only exception to State ownership was made when antiquities are fortuitously found on private land during the construction of bridges, sites, canals and the similar. Consequently, half of the findings were to be given to the landowner according to Article 14 of the Decree. Even then, the Ottoman Empire had the right to buy the objects and to determine which objects to choose for itself.

The last measure that was taken by the Ottoman regime prior to the emergence of the Republic was the 1906 Decree on Antiquities. The 1906 decree has strengthened State ownership of antiquities even further. Article 4 has prescribed that all monuments, movable and immovable antiquities are State property regardless of them being situated on private or public lands. For the new discoveries, an *ipso iure* ownership was thereby given to the State. The Decree did not possess retroactive effect. Therefore, from 1884 until 1906, only the discoveries from Public lands out of excavations are *ipso iure* State property. However, after 1906, antiquities that are found in any manner on either public or private lands are *ipso iure* State Property. Article 10 of the Decree states that objects obtained from clandestine excavations are to be seized by the State. Article 11 punishes such perpetrators by imprisonment. Articles 10 and 11 were referred to in *Basel Decisions*, however they only restate the principle of State ownership and the dedication of the State to fight with any act that is contrary to its ownership.[46] Article 12 was also referred to in the *Basel Decisions*. Article 12 prescribes that in case an antiquity that is found on private land is worthy of being preserved in a museum, the landowner may be rewarded a sum and the object would be taken by the State. In case such object is determined not worthy of being preserved in a

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[39] Article 3 of 1869 Decree on Antiquities.

[40] Özel, S. (2000). *The Basel Decisions: Recognition of Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Territory of Origin*. International Journal of Cultural Property. 9(2), p. 324. ("Özel III").

[41] 7 April 1874 Decree on Antiquities, the Decree was adopted in 26 Mart 1290 according to the Islamic calendar.

[42] Article 7 of 1874 Decree on Antiquities.

[43] Article 3 of 1874 Decree on Antiquities. The government had the discretion to decide whether the allocation would be made *in res* or by value according to Article 5.

[44] 21 February 1884 Decree on Antiquities, adopted in 21 Subat 1299 according to the Islamic calendar.

[45] Article 3 of 1884 Decree on Antiquities.

[46] Özel III, p. 326.

museum, it may be returned to the landowner. Crucially, Article 12 does not grant private ownership over the antiquities but merely indicates a reward.[47]

b. *During the Republic*

The 1906 Decree has maintained its full affect until 1973.[48] In the meantime, Turkish Civil Code (hereinafter TCC) was adopted in 1926.[49] Article 697 of TCC stressed the Republic's ownership on the antiquities. The ownership of antiquities is given to the Republic *ipso iure* by TCC without the need for possession or an act of acquisition.[50] Article 697 remains in full force and has not been repealed by any other legislation.

With regards the *lex specialis* relating to cultural property, the Decree of 1906 was replaced with Law on Antiquities on 1973 with the law number 1710. 1973 Law has kept using a similar language with the 1906 decree. Article 3 of 1973 Law states that:

> "*All movable and immovable antiquities and every kind of monument situated on land and estates belonging to the State or owned by natural and juristic persons, whose existence is known or to become known, are State property. The discovery of such works by means of excavations, their preservation in their original places and the collection of movable antiquities in the museums will be effected in conformity with the present law.*"

As it is obvious from the wording of the Article, the State is determined to be the owner of antiquities found on either private or public lands. There seem to be no complications on this matter as it is clearly established that the State has ownership. However, the 1983 Law was worded somewhat differently, leading it to be construed divergently by different courts or in any case leading to difficulties in determining its exact meaning. Article 5 of the 1983 Law states:

> "*Movable and immovable cultural and natural properties requiring protection that are known to exist or may be discovered in the future on immovable properties belonging to the State, public institutions and entities and natural and juristic persons that are subject to the provisions of private law, qualify as State property.*"

The first noticeable difference between the 1973 and 1983 Laws may be that while in the former the word 'antiquities' is used, in the latter this term had been changed into 'cultural and natural properties'. 1983 Law itself is considered to be the outcome of a quest to achieve a fresh perspective on cultural heritage protection which is regarded as the reason for a change in the terminology. Nevertheless, the content of the two phrases remain almost the same.[51] The difference is that with the 1983 Law cultural property has been divided into either movable or immovable property. In effect, the regulations on cultural property have differentiated between the two types from 1983 onwards.

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[47] *Ibid, p.* 327.

[48] 06.07.1965, E. 1965/16; K. 1965/1 in the Journal of Constitutional Court Judgements 1966 v 3, p 142. Also see: Özel III, P. 325.

[49] Turkish Civil Code was derived from the Swiss Civil Code. The courts in *Basel Decisions* have chosen to interpret the equivalent Article in the Swiss Civil Code as opposed to the one included in TCC and have overlooked the consensus reached in the Turkish literature and practice regarding the issue. However, due to this matter being outside the scope this paper, no further analysis of it is going to be considered in depth.

[50] Özsunay, E. (1997). Protection of Cultural Heritage in Turkish Private Law. International Journal of Cultural Property. 6(2), pp. 278, 279.

[51] Çal, H. (2005). Cultural Property Legislations from Ottoman times to the Republic. Ankara: Prof. Dr. Kazım Yasar Kopraman'a Armağan, pp. 234, 237.

The other divergence between the Laws 1973 and 1983 was the entitlement of property ownership to State by using different words. Since 1906, all the movable and immovable antiquities have been determined as State property. The ownership that has been illustrated is projected for the cultural property that is known to exist nonetheless no private ownership has been established on it. The ownership also encompasses the newly found or to be found cultural properties. There has been talks at the Advisory Council prior to the adoption of the 1983 Law where it was referred that the change in terminology could lead to misunderstandings or confusions. However, the talks at the Council were on whether the protection requiring immovable properties to be encapsulated by the new legislation without the need for expropriation procedure. Hence, the change in legal terminology from '*are State property*' to '*qualify as State property*' has not narrowed the scope of the law, quite to the contrary it has expanded it.[52]

1983 Law is effective to this day. Attempts have been made in order to solidify its scope of application. Especially the movable and immovable cultural properties that require protection needs to be clarified since it is the determining factor for a property to be regarded as State property pursuant to Article 5 of the 1983 Law.

F. Cultural Property that Requires Protection

Cultural property is broadly defined in Article 3(a)(1) of 1983 Law.[53] However, not every cultural property is deemed to be valued such as to be determined as worthy of protection. Therefore, the cultural and natural property that require protection has been specified under the same law first in Article 6 on immovable cultural property to be protected. Secondly, in Article 23 of the 1983 Law, the movable cultural and natural property that require protection is specified.[54] Once a property qualifies as one under Article 6 or 23 of 1983 Law, exporting such property is prohibited under Article 32 of 1983 Law. Exceptionally, these objects can be exported from Turkey for temporary exhibitions on the decision of the Council of Ministers which is to issue the decision on the proposal of the Ministry of Culture and Tourism.[55] The rules and procedures to be followed for taking a protected cultural property abroad is further regulated by a regulation.[56] These procedures illustrate that exporting cultural property from Turkey even for an exhibition has been regulated with high hurdles.

In the following paragraphs, firstly, Article 6 of the 1983 Law on immovable cultural property will be examined followed by Article 23 of the 1983 Law on movable cultural property.

a. *Immovable and Natural Property to be Protected*

Article 6 specifies some immovable cultural and natural property[57] to be protected as 'rock-cut tombs, stones with inscription, painting, and relief, cave paintings, mounds (höyük), archaeological sites, castle, fortress… synagogue, basilica, church, monasteries, külliye (complex of buildings adjacent to a mosque), ancient monuments and mural ruins, frescoes, reliefs, mosaics, chimney rocks'.

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[52] Özel I, p. 228.
[53] See Chapter B for Article 3(a)(1) of 1983 Law.
[54] Özel I, p. 217.
[55] Article 32 of 1983 Law.
[56] Regulation on Removal and Displacement of Protected Cultural and Natural Properties (16.02.1984-18314).
[57] For the definition of natural property see: Article 3(a)(2) of the Law number 2863 on the Conservation of Cultural and Natural Property 1983.

Article 6 provides that the immovable cultural properties that were exemplified or otherwise which were built or made prior to the year 1899 are considered to be cultural heritage for which protection is required without any other procedure. However, immovable cultural properties that were built after 1899, require the decision of the Ministry of Culture and Tourism to designate them as property to be protected. The immovable cultural properties that are located within conservation sites are deemed to be protected without the need for any other procedure.[58] In addition to these, the buildings that have been in some way the object of or witnessed to the National War of Independence and the Foundation of the Republic of Turkey are also protected without any procedures required. The areas that are identified as such and also the houses used by the first president of Turkey, Mustafa Kemal Atatürk, are protected properties.

b. ***Movable Cultural and Natural Property to be Protected***

Article 23 of 1983 Law regulates the movable cultural and natural property that is worthy of protection. Article 23 comprises a wide range of movable objects. Almost every object that is capable of shedding light on or having an explanatory character of the cultural, historical, social, technical or scientific features of the period that it comes from is considered as movable cultural property under Article 23[59] which is worthy of protection under Turkish law. Protection-worth objects have been classified under certain categories such as archaeological property[60] and fine arts[61] under the Regulation on Classification which has been accepted on the basis of the Law number 2863.[62]

Article 23 enumerates the non-exhaustive list of some objects such as '…ceramics, similar pots and pans, statues, figurines, tablets, weapons to cut, for defence and assault, icons, glassware, ornaments (hülliyat)… reliques (muhallefat), arms(nişan) …'.

Article 23 allows coins from the time of the last six Ottoman Sultans to be bought and sold domestically. However, the coins dating prior to the six Sultans would automatically be within the ambit of the protected movable cultural property.[63] Movable cultural objects form the Independence war and Foundation of the Turkish Republic are also protected with the addition of the personal belongings of Mustafa Kemal Atatürk.

G. <u>Turkish State's Actual Scope of Ownership</u>

The objects which are worthy of protection are very wide in scope as has been exemplified in chapter F. Not every object that require protection can be regarded as State property though. In order for a movable or immovable cultural property to be regarded as State property, it initially needs to be a cultural property under Article 3 of the 1983 law. This movable or immovable cultural property needs to be worthy of protection under either Article 6 or 23 of the 1983 law.

Article 5 of the 1983 Law states that immovable or movable property that require protection and are known to exist would be State property. In case a new property is found, it becomes

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58 For the definition of conservation sites see: Article 3(a)(3) of the 1983 Law.

59 Özel, 'The Ownership of Cultural Property in Turkish Laws' (n 27) 219.

60 Article 3(a) of Regulation on Classification, Registration and Acceptance to Museums Movable Cultural and Natural Property which needs Protection' (20.04.2009-27206) Article 3(a).

61 *Ibid* Article 3(d).

62 Published in the Official Gazette of Turkey on 20.04.2009 with the number of the Gazette being 27206.

63 Özel I, p.219.

ipso iure owned by State. However, in Turkish administrative law, a property is either a State property or the property of an individual.[64] Hence, if a property is owned by an individual it cannot be State property.[65] Therefore, if an ownership has already been established on a property, this would not become the property of the State. The way for such a property to be owned by the State is by expropriation pursuant to Article 15 of the 1983 Law.

Whilst it may seem from the outset of Article 5 of 1983 Law as if the State owns every protection worthy cultural property, that is in fact not the case when private ownership has been established on such objects.

H. Turkey: Cultural Nationalist or Internationalist with Regards the Ownership

Turkey is a source nation of cultural property,[66] also described as an open-air museum.[67] In order to preserve this richness, Turkey has issued blanket legislation throughout years in order to allocate the ownership of cultural property to the State. For instance, 1983 Law has allocated ownership of the newly found cultural property as well as the non-owned ones to the State. Turkey has also banned the possibility of exporting cultural property with minor exceptions such as when it is for an exhibition, which is nevertheless heavily regulated.

China is a similar example with Turkey, for China is a source country that is rich of cultural artifacts like Turkey. China is considered to be a cultural nationalist country, seeking to keep its cultural property within its borders where it deems them to be best protected and understood.[68] However, China cannot successfully protect its cultural properties. For example, a security employee of a museum in China was accused of stealing 158 cultural objects from the museum over six years.[69] The cultural and monetary values of these objects were very high. Additionally, it is estimated that between 1998 and 2003 around 220.000 tombs were looted and the found objects were illicitly traded across the world.[70] In 2004, China requested the US to employ an importation restriction on Chinese cultural objects pursuant to Article 9 of the 1970 UNESCO Convention.[71] With these endeavors China seeks to prevent cultural properties that originated from within its land from leaving. The seemingly not sufficient protection that is provided in China does not change the policy that is implemented. Much like China, Turkey has been facing difficulties protecting its cultural properties within its borders or even destructing them itself. Preparing to flood the ancient Hasankeyf under water

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[64] State property is interchangeably expressed as public property in Turkish administrative law. See: Kemal Gözler and Gürsel Kaplan, *Idare Hukuku Dersleri* (Bursa 2017) 674; Tayfun Akgüner and Kahraman Berk, *Idare Hukuku* (İstanbul 2017) 824; Ismet Giritli (eds) *Idare Hukuku* (İstanbul 2015) 998.

[65] Yıldırım, T. (eds), *Idare Hukuku* (7th edn, 2018) 320; Gülan, A. Kamu Malları in Özay, İ. (2004). *Günışığında Yönetim*. İstanbu, p. 664.

[66] Price, K. (2010). Who Owns the Past - Turkey's Role in the Loss and Repatriation of Antiquities. International Journal of Legal Information. 38. 201, 203.

[67] Özdoğan, M. (1998). Ideology and Archaeology in Turkey in Meskell, L. *Archaeology under Fire: Nationalism, Politics and Heritage in the Eastern Mediterranean and Middle East*. London and New York: Routledge. 111, 113.

[68] Liu, Z. (2015). *Repatriation of cultural objects: The case of China*. Springer. 131.

[69] US State Department, Bureau of Education and Cultural Affairs, Public Summary: Request Of The People's Republic Of China To The Government Of The United States Of America Under Article 9 Of The 1970 UNESCO Convention (2004).

[70] Hannah Beech, 'Spirited Away' Time (October 13 2003) <http://content.time.com/time/world/article/0,8599,2056101,00.html> accessed on 17 January 2020.

[71] Notice of Receipt of Cultural Property Request From the Government of the People's Republic of China, 69 Federal Register No 171 Department of State (August 26 2004).

due to the construction of a dam,[72] reburying a well preserved 2000-year-old Roman Spa[73] and major thefts from State museums only form part of the insufficient protection allocated for cultural property in Turkey.[74]

When the matter comes down to who is worthy of protection of these objects these countries unreservedly deem themselves as the righteous protectors of these objects. Regardless of the fact that under certain circumstances the cultural properties in question are better protected where the source country claims them from. The strict adherence to cultural nationalism sometimes leads to these outcomes, which clearly disregard the cultural internationalism arguments. The reasons for this are manifold, among others, it has been argued that nationalism that has been in rise in Turkey might have had an impact on such behavior.[75] Besides, Turkey also believes that these objects can best be understood where they have originated. Considering the strict approach towards the ownership of cultural properties and the given reasons, Turkey seems to have adopted the cultural nationalism view when it comes to the protection of cultural property regardless of being a party to the UNESCO Convention.

I. Conclusion

Cultural property protection laws have existed in the territory where Turkey is situated today, even before the establishment of the Republic of Turkey in 1923. The first law to protect cultural property, among other measures, by entitling the State as the owner of some antiquities was 1869 Decree on Antiquities. 1869 Decree allowed individuals to own the antiquities that have been discovered on their lands. The following Decree was adopted in 1874, which has expanded the ownership of the State to include every undiscovered antiquity regardless of being located on private or public land. 1884 Decree then has provided the State with ownership right on the antiquities found within the Territory of the Ottoman Empire including the lakes, rivers, and sea. An exception was made to the State ownership when antiquities were fortuitously found on private land during construction for public use. The last Decree of Ottoman Empire was in 1906 which has granted the State ownership of every undiscovered antiquity regardless of where and how it was discovered.

1906 Decree has remained in force after the establishment of the Republic until 1973. In 1973 the law restated the long effective principle that the State is the owner of known or to be known cultural property. Until 1983, no major change has occurred with the antiquity protection by giving the State right of ownership. The 1983 Law has changed the stance taken by Turkish law towards antiquities. First, the word antiquities have been superseded by the term 'cultural property' which encompassed the same objects. Secondly, the cultural property was divided into movables and immovables, shaping the adopted legislation to take them separately. Nevertheless, 1983 Law contentiously prescribed that protection-worthy cultural

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[72] Tessa Fox, 'They are barbaric' Guardian (September 12 2019) <https://www.theguardian.com/cities/2019/sep/12/they-are-barbaric-turkey-prepares-to-flood-12000-year-old-city-to-build-dam> accessed on 17 January 2020.

[73] 'Pictures: Ancient Roman Spa City Reburied in Turkey' National Geographic (December 30 2010) <https://www.nationalgeographic.com/news/2010/12/101229-roman-spa-city-filled-sand-allianoi-turkey-pictures/> accessed on 17 January 2020.

[74] 'Ministry admits grand theft from art museum', Hurriyet Daily News (August 8 2012) <http://www.hurriyetdailynews.com/ministry-admits-grand-theft-from-art-museum-27288> accessed on 17 January 2020.

[75] Turkish news proudly announce the repatriated cultural property: <https://www.haberturk.com/kultur-sanat/haber/707940-binlerce-tarihi-eser-yurda-dondu> accessed 15 March 2019.

property would '*qualify as State property*'. Interpretation of which has been problematic in cases such as *Elmali Hoard* case. The *travaux préparatoires* prior to 1983 Law has reached a consensus that the new wording has not resulted in narrowing the scope of State ownership, but it has expanded the ownership of State also to the newly emerged category of immovable cultural property.

Finally, Turkey is found to belong to a cultural nationalist view with regards the cultural property protection by allocating State ownership to a very wide range of cultural objects and restricting the export of cultural property rather severely. A strict adherence to cultural nationalism has the risk of disregarding cultural internationalism. For instance, when a cultural object can be restored better outside its country of origin, the requirement need not be to repatriate such property to the source nation due to risks of the object being damaged. Therefore, striking the right balance is of utmost importance for the property of humanity to be restored better for the future generations.

In spite of the cultural property protection laws going a long way in history for Turkey, the scope and the exact definitions of the used concepts need clarifications. Further research on the field could focus on the differentiation in Turkish administrative law between State and private ownership of property. Clarifications on this matter could be extremely helpful in determining the ownership of objects that are the cultural heritage of all human beings.

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MALAYSIAN MAID ONLINE SYSTEM (SMO): INDONESIAN MIGRANT DOMESTIC WORKERS' PROTECTION AT STAKE

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Abstract

While international labor migration is an important sector of the Indonesian economy, a significant number of migrant domestic workers are still facing issues such as exploitation and the lack of legal protection. However, another problem arose in early 2018 when Malaysia implemented the Direct Hiring Policy, namely the Maid Online System (SMO), which allows an employer to hire a migrant domestic worker without going through an agency. The Indonesian government expressed their opposition to the policy since it contradicted Indonesian laws and regulations that protect migrant domestic workers. This policy raises the vulnerability of Indonesian Migrant Domestic Workers towards the violation of their rights and wellbeing as there is no oversight by the partner agency. This article is based on normative legal research, done by reviewing laws and regulations that apply to this specific legal issue. In conducting this research, authors used secondary data obtained from official reports and news portals, legal journals, and related regulations to analyze Indonesian laws and regulations that do not correspond to the Direct Hiring Policy, Indonesian's stance regarding this, as well as the risks and impact of the policy for both countries.

Intisari

Meskipun tenaga kerja migran adalah sektor yang penting bagi perekonomian Indonesia, sejumlah pekerja migran masih mengalami permasalahan seperti eksploitasi dan kurangnya perlindungan hukum. Pada awal tahun 2018, permasalahan lain muncul ketika Malaysia menerapkan kebijakan Direct Hiring yang memungkinan majikan untuk secara langsung memperkerjakan tenaga kerja migran tanpa melalui mitra usaha. Pemerintah Indonesia tidak menyetujui keputusan tersebut karena bertentangan dengan hukum dan peraturan Indonesia yang juga menyediakan perlindungan bagi para pekerja migran. Kebijakan tersebut dapat meningkatkan kerentanan Pekerja Migran Domestik Indonesia (PMI) terhadap pelanggaran hak-hak dan kesejahteraan mereka karena tidak ada peran mitra usaha sebagai pengawas. Penelitian ini dilakukan melalui penelitian hukum normatif, dengan meninjau peraturan perundang-undangan yang mencakup isu spesifik ini. Penelitian ini menggunakan data sekunder yang didapatkan dari laporan resmi, portal berita, jurnal hukum dan peraturan perundang-undangan terkait untuk menganalisis peraturan perundang-undangan Indonesia yang tidak sesuai dengan kebijakan Direct Hiring, sikap Indonesia dalam meresponnya, kemudian berlanjut pada analisis risiko dan dampak kebijakan terhadap kedua negara.

Keywords: *Indonesian Migrant Domestic Worker, Law on Protection of Indonesian Migrant Workers, Maid Online System, Indonesian government, Malaysian government*

Kata Kunci: *Pekerja Migran Domestik Indonesia, Hukum Perlindungan Tenaga Kerja Migran, Maid Online System, pemerintah Indonesia, pemerintah Malaysia*

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A. Introduction

International labor migration is an important sector of the Indonesian economy in its own right, requiring commensurate efforts to improve its professionalism as a sector and instill modernization across various components to maximize its potential for the benefit of all stakeholders. In 2005, about 3 million documented Indonesians worked overseas, comprising about 3 percent of the country's total labor force. By 2016, over the course of a decade, the number of documented migrant domestic workers rose to almost 4.9 million and constituted about 3.8 percent of the national labor force at that time but the number is far higher if undocumented migrants are included. With the undocumented migrants included, the number reaches over 9 million Indonesians, equivalent to almost 7 percent of Indonesia's total labor force.[1] These rising numbers emphasize the significant amount of Indonesian people working overseas. In the East Asia region, only China and the Philippines have more migrants working overseas than Indonesia. Most of these Indonesian migrant domestic workers move to nearby Malaysia to find work, while the rest find work in other East Asian Countries and the Middle East.[2]

The International Labour Organization's Convention No. 189 and the International Organization for Migration define migrant domestic worker or foreign domestic helper as any person "moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family, working in or for a household." In countries that are predominantly countries of origin of migrant workers, there is an abundance of lower-skilled workers looking for employment resulting from high rates of unemployment, poverty and teenage school dropouts. These individuals are easily attracted to jobs overseas, which often pay more than they could earn for the same work in their home country.[3]

Improving their economic welfare is considered the main impetus which drives the majority of Indonesian labor migrants to migrate abroad. The high level of unemployment and underemployment in Indonesia pushed numerous people to search for employment outside of their countries of origin. Many grew increasingly incentivized in the wake of discovering the accessibility of occupations from recruitment agencies and social networks as well as the higher salaries abroad.[4]

The status of migrant domestic workers is unique in the field of labor, due to the site of their employment: the home. The domestic sphere, by definition, "is imagined as a place for private individuals, not political or indeed market actors".[5] Since their work primarily takes place in private households, they are invisible from formal labor structures and hidden from the public. The informal nature of domestic work often results in exploitative and harsh forms of labor,

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1 To migrate through official channels and become a "documented migrant", one must comply with official procedures of recruitment and placement required by the National Agency for the Placement and Protection of Indonesian Migrant Workers (BNP2TKI), and thus have official documents required to work overseas.

2 The World Bank (2017), *Indonesia's Global Worker: Juggling Opportunities and Risks,* The World Bank, Washington DC: The World Bank, p. 11.

3 International Organization for Migration (2010), *Labour Migration From Indonesia: An Overview of Indonesian Migrant to Selected Destination in Asia and the Middle East,* International Organization for Migration (IOM), International Organization for Migration: Mission in Indonesia, Jakarta: International Organization for Migration, p. 7.

4 *Ibid*, p. 10.

5 Bridget Anderson (2010), Mobilizing migrants, making citizens: migrant domestic workers as political agencies, *Ethnic and Racial Studies, 33* (1), p. 64.

exposing these workers to human rights abuses. Zero to none regulation migrant domestic workers face excessive hours, physical and sexual abuse, forced labor and confinement. In many countries, this also includes foregoing wages and paying debt bondage.[6] In some countries, these migrant domestic workers work under slavery-like conditions, trapping them in their employment, and they can be susceptible to food deprivation and, in extreme cases, even death.[7] Even when the workers are paid, it is not always sufficient to provide for themselves and their families. Since migrant domestic workers have little to no opportunity to demand better working conditions through unions and legal protection, they often receive few, if any, social benefits. This includes insufficient rest time and little to no opportunities to visit their relatives during medical emergencies, and no pension. Migrant domestic workers are also often subject to physical, psychological and sexual abuse and harassment, torture, arbitrary arrest and detention, and prohibition of family unity and reunification among many other human rights violations.

Unfortunately, migrant domestic workers who are victims of exploitation and abuse nonetheless have limited to no access to justice at the different stages of their migration.[8] Including those who are from Indonesia, there are many cases in which they lack a steady bargaining position when faced with cases and issues abroad. Access to justice is a fundamental shield for migrant domestic workers in global migration. Therefore, an effort is required to make sure that workers who are about to go abroad receive sufficient training and knowledge on matters related not only to the conditions in the destination country but about their legal rights in the destination countries.[9]

Another recent issue that is faced is the enactment of the Direct Hiring Policy (hiring), or Maid Online System (SMO) by the Malaysian government on January 1, 2018. The policy serves as a new mechanism of recruitment of migrant domestic workers in Malaysia, enabling hiring them to be done directly from nine selected countries without going through an agency. This policy was lauded by many parties, especially the middle-class population who are struggling to juggle family and career. The exorbitant cost of hiring migrant domestic workers has been an obstacle for many households due to the agency cost, which can come up to RM12,000 to RM18,000 in total. However, through Direct Hiring, such recruitment of migrant domestic workers can be easily done through the Maid Online System (SMO), cutting the costs dramatically to only a fee from RM 1.600 to RM 2.500. Hiring migrant workers directly to the domestic sector is valid for the recruitment of manpower from nine countries, namely Indonesia, Thailand, Philippines, Cambodia, India, Laos, Nepal, Sri Lanka, and Viet Nam.[10]

On the one hand, the Direct Hiring Policy does reduce the cost of recruitment of migrant domestic workers. However, on the other hand, it causes greater vulnerability of the migrant domestic workers during their working period as there is no oversight role of the bureaucracy. Moreover, this new mechanism contradicts Indonesian law and regulations that are made to

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[6] International Labour Organization (2013), *Domestic workers across the world: Global and regional statistics and the extent of legal protection,* International Labour Organization, Geneva: International Labour Office, 44.

[7] Human Rights Watch (2010), *Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East,* Human Rights Watch, New York: Human Rights Watch, 2.

[8] International Organization for Migration (2010), *Labour Migration From Indonesia,* p. 38.

[9] *Ibid*, p. 38-39.

[10] Migrant Care (2018, January 29), *Tentang Program Perekrutan Langsung (Direct Hiring) Pekerja Migran di Malaysia*, Retrieved November 5, 2019, from Migrant Care: http://www.migrantcare.net/2018/01/tentang-direct-hiring-di-malaysia/.

ensure the protection of Indonesian migrant domestic workers by involving a third party in the hiring process. The Indonesian government remarked that Malaysia has never spoken to Indonesia on the implementation of the mechanism; therefore, the government has urged its neighbor to discuss the issue and renew the agreement on migrant domestic workers' recruitment, which had expired on May 31, 2016 in the form of a new bilateral agreement that will become a legal umbrella for placement and protection of Indonesian migrant domestic workers in Malaysia.[11]

B. Malaysian Government's Direct Hiring Policy Mechanism

The new Direct Hiring Policy uses an online system, in which all things related to the direct hiring must be accessed through the SMO website (Foreign Maid-*Jabatan Imigresen* Malaysia). Such includes the necessary documents and requirements of the potential migrant domestic worker, and even potential employer's criteria. The new system requires the migrant domestic worker to already be residing in Malaysia on a social visit pass. Those who have overstayed and have their visas expired are also eligible to be hired and no longer need to look for an agency, however, an additional charge will be incurred to the employer. Once they are able to find an employer who would process their hiring or sponsor them, it will be processed easily. As the prospective migrant domestic workers are already in the country and all the documents and requirements have also been completed and fulfilled, the hiring process is estimated to be significantly reduced to about five to eight days.[12]

There are nine steps in hiring a migrant domestic worker through SMO. Firstly, the employers need to register for an account in SMO prior to registering their prospective migrant domestic workers and upload the Foreign Workers Medical Examination Monitoring Agency (FOMEMA) screening document. This process takes up to five days. *Jabatan Imigresen Malaysia* is involved in the remaining steps, which are; application and document upload process, document check, approval, result notification, payment online, and lastly, printing the Temporary Employment Visit Pass (PLKS) and i-Kad or identity card for migrant domestic workers. The last step requires both employers and migrant domestic workers to come to the office of *Jabatan Imigresen Malaysia* to have their biometric data recorded before issuing the PLKS.[13] Since employers can now directly hire migrant domestic workers, it would also be their responsibility to create contracts and to apply for domestic workers' insurance for accidents, health, and death.[14]

Before the Direct Hiring Policy was established, private employers and homeowners have always needed to hire migrant domestic workers through agencies. The most credible place to recruit migrant domestic workers is a registered and licensed local private employment agency by the Ministry of Human Resources. Further, the relevant agency must be authorized by the Department of Immigration to bring in workers from abroad to be employed as

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[11] *Indonesia Opposes Malaysia`s Direct Hiring Scheme* (2018, January 11), Retrieved November 6, 2019, from Tempo: https://en.tempo.co/read/914746/indonesia-opposes-malaysias-direct-hiring-scheme.

[12] Chiahoong Lim (2018, January 15), *Malaysians can now hire maids ONLINE. Here's how,* Retrieved November 5, 2019, from AskLegal: https://asklegal.my/p/maid-online-malaysia-application-immigration-smo-2018.

[13] Imigresyen Malaysia, *Manual Pengguna System Maid Online, p.* 15.

[14] Hashini Kavishtri Kannan (2017, December 29), *From Jan 1, it will take only eight days to hire a foreign maid*, Retrieved November 5, 2019, from New Straits Times: https://www.nst.com.my/news/nation/2017/12/319544/jan-1-it-will-take-only-eight-days-hire-foreign-maid.

migrant domestic workers.[15] The process of recruitment is subject to the agreement between each country in accordance with the Malaysian laws, rules, regulations, national policies and directives regulated under The Employment Act 1955 and The Immigration Act 1959. Even though as of now the Direct Hiring Policy is not compulsory, all the hiring process of migrant domestic workers is gradually encouraged to use this mechanism.

C. The Protection of Migrant Domestic Workers Under Indonesian Law and Regulation

Considering the increasing number, Indonesian migrant domestic workers are an important component of the national workforce.[16] However, domestic work is frequently undervalued, isolated, and deemed unimportant, exposing migrant domestic workers to a heightened risk of exploitation and abuse. The pressing need for comprehensive protection due to various issues faced by Indonesian migrant domestic workers poses sufficient reason for the government to ratify Law Number 18 Year 2017 concerning The Protection of Indonesian Migrant Workers. The regulation provides protection not only through the central government and regional government but also the village government. This regulation provides protection for migrant domestic workers and their families who are departing with them to the destination country, ranging from the pre-departure stage, during and after placement of work. The protection pre-departure, according to Article 8 includes document checking, working conditions drafting, skills training, and Social Security to name a few. Protection during the working period includes registering by Labor Attaché, employers' evaluations, and legal assistance as stated in Article 21. Meanwhile, Article 24 explains the protection after work, which includes facilitating their return, social rehabilitation, and the empowerment of the workers and their families.

This regulation also emphasizes the role of third parties other than the employers and the migrant domestic workers in the hiring process to provide better protection of rights for the migrant domestic workers, including "*Mitra Usaha*" or Business Partner, the government agents, and the government themselves. According to Article 1 paragraph 12, Business Partners are responsible for the placement and contract of migrant domestic workers along with the Private Indonesian Manpower Supplier Company (PPTKIS). Article 9 and 10 mentions the role of the Labor Attachés to verify the partner agencies and employers in destination countries and reports them if there is any problem. The following Article 11 explains the role of the Indonesia central government until village governments to distribute information and request of Indonesian migrant domestic workers. The central government is responsible for the distribution of information towards the regional government, while the regional government further notifies the village government about the information. Hereafter, the villages of migrant domestic workers provide protection through procedural administration, strengthening migrant domestic workers' rights, and empowering migrant domestic workers. The strengthening of the rights is done by conducting socialization, case training and studying the regulations of the destination country. By strengthening the rights of migrant domestic workers, it is expected that they understand the scope of their rights which provides guidance when encountering issues. It is expected that with a pre-procedural placement process and readiness to understand the rights of migrant domestic workers, issues can be mitigated when working

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[15] Ministry of Human Resources (2017), *GUIDELINES AND TIPS FOR EMPLOYERS OF FOREIGN DOMESTIC HELPERS,* Putrajaya: Ministry of Human Resources, Malaysia, 6.

[16] Nabiyla Risfa Izzati (2019), Indonesian Migrant Workers Protection through the Law Number 18 of 2017: New Direction and its Implementation Challenges, *PADJADJARAN Journal of Law, 6* (1), p. 191.

abroad. The specific articles of Law Number 18 Year 2017 that are not in line with the Direct Hiring Policy will be discussed below.

D. The Direct Hiring Policy's Contradiction to Indonesian Law and Regulation

The Government of Indonesia opposes Malaysia's direct hiring mechanism for migrant workers in the domestic sector since it contradicts Law Number 18 Year 2017 on the Protection of Indonesian Migrant Workers and Government Regulation Number 5 Year 2013 on Partner Agency or Procedures for Assessing and Determining Personal Business Partners and Users. The government has also warned PPTKIS to avoid sending migrant domestic workers under such a mechanism and instructed the Labor Attaché in Kuala Lumpur, Malaysia to ignore the demand for Direct Hiring Policy.[17]

It can be pointed out that the Direct Hiring policy contradicts the Government Regulation Number 5 Year 2013 on Partner Agency or Procedures for Assessing and Determining Personal Business Partners and Users, which requires PPTKIS to send migrant domestic workers through a partner agency in the destination country. Especially it is clearly stated and regulated under Article 2 of Government Regulation Number 5 Year 2013 on Partner Agency:

> "*Private Indonesian Manpower Supplier Company (PPTKIS) who carries out the placement of Indonesian migrant workers abroad for Individual Users, must go through a Business Partner/ Agency Partner in the country of destination.*"

The article regulates that PPTKIS or Partner Agency, which carries out placements of migrant domestic workers for individual users, must go through business partners or partner agencies in the destination country. The procedure requires prospective users of migrant domestic workers to submit requests to partner agencies in Malaysia. Hereafter, the agencies deliver the requests of those employers to the Indonesian Embassy in Malaysia for them to record the documents.

The Direct Hiring Policy mechanisms also contradicts another Indonesian regulation, Indonesian Law Number 18 of Year 2017. Article 1 paragraph 10 mentions that "*Mitra Usaha*" or Business Partner is an institution and / or business entity in the form of a legal entity in the country of destination that is responsible for placing Indonesian Migrant Workers at the employer. Referring to this regulation, the Indonesian government, therefore, could not process the placement of migrant domestic workers who did not go through Business Partners. The Indonesian government is concerned that the establishment of the Direct Hiring Policy will encourage prospective migrant domestic workers to directly visit Malaysia without going through established procedures. This is unfavorable because when the migrant domestic workers are not hired through the proper channels (agencies), no one can protect them when their rights are violated.

While containing the same regulation as Government Regulation Number 5 Year 2013 about the role of Business Partners in the hiring process of migrant domestic workers, Indonesian Law Number 18 of Year 2017 took one step further towards defining the drafting of the contract. Article 1 paragraph 12 addressed that the Business Partners mentioned above should be involved in the formulation of a cooperation agreement. A cooperation agreement is a written

[17] *Indonesia Opposes Malaysia`s Direct Hiring Scheme* (2018).

agreement created between PPTKIS, Migrant Domestic Workers Agencies in the hosting country, and Employers (households) that contains the rights and obligations of each party in the placement and protection of Indonesian domestic migrant workers in the destination country. Therefore, Malaysian employers (households) are not allowed by this regulation to create contracts solely by themselves and to apply those contracts for migrant domestic workers' insurance. Once again, the direct hiring mechanism is commendable as it allows Malaysians to save cost but the employers may take the law into their own hand, which can be dangerous for both the employers and the prospective migrant domestic workers. Because migrant workers in the domestic sector are vulnerable, it is better for the Indonesian government to send their migrant workers through the agencies so that there is a third actor to guarantee the workers' fulfillment of rights in the contract.

Furthermore, the direct hiring mechanisms are also in contradiction with Article 9, Article 10, and Article 11 of Law Number 18 of Year 2017, concerning the complete mechanisms to request migrant domestic workers from Indonesia. These regulations emphasize the central role of bureaucracy in ensuring the credibility of employers and keeping the prospective migrant domestic worker informed about their jobs so that their safety is guaranteed. However, the Direct Hiring Policy allows the employer to be in contact with the migrant domestic workers without the overseeing role of Labor Attachés, partner agencies or Indonesian government.

Considering those contradictions, a more appropriate approach should be taken where the Malaysian government first consults with Indonesia in a bilateral forum before issuing regulations relating to migrant domestic workers. Such decision-making must involve both the sender and destination country in order to ensure that it is in line with the policy of both sides.

E. Possible Risks and Impacts of the Direct Hiring Policy

a. *Indonesia*

Recruitment and placement agencies play an important role in protecting the rights of migrant domestic workers because if they run into any problem with their employers, the agencies can offer assistance. Regarding legal assistance, Article 21(1)(f) of Law Number 18 of Year 2017 mentions "During-Work" Protection, which regulates the provision of legal assistance in the form of advocacy services by the Central Government and/or Representative of the Republic of Indonesia. It regulates in general about the Settlement of Disputes by means of deliberation, through local partner agencies in the receiving country, until the lawsuit is filed against the court. The process is under the supervision of Labor Attaché and PPTKIS. The implementation of "During-Work" Protection is different from other types of protection because it can only be carried out in accordance with the legislation and the law of the destination country, as well as international laws and customs. If the migrant domestic workers are hired directly, there is a big possibility for them to not be able to seek protection or counseling without these parties. Moreover, when their employment contract is decided only between them and the employer, no third party or an agency can ensure that they are properly treated and their rights are protected.

For migrant workers in Malaysia, there are several mechanisms to seek justice including labor claims for unpaid wages, filing a claim in the civil courts, or going to the police, especially if they have strong claims and sufficient evidence. Unfortunately, numerous factors cause the

difficulty of those migrant workers to access justice, including delays in the court system, high costs of retaining a lawyer, or lack of familiarity with laws and legal processes.[18] In these conditions, they are able to look for intermediaries to improve their access to justice, for example, NGOs, legal aid organizations, community groups, trade unions, and labor attachés at embassies. However, migrant domestic workers are facing the greatest barrier, because they are the most isolated, are often confined to the employer's home, rarely hold their personal documents, have no guarantee of private space and no demarcation between work and personal time.[19] Therefore, if they have to seek justice for themselves, it might require them to escape from the employer and be able to locate assistance. Some workers sometimes do not have any community to support them during the process of seeking justice, causing them to stop pursuing the redress and instead only seek to return home. Hence, having an agency is a better option for them because they have a certain place to contact and who might provide them support in the process.

The concern of this policy's risk is not only coming from the Indonesian Government but also coming from PAPA (Malaysian Association of Foreign Maid Agencies). The agency raised concerns after the death of an Indonesian migrant domestic worker allegedly abused by her employer in Penang.[20] PAPA stated that they are not in favor of direct hiring because the employers may take the law into their own hand. In preventing this particular issue, agencies usually have a list of bad employers and that they would normally intervene to curb problems between the employee and the worker. Therefore, the migrant domestic worker has a place to contact, the agency, if she needs help so the agency can help her by sending her to a better home or back to her country. On the other hand, *Jabatan Imigresen Malaysia* also has a list of blacklisted employers but there will still be many loopholes. For instance, without the watch of agencies, another family member of a blacklisted employer could apply for a previous migrant domestic worker to work in their home.

b. ***Malaysia***

There are potential drawbacks of the Direct Hiring Policy that Malaysia government needs to take into account. Although there are also risks involved when the employers hire through an agency, such as that several agencies do not give refunds when the migrant domestic worker has absconded. If the employers are hiring directly as directed by the Direct Hiring Policy, here are some problems the employers may face:

1. **Difficulty in finding a migrant domestic worker**

Unless the employers have the contact of a potential migrant domestic worker in the country with a social visit pass in the country, it will be quite difficult for an employer to find a potential employee without an agency's data. Moreover, the risk of employing a migrant domestic worker with a dubious background is higher without an agency to vet the applicants.

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[18] Eleanor Taylor Nicholson, R. Balasubramaniam & N. Mahendran (2019), *Migrant Workers' Access to Justice: Malaysia,* Bar Council Malaysia, Kuala Lumpur: Bar Council Malaysia, p. 203.

[19] *Ibid*, p. 212.

[20] Minderjeet Kaur (2018, February 18), *Direct hiring exposes maids to abuse, says maid hiring body,* Retrieved November 4, 2019, from FMT News: https://www.freemalaysiatoday.com/category/nation/2018/02/18/direct-hiring-exposes-maids-to-abuse-says-maid-hiring-body/.

2. **The risk of getting scammed**

Many employers will likely contact their previous live-in migrant domestic worker who is now back in their home country. The cost of the migrant domestic worker to fly into Malaysia will be borne by the employer. However, there have been cases where the potential migrant domestic worker disappears after receiving the money to travel from their village to the city or after getting the plane ticket.

3. **Lack of training**

Without an agency as a middle person, all training of the migrant domestic worker will fall on the employer. This does not just include training on the work but also the introduction to a difficult culture, especially for a new worker.

According to Datuk Raja Zulkepley, President of Malaysian National Association of Employment Agency (PIKAP), the scheme of Direct Hiring Policy was made without any engagement toward relevant stakeholders including PIKAP. He mentions that there will be more negative outcomes with the implementation of Direct Hiring Policy, considering the fact that the Government of Malaysia has not yet confirmed to the relevant stakeholders whether the particular policy has been endorsed by the source nations especially from nine source countries listed at SMO (Koris, 2017). Most of the source countries would never allow their citizens to work abroad as a maid without assurance of their welfare especially in such a mechanism where legitimate partner agencies are not available anymore to take care of such matters.

F. Conclusion

The Indonesian government's response to opposing and banning the Direct Hiring Policy carried out by the Malaysian government is worthy of appreciation. The Indonesian government considers that the aim of cutting placement costs should not violate the policies of the two countries (Indonesia and Malaysia). Therefore, the Indonesian Government expresses its opinion that if the employer is not able to use the services of migrant domestic workers from Indonesia, the Malaysian government should not impose such regulation that will harm the parties involved, as can be seen in the mechanism and objectives of Malaysian Direct Hiring Policy. In order to maintain harmonious relations between the two countries (Indonesia and Malaysia) and to protect migrant domestic workers who have helped the condition of Malaysia in the domestic sector, the Malaysian government should limit its citizens to obtain services for Indonesian laborers at low wages.

While there are continuing efforts from both sending and receiving countries to protect migrant domestic workers, improved systems and interventions are urgently required. Indonesian and Malaysian government need to discuss a regulation that corresponds to both existing laws while prioritizing the protection of the migrant domestic workers. There should be a comprehensive policy development in terms of direct hiring and it better be presented in the form of a bilateral agreement (with the foreign governments) instead of a Memorandum of Understanding (MoU). At least two things need to be discussed further. First, it must pay attention to aspects of protection for migrant domestic workers. The international community is already aware that the position of migrant workers in the domestic sector is vulnerable. Therefore, such bilateral agreement should protect the rights, interests, and welfare of both

employers and migrant domestic workers. Second, the policy must be in line with national law in Indonesia and Malaysia. For the Indonesian government, it should be aligned with the Law Number 18 Year 2017 and Government Regulation Number 5 Year 2013. An example of a direct hiring policy that might be emulated is the practice in Singapore, in which the employers can recruit the migrant domestic workers directly, but the signing of the employment contract must be witnessed by the Indonesian Embassy.

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THE ENTRY OF EUROPEAN REFUGEES REGULATION 1939: ITS RELATIONSHIP WITH INTERNATIONAL LAW AND CHINESE SOVEREIGNTY IN THE CONTEXT OF THE INTERNATIONAL SETTLEMENT OF SHANGHAI (1863-1941)

Csobán György Gőcze[1]

Abstract

The purpose of this paper is to analyse the Entry of European Refugees Regulation (EERR) introduced in 1939 in order to stem the uncontrolled influx of Jewish refugees entering the International Settlement of Shanghai (in existence from 1863-1941). The Settlement's executive organ-the Shanghai Municipal Council- could exercise border controls on the Settlement's territory through this regulation. Since controlling borders is part of the territorial rights reserved to a sovereign state, the question this paper addresses is whether the EERR had a legal basis flowing from the treaties formed between western powers and China that lead to the creation of the International Settlement, the so-called Unequal Treaties and the Land Regulations being focused on in particular.

First of all, an introduction and explanation of the International Settlement's relation with the aforementioned treaties is. Next, a legal basis for the EERR is searched for in the Land Regulations, because it was the basis for most of the Municipal Council's competences, including limited adjudicative powers. The conclusion made is that the Regulation did not provide the Council competence to introduce or enforce the EERR. After this, whether the EERR was in conflict with Chinese national law is determined. Due to China being in the midst of multiple chaotic power struggles at the time, the author concludes that determining what constituted a valid legal source goes beyond the scope of the paper. Therefore, this

Intisari

Tujuan dari artikel ini adalah untuk menganalisa European Refugee Regulation (EERR) yang diperkenalkan pada tahun 1939 untuk membendung masuknya pengungsi Yahudi yang tidak terkendali memasuki Pemukiman Internasional Shanghai (yang ada sejak 1863-1941). Dewan Kota Shanghai - dapat melakukan kontrol perbatasan di wilayah Penyelesaian melalui peraturan ini. Karena mengendalikan perbatasan adalah bagian dari hak teritorial yang dimiliki oleh negara berdaulat, pertanyaan yang dibahas dalam artikel ini adalah apakah EERR memiliki dasar hukum yang mengalir dari perjanjian yang dibentuk antara kekuatan barat dan China yang mengarah pada penciptaan Penyelesaian Internasional, sehingga - menyebutkan Perjanjian Tidak Merata dan Peraturan Tanah yang difokuskan pada khususnya.

Pertama-tama, pengantar dan penjelasan tentang hubungan Penyelesaian Internasional dengan perjanjian-perjanjian tersebut adalah. Selanjutnya, dasar hukum untuk EERR dicari dalam Peraturan Pertanahan, karena itu adalah dasar untuk sebagian besar kompetensi Dewan Kota, termasuk kekuatan ajudikatif terbatas. Kesimpulan yang dibuat adalah bahwa Peraturan tersebut tidak memberikan kompetensi Dewan untuk memperkenalkan atau menegakkan EERR. Setelah ini, apakah EERR bertentangan dengan hukum nasional Tiongkok ditentukan. Karena Cina berada di tengah-tengah

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issue remains not entirely conclusive.

Finally, the essay goes beyond the lex specialis of the Settlement to the lex generalis found in the case law of the Permanent Court of International Justice. Two aspects are considered. Firstly, whether the International Settlement was a sovereign entity independent from China. The essay argues that the Settlement was not independent, because Chinese sovereign rights permeated the constitutional documents of the Settlement. Secondly, if the high level of independence the Chinese informally allowed the Settlement to enjoy constituted rights the Settlement could claim under customary international law. The conclusion reached is that no such rights could be claimed, because the situation did not satisfy the requirements required by the Court.

berbagai perebutan kekuasaan yang kacau pada saat itu, penulis menyimpulkan bahwa menentukan apa yang merupakan sumber hukum yang sah melampaui lingkup makalah ini. Karenanya, masalah ini tetap tidak sepenuhnya konklusif.

Akhirnya, artikel melampaui lex specialis Penyelesaian ke lex generalis yang ditemukan dalam hukum kasus Pengadilan Permanen Keadilan Internasional. Dua aspek dipertimbangkan. Pertama, apakah Penyelesaian Internasional adalah entitas berdaulat yang independen dari Cina. Esai berpendapat bahwa Penyelesaian ini tidak independen, karena hak-hak kedaulatan Cina meresapi dokumen konstitusional Penyelesaian ini. Kedua, jika tingkat independensi yang tinggi, orang China secara informal mengizinkan Penyelesaian untuk menikmati hak-hak yang merupakan Penyelesaian yang dapat diklaim berdasarkan hukum kebiasaan internasional. Kesimpulan yang dicapai adalah bahwa tidak ada hak yang dapat diklaim, karena situasinya tidak memenuhi persyaratan yang dipersyaratkan oleh Pengadilan.

Keywords: *Shanghai, International Settlement, Hongkew, Municipal Council, Jewish Refugees, Land Regulations, Unequal Treaties, Chinese Sovereignty, International Customary Law, PCIJ Case Law.*
Kata Kunci: *Shanghai, Penyelesaian Sengketa Internasional,Hongkew, Pengungsi Yahudi, Hukum Pertanahan, Kedaulatan Tiongkok, Hukum Kebiasaan International, Kasus-Kasus PCIJ.*

A. Introduction

a. *Context*

In the hyper-modern metropolis that is today's Shanghai, one can still find remnants of an era that is largely forgotten. North of Suzhou Creek lies the historic district of Hongkew. There one can still find rows of two-storey lane houses with wooden foundations that have a musky, earthy smell during Shanghai's humid summer months. Today, these houses are left abandoned with 拆 (to be demolished) painted in red over their walls. Yet, during the first half of the 20th century, Hongkew had been the nerve-centre of a vibrant community of Russian, German, Austrian, and Polish-Lithuanian Jewish refugees escaping the horrors of social unrest and anti-Semitism sweeping across Europe at the time. The International Settlement of Shanghai (the international settlement), an 1863 merger of the British and the American enclaves in Shanghai, was one of the few places in the world without any migration restrictions.[1] Naturally, an uncontrolled wave of Jewish refugees entering the port occurred in 1938. In 1939, the international settlement's governing body, the Shanghai Municipal Council (SMC or the council) in cooperation with the Japanese Army responded by introducing a restrictive migration policy called the Entry of European Refugees Regulation (EERR or refugee regulation). These refugee regulations played a role in drastically reducing the influx of Jews entering Shanghai, bringing the number from 15,000-16,000 in December of 1938 down to 2,000-2,500 a mere few months later.[2]

This leads to the research question at hand: to what extent did the Entry of European Refugees Regulation of 1939 have a legal basis under international law, particularly under the Land Regulations first issued in 1854 (also referred to as the Regulations) and case law of the Permanent Court of International Justice (PCIJ)? The legal perspective is sorely missed in the rich academic debate on the story of the international settlement's Jewish community. This text aims to contribute a legal analysis on this issue.

b. *Scope of Research*

In 1938, greater Shanghai consisted of four parts: the Shanghai International Settlement (the international settlement), the Shanghai French Concession, Japanese Hongkew with its 30 000 Japanese residents, and the old Chinese city of Shanghai.[3] Despite this, the international settlement and its governing council (SMC) will be this essay's focal point, because the SMC's jurisdiction covered the ports where most refugees arrived[4], and the SMC was arguably the most influential governing authority in the area. Consequently, the Shanghai French Concession's *Conseil d'Administration Municipale* and the Chinese governing structure of Shanghai city will not be covered. After the Battle of Shanghai in 1937, the Japanese military controlled Hongkew. Consequently, it is worthy to note that they played a significant political

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1 Avraham Altman & Irene Eber. (2000). Flight to Shanghai, 1938-1940: The Larger Setting. *Yad Vashem Studies 28,* p. 12.

2 David Kranzler. (1974). Restrictions against German-Jewish Refugee Immigration to Shanghai in 1939. *Jewish Social Studies 36 (1),* pp. 51 & 56-58.

3 Note: The French concession and international settlement were located north and outside the walls of the old Chinese city of Shanghai which did not permit foreign residents within its walls.

4 Office of Shanghai Chronicles. (2001). *境域变迁.* [Website]. http://www.shtong.gov.cn/newsite/node2/node4/node2249/node4418/node20195/node20313/node62840/userobject1ai8138.html

role in the creation of the EERR.[5] The Jews covered here primarily came from Germany and Austria. The story of Jews fleeing from the Soviet Union will not be considered, as that is a separate issue.

c. ***Research Method***

The essay structure and research method follows: firstly, the legal relationship, under the Treaties of Nanjing and Wangxia, between Qing China and the United Kingdom (UK) and United States (US) will be described (section B). This is to provide a legal context surrounding the origins of the international settlement. A great portion of the rest of the essay is a doctrinal analysis of the EERR in different legal settings (sections C-E). The research method utilised follows a bottom-up approach and can consequently be divided into two parts: the first part concerns the *lex specialis* written specifically with the settlement in mind (section C). Thus, the Land Regulations are focused on here, since they established the Shanghai Municipal Council (SMC), outlined its administrative structure, and defined its legislating competences. The author will look for a legal basis for the EERR in the Land Regulations, and in doing so will determine whether these regulations directly provided the SMC with mechanisms to exercise border-control on the international settlement or alternatively, with the competence to create legislation restricting migration.

The second part concerns the *lex generalis* written to apply with a broader jurisdiction. Consequently, the text will briefly look at whether Chinese immigration law played a role in relation to the validity of the EERR (section D).

Furthermore, the text will explore the EERR's legal validity under public international law embodied within the case law of the PCIJ. Since public international law was not as developed as it is today, the author considers the PCIJ to be the authority whose judgements were most widely accepted regarding what constituted public international law, taking into account the wide-ranging membership of the League of Nations.[6] Even so, the short life-span of the PCIJ means that certain concepts, such as customary international law, were not as fleshed out as they are today. As a result, the author chose to compare judgments and opinions relating to cases with similar circumstances to the situation at hand. In relation to this, two possible arguments in favour of the EERR's validity are considered: firstly, the argument that the settlement was a sovereign entity, therefore it had territorial rights to exercise border controls and the EERR is merely an embodiment of these rights. Secondly, the argument that due to the Chinese central-government informally providing the settlement wide-ranging autonomy the settlement could claim sovereign rights, including the right to control borders, under customary international law, because this laissez-faire attitude of the Chinese constituted a customary practice.

The core issue that runs throughout this paper is as follows: *de facto*, the international settlement was run autonomously from the rest of China. This makes the settlement in appearance a ceded territory, similar to the British colony of Hong Kong. Whether this is also the case *de jure* must be determined, because it shows the extent of Chinese sovereign rights

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5 David Kranzler. (1976). *Japanese, Nazis & Jews: The Jewish refugee community of Shanghai, 1938-1945*. New York: Yeshiva University Press, chp. 7 & 8 (pp. 169-267) goes in great depth on the politics surrounding the EERR's creation and the Japanese Army's role.

6 International Court of Justice. (2019). *Permanent Court of International Justice*. [Website]. Retrieved from https://www.icj-cij.org/en/pcij

applicable to the settlement, the extent of the SMC's rights, and the place the EERR occupied in this legal relationship.

B. The International Settlement and its Basis under International Law

The Treaty of Nanjing signed by Britain and Qing China in 1842 ended the first Opium War and forcefully opened China to trade with Britain through the establishment of five treaty ports where British merchants could freely trade with all Chinese traders.[7] One of these free-trade ports was the town of Shanghai.[8] In 1843, the Treaty of Humen was signed into force as a supplement to the Nanjing Treaty. It included providing British nationals with rights to rent or purchase land in the five ports and the acceptance of the British government's extraterritorial jurisdiction over their nationals.[9] Comparable rights were granted to US and French nationals via unilateral agreements with China, namely, the Treaty of Wangxia and the Treaty of Huangpu, both signed in 1844.[10] These rights were, through similar treaties, extended to other foreign powers in the coming century.

As more foreign settlers entered Shanghai, the British consul and Chinese authorities agreed, in 1845, on the first of many versions of the Land Regulations, containing the boundaries of the British Concession of Shanghai, competences of the British consul to levy taxes on non-British nationals within the Shanghai area, as well as basic administrative structures for managing infrastructure.

In 1854, due to an influx of Chinese refugees escaping from the violence of the Taiping Rebellion in old Shanghai city, the jurisdiction of the Land Regulations expanded over the American and French Concessions as well. A reason for this was to ensure orderly governance within the European settlements via a common executive organ: the Shanghai Municipal Council.[11] The council was granted power to initiate "bye-laws" to further the goals of the Land Regulations, which upon agreement from a majority of consuls established in Shanghai, and a special meeting consisting of landowners and businesspeople, would be promulgated as law (art. 11, the Regulations). While the SMC's authority and competences were limited on paper, from its establishment it strived aggressively to expand its authority: it established its own municipal police force, established its own militia, pushed for territorial expansion beyond what was agreed within the treaties, refused to accept Chinese members until 1928, and resisted Chinese jurisdictional control.[12]

In 1849, the French parted ways with the British and Americans and set up the *concession française*. In 1863, through the amalgamation of the British and American settlements, the international settlement was formally established.[13] Over time a complex web of different jurisdictions developed. States exercising extraterritorial rights in Shanghai, some until after

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7 Nanjing Treaty 1842, art. 5.
8 Nanjing Treaty 1842, art. 2.
9 Humen Treaty 1842, artt. 7 & 9.
10 Treaty of Wangxia 1844, artt. 3, 21, & 17 opened the same five ports to US merchants, enforced extraterritoriality on US citizens, and gave US nationals right to purchase land.
11 Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume II*. London: Longmans, Green & Co., pp.120-124.
12 Robert Bickers. (1998) Shanghailanders: The Formation and Identity of the British Settler Community in Shanghai 1843-1937. *Past & Present, 159,* pp.169 & 172-174.
13 Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume I*. London: Longmans, Green & Co., pp.348-350.

World War II, included: Belgium, Luxembourg, Canada, the Netherlands, Norway, Portugal, Sweden, and Switzerland.[14] In 1906, the US Congress established, in Shanghai, the United States Court for China, where appeals had to be taken to the Court of Appeals for the Ninth Circuit in San Francisco.[15] The SMC itself did not answer to any one state, unlike how the Governor of Hong Kong answered to the UK parliament in London.[16] This granted them a degree of autonomy from western powers when it came to running the international settlement.

Almost 100 years later, in August 1939, the SMC imposed a blanket ban on all migration from Europe into the international settlement. Shortly afterwards, the EERR was published in the Municipal Gazette on October 2nd, 1939 and represented a slight relaxation of this blanket ban. It is a very short piece of legislation, simply stipulating the four categories of persons admitted entry into Shanghai, which were: persons able to provide a deposit of 400 USD; persons with immediate family residing in Shanghai; persons with a contract for employment in Shanghai; and finally, persons intending to become the spouse of a resident in Shanghai.[17]

C. Legal Basis of the EERR under the Land Regulations

a. *Explicit legal basis*

First, the question to be answered is whether the Land Regulations have provisions that explicitly give the SMC competence to exercise border controls on the international settlement. Upon consideration of each provision of the Land Regulations and its annexed bye-laws, the conclusion to be reached is that the SMC was provided authority on merely municipal matters.[18] Broadly speaking, the first half of the Land Regulations is related to the purchase and use of land by private owners, while the second half relates to the institutional structure of the international settlement, primarily regulating the setup of the SMC. The annexed bye-laws contain elaborate provisions on technical matters, such as wastewater management, trash collection, and the repairing of roads. There is no provision that allows the SMC to control the borders of the settlement. For that reason, the SMC would not be able to cite a provision of the Land Regulations to directly justify the EERR.

b. *Implicit legal basis*

The second question is whether the Land Regulations have provisions that give the SMC competence to promulgate the EERR. Under Art. 11 of the Land Regulations, the SMC has some level of authority to create its own laws however, the provision requires that any new bye-laws must be created to further the objectives of the Land Regulations. As previously explained, these regulations purely contain provisions concerning technical matters. The objective to be derived from the regulations cannot, therefore, be anything but ensuring the smooth running of the international settlement's administration and infrastructure. Consequently, any bye-laws created by the SMC should only be to facilitate its administrative duties. Protecting the settlement's borders with the SMC's police department and *de facto* migration department did

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[14] Committee on the Judiciary of the US Senate. (1954). *Shanghai Municipal Council Report No. 1466, Calendar No.* 1458: Washington DC, p. 3.

[15] Act Creating a United States Court for China 1906, s. 3.

[16] Land Regulations 1907, art. 27 provided the only way through which the SMC could be held accountable. The SMC could be tried by a court of foreign consuls established each year by all treaty consuls in Shanghai.

[17] Entry of European Refugees Regulation 1939.

[18] Christopher Finlay Fraser. (1939). The Status of the International Settlement at Shanghai. *Journal of Comparative Legislation and International Law, 21 (1)*, p. 45.

not flow from these rules.[19] The EERR was promulgated with the excuse that the refugees placed strain on the resources and infrastructure of the settlement, which, the SMC could argue, was preventing them from achieving the objectives of the regulations. However, this seems far-fetched. Moreover, the rightful authority to exercise border controls was the Chinese government. The SMC should have turned to them rather than taking the initiative and controlling the borders itself. This can be derived from Art. 1 of the regulations which details the settlement's boundaries. The SMC could have argued this article obliged it to uphold these boundaries, which in turn could justify the EERR. But, according to the same article, the settlement's borders had to be confirmed by the viceroy of Nanking and Shanghai district magistrate, both officials of the central Chinese government. Even in something as fundamental as the provision establishing the border of the settlement, Chinese consent was indispensable. This provision, among others, shows how Chinese sovereignty was ingrained in the constitutional document of the settlement, meaning the fundamental rights of the Chinese state to control its borders had not been given up in the regulations, and therefore that the SMC lacked the competence to regulate on this matter.

Art. 35 of the bye-laws might also be a provision the SMC could rely on to promulgate the EERR. It concerns persons causing a disturbance who may be punished by the SMC. There are five categories of offenders, the last and broadest of which is of interest here. It concerns those who commit acts that "legitimately come within the meaning of the term nuisance". The definition of nuisance must be derived from English tort law[20]. The influx of Jewish refugees arguably adversely affected the community of the international settlement, thereby falling within the ambit of public nuisance.[21] Yet, the SMC could not argue the EERR was created to tackle this issue, because nuisance-causers were only liable for the payment of a ten-dollar fine. Therefore, even in a worst-case scenario, where a tortfeasor refused to pay such a fine, they would only be susceptible to arrest by SMC officers to be brought before their consul.[22] In other words, even if Jewish refugees were causing a nuisance, the SMC would, at most, only have the competence under the Regulations to bring these refugees to be adjudicated before their consuls.

c. *Conflict between the EERR and the Land Regulations*

A final point to be made here is that where a person violated the regulations and bye-laws of the council, this person was to be brought before the consul of his or her nationality who acted as judge and determined culpability and punishment.[23]

Strictly speaking, Jewish refugees who did not fall within the four categories of the EERR, should have been brought before their consul. Even for refugees left stateless as a result of anti-Semitic laws, such as the Nuremberg Laws of 1935, the situation was largely the same. For them to be punished, an application of one or more consuls had to be lodged to the

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19 David Kranzler. (1976). *Japanese, Nazis & Jews: The Jewish refugee community of Shanghai, 1938-1945*. New York: Yeshiva University Press, p. 274.

20 Land Regulations 1907, art. 40.

21 Right hon. Earl of Halsbury (Hardinge Stanley Giffard) et al., (Eds.). (1912). *The Laws of England (1st edition)*. London: Butterworth, pp. 505-506, s. 843 & pp. 511-512, ss. 855-858. The author considers public negligence to be most relevant here, and has therefore ignored private negligence.

22 Land Regulations 1907, annexed bye-laws art. 38.

23 Land Regulations 1907, art. 17; annexed bye-laws, art. 38.

council, who then could choose to lodge the case to the Chinese chief authority.[24] By enforcing the EERR through not permitting the entry of Jewish refugees into Shanghai, the SMC would be violating its obligation to bring these refugees before the competent courts. It must be noted, however, that there is no evidence that the SMC refused entry of refugees without adequate paperwork at the port. When the blanket ban came into place, ships with refugees on the high seas were still permitted to continue their journeys to Shanghai.[25] Refugees were only allowed to embark from a European port once their situation had been assessed by the SMC, so incidents of refugees arriving in Shanghai without correct paperwork were unlikely to occur.

D. Legal Basis of the EERR under Chinese Law

Having concluded that the Land Regulations did not provide the SMC with a legal basis to create the EERR, the question arises whether the EERR can find legitimacy in a law legislated by the Chinese state on restricting migration. This is hard to say because the Chinese political situation was incredibly volatile throughout the first half of the 20th century. To determine which legal sources applied to Shanghai is not easy since the region was subject to several regime changes. First, it was under the Qing Empire, which collapsed in 1912 after 300 years of rule. Next, Shanghai fell under the authority of the Republic of China. Between 1916 and 1927, various warlords of the Anhui Faction ruled. After this, Chiang Kai Shek's nationalist government ruled from Nanjing. Finally, Shanghai fell within territory controlled by the Reformed Government of the Republic of China from 1938 until 1940, which itself was a Japanese puppet-government.

Trying to establish valid legal sources during this chaotic period is a topic entirely of its own.[26] The question of whether there was a border restriction law from a Chinese perspective is therefore beyond the scope of this essay. As a result, the question of whether the EERR of 1939 was illegitimate due to conflicting with Chinese national law cannot be ruled out, although due to political reasons this seems unlikely. This is relevant to the research question, because it illustrates the difficulty in determining where the scope of the international law of the treaties and the Regulations ended and where the scope of Chinese law began within the multi-jurisdictional setup of the settlement. It also gives an indication as to why the SMC took on the role of legislating in areas where it lacked explicit competence, as was seemingly the case for the EERR.

E. The EERR's Legitimacy under General International Law

a. *The Product of a State Entity Exercising Sovereign Rights?*

Was the international settlement a sovereign entity separate from China under public international law? If so, the EERR would then be the product of a legitimate exercise of sovereign rights by the SMC. From the mid-19th century already, the SMC strove expansion of its authority in many fields, epitomised in the case of the External Roads Area.[27] This was for several reasons: rapid population growth, great industrial and economic growth, and a lack of

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[24] Land Regulations 1907, art. 37.

[25] David Kranzler. (1974) Restrictions against German-Jewish Refugee Immigration to Shanghai in 1939. *Jewish Social Studies,36 (1)*, pp. 57-60.

[26] Meredith Perry Gilpatrick. (1950). The Status of Law and Lawmaking Procedure under the Kuomintang 1925-46. *The Far Eastern Quarterly, 10 (1)*, pp. 44-53.

[27] William Wirt Lockwood, Jr. (1934). The International Settlement at Shanghai, 1924-34. *The American Political Science Review, 28 (6)*, pp. 1036-1037.

Chinese governmental support in areas, such as securing the settlement's borders.[28] Consequently, the international status of the settlement was called into question.

Despite this ambiguity, there is consensus among academics that the overall authority exercised by the SMC lacked a legal basis, and that the settlement was under Chinese sovereignty.[29] Art. 2 of the Nanjing treaty clearly only aimed to open Shanghai up to trade, without Chinese sovereignty over Shanghai being transferred to the UK. Looking at the Land Regulations, while it is true the SMC had some legislative and fiscal competences, at the same time Chinese sovereignty is clearly affirmed by these same Regulations. Under Art. 2 of the regulations, foreigners purchasing land within the settlement were required to send the deeds to the Chinese authorities to be sealed. Under Art. 8, foreigners were subject to land tax levied by the Chinese government. Finally, revising the contents of the regulations required confirmation by foreign representatives *and* the central government in Beijing under Art. 28. This demonstrates that the Chinese retained fundamental sovereign powers over the international settlement. Moreover, any powers conferred to the SMC were the result of bilateral agreements between the Chinese and foreign powers, the SMC did not have a legal role to play in these negotiations and was thus subordinate to the rules of the treaties. These documents alone, therefore, prove that the settlement's status was not entirely independent from China.

For the sake of argument, the *Greenland* case will be considered[30]. The PCIJ analysed the conflicting territorial claims of Denmark and Norway over Greenland and concluded the case in favour of Denmark. The Court established Danish sovereignty over Greenland relying on two grounds: firstly, that a peaceful and continuous display of state authority over the territory was present, and secondly, that other relevant countries recognised Danish sovereignty over the region. The same criteria can roughly be used to establish Chinese sovereignty over the international settlement as well. Regarding the first ground, through simply applying the aforementioned provisions in the Regulations, the Chinese maintained a peaceful and continuous display of exercising their state authority with the intention to act as the sovereign.[31] The first ground is, thus, established. Regarding the second ground, the PCIJ found that a statement by the Norwegian foreign minister bound Norway to recognise Danish sovereignty over Greenland.[32] Likewise, the foreign consuls in Shanghai explicitly recognised Chinese sovereignty on several occasions. One example being, when the British consul in 1862 responded to the SMC's proposal to make Shanghai a protectorate, he noted: "...the plan proposed is one which the land-renters cannot legitimately adopt, seeing that the territory belongs to the emperor of China, who merely accords to the foreign powers [extraterritoriality]...but retains authority over his own territory and subjects."[33] While consul is not of the same rank as foreign minister, its seniority certainly provides the above statement with some weight under international law. Under the *Greenland* criteria, China certainly has

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[28] Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume II*. London: Longmans, Green & Co., pp. 123-124.

[29] Fraser 1939, pp. 51-53; Johnstone 1937, p. 946; Lockwood 1934, p. 1033; Report of Feetham 1931 pt. v, c. iv. Please see the bibliography for the full citations.

[30] Legal Status of Eastern Greenland (Norway v. Denmark) (Judgement) [1933] Permanent Court of International Justice Series A/B, No. 53, ICGJ 303. Henceforth written as Greenland case 1933.

[31] Greenland case 1933, para. 95 & 97.

[32] Greenland case 1933, para. 176-186.

[33] Walter Henry Medhurst. *Mr. Medhurst to the Municipal Council, 15th July 1862* [Private Letter]. Published in the North-China Herald on 7th August 1862.

grounds to establish a stronger title of sovereignty over the settlement than the SMC. Meaning, the SMC would not be able to argue the EERR was a result of them exercising sovereign rights they legitimately acquired by being part of an autonomous sovereign entity.

b. ***The Product of Rights Procured through Custom?***

From its establishment, the Chinese followed a hands-off approach regarding the internal matters of the international settlement.[34] During conflicts between Chinese in the Shanghai region, the borders of the settlement were always protected by western treaty powers or the SMC's militia e.g. the Taiping Rebellion, the Boxer Rebellion, and conflicts during the Warlord era. The Chinese tolerated this, and these conflicts did not intentionally spill into the settlement.[35]

Could such acceptance of the SMC exercising Chinese sovereign rights in place of the Chinese central government mean they gained a right to control the settlement's borders overtime under customary international law? The requirement for establishing customary law was as follows: "immemorial usage consisting both of an uninterrupted recurrence of accomplished facts in the sphere of international relations and of ideas of justice common to the participating States and based upon the mutual conviction that the recurrence of these facts is the result of a compulsory rule".[36] Applied here, toleration would not bring forth rights for the SMC, because a span of 100 years is too short to fulfil the requirement that a custom must be immemorial. Besides, the ideas of justice between the SMC and Chinese were certainly not common. For this condition to be fulfilled, the SMC must have closed the settlement's borders believing it acted under a compulsory rule, meanwhile China must have shown recognition of the SMC exercising its right to border control as lawful, through external action or constant abstentions.[37] Looking at the extensive proceedings leading to the creation of the EERR, the overall impression to be had is that the decision to promulgate the regulation was not so much based on a rule requiring the SMC to act, as it was based on political pressure from various interest groups, in particular the local Sephardi Jewish community and Japanese community, for the SMC to uphold this restriction.[38] The same applies to the SMC's actions during other conflicts. Regarding China's reactions, there is no evidence that they expressly recognised these actions as lawful. Arguably, consistent practice of abstentions by the Chinese in exercising their territorial right to border-control is present. This, however, does not influence the conclusion that the SMC did not derive territorial rights through customary law.[39]

F. Conclusion

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[34] Christopher Finlay Fraser. (1939). The Status of the International Settlement at Shanghai. *Journal of Comparative Legislation and International Law, 21 (1)*, pp. 45-46.

[35] Hosea Ballou Morse, LL.D. (1910). *International Relations of the Chinese Empire, volume II*. London: Longmans, Green & Co., p. 128.

[36] Note: the author chose to use the criteria mentioned in Judge Negulesco's dissenting opinion of the Jurisdiction of the European Commission advisory opinion (1927). This is because the case tackles a similar situation where a non-state entity with its own legislative and executive powers potentially infringed upon the sovereignty of Romania.

[37] Jurisdiction of the European Commission of the Danube between Galatz and Braila (France and others v Romania) (Opinion) [1927] Permanent Court of International Justice Series B, No. 14, ICGJ 281, p. 36.

[38] David Kranzler. (1976). *Japanese, Nazis & Jews: The Jewish refugee community of Shanghai, 1938-1945*. New York: Yeshiva University Press, chp. 7 & 8 (pp. 169-267)

[39] Jurisdiction of the European Commission of the Danube between Galatz and Braila (France and others v Romania) (Opinion) [1927] Permanent Court of International Justice Series B, No. 14, ICGJ 281, Judge Negulesco dissenting opinion, p. 105.

a. *Addressing the Research Question*

The research question addressed in this article is as follows: to what extent did the Entry of European Refugees Regulation of 1939 have a legal basis under international law, in particular the Land Regulations and case law of the PCIJ? Looking at the Land Regulations, no legal basis could be found giving the SMC direct competence to control the borders of the international settlement. The provision giving the SMC competence to create legislation was too narrow to use for justifying the creation of the EERR. The EERR, therefore, lacked legal basis within the Land Regulations. Moreover, through enforcing the EERR the SMC was potentially violating the Land Regulations by not bringing refugees before their own consular courts. Whether the EERR was invalid due to conflicting with Chinese immigration law is difficult to assess due to the ambiguity surrounding what constituted valid legal sources in China.

In relation to the PCIJ's case law, the next question posed was whether the international settlement was a sovereign entity giving the SMC territorial rights to control borders, thereby justifying the EERR. Under the *Greenland* criteria, Chinese sovereignty was strongly established within the settlement's legal fabric, meaning the SMC could not claim such rights since China rightfully held onto them.

The final question asked, was whether the Chinese practice of tolerance in relation to the SMC exercising sovereign territorial rights could amount to the SMC being able to claim these rights under customary international law. The conclusion was that the timeline within which the practice was conducted was too short and that the SMC lacked *opinio juris*. Instead, it acted often more out of practical necessity or political pressure. Consequently, the SMC could not derive customary rights under this practice. With the research question in mind, the conclusion is that the EERR lacked any proper legal basis and was thus not enforceable by the SMC under international law.

b. *Lessons to be Learnt*

Generally it is important to understand the historic relationship between Asia and Europe at the height of colonialism. Not only did the existence of the international settlement coincide with the apex of European imperialism between the mid-19th and mid-20th centuries, the settlement was also under the shared-control of the largest colonial powers of the time. Therefore, the settlement acts as a petri dish representing the ruling methods of colonial powers across the world in one small area. The EERR epitomises how these methods sometimes emphasised practicality over legal certainty, efficiency over justice, centralised-governance over checks and balances. While it is important to acknowledge the suffering and injustice the EERR may have caused to Shanghai's Jewish refugees, it is also important to place the EERR in a bigger picture of Western dominance over a vulnerable China.. If former colonial powers genuinely wish to build bonds with former Asian colonies in general, and with China in particular, it is perhaps wise to meditate and communicate together on this increasingly hidden away and ignored past. Only by doing so can the long journey of healing and restoring trust commence.

To conclude, this author wishes to call to action scholars and researchers from the east and the west to start a dialogue. In these turbulent times of change on a global scale it is important to form new partnerships that are productive and meaningful for all parties involved. This essay's role is to provide a first step within the legal academic community towards this dialogue.

Additionally, within the diplomatic community strong ties are being formed as exemplified by the agreements finalised by the European Union with certain Asian partners such as Vietnam, Singapore, South-Korea, and Japan.[40] The author hopes such relations to expand further to include, for example China and other ASEAN countries including Indonesia. The author also hopes for these ties to deepen as well, to not only cover matters related to trade and economics, but also cover matters related to culture and society as a whole. For this to occur, dialogue of the past is essential and has the potential to open up many new possibilities within the legal realm and beyond on a regional and international scale.

[40] European Commission. (2019). *Negotiations and agreements.* [Website]. Retrieved from https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place

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ARBITRATOR'S DILEMMA: TROUBLES WITH THE SAME PERSON AS BOTH MEDIATOR AND ARBITRATOR IN INDONESIA?

Aldeenea Cristabel[1]

Abstract

A form of alternative dispute resolution that combines mediation and arbitration is not new. In such "med-arb" situations - many sees the cost and efficiency advantage of having to only appoint one person who can serve as both mediator and arbitrator. This format would mean that there is no need for the neutral to re-learn the facts of the case – for one. However, this format does not come with no cost. The procedural concerns arising out of such situations ranges – from confidentiality concerns, impartiality concerns and validity and enforceability concerns. This paper aims to see how Asian jurisdictions respond to this issue – and determine if the arbitrator's dilemma is something that parties should be concerned about when dealing with disputes in Asia.

Intisari

Dalam penyelesaian sengketa alternatif yang penggabungan mediasi dan arbitrasi bukanlah hal yang baru. Dalam situasi "med-arb", banyak yang melihat keuntungan dalam bentuk biaya dan efisiensi dari prosedur yang hanya menunjuk satu orang yang bertindak sebagai mediator dan arbitrator. Misalnya format ini berarti tidak perlu bagi pihak ketiga yang netral untuk mempelajari kembali fakta-fakta dari kasus yang sudah ditanganinya. Namun, peran ganda ada resikonya. Kekhawatiran prosedural yang timbul dari situasi seperti itu berkisar, dari masalah kerahasiaan, masalah ketidakberpihakan dan masalah keabsahan dan penegakan. Makalah ini bertujuan untuk melihat bagaimana Indonesia menanggapi terhadap masalah ini - dan menentukan apakah dilema arbiter adalah sesuatu yang harus dikhawatirkan oleh para pihak ketika menangani perselisihan di Indonesia.

Keyword: *Arbitration, Mediation, Med-Arb, Arbitrator's Dilemma, Impartiality, Confidentiality*
Kata Kunci: *Mediasi, Med-Arb, Dilemma Arbiter, Ketidakberpihakan, Kerahasiaan*

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A. Introduction

In business relations no one method of dispute resolution can be said to be the best solution for each and every type of dispute. Dispute mechanisms should ideally be tailored to meet the needs and interests of the parties whilst also ensuring a final and binding resolution of the dispute.[1] A fine example of this flexibility in application is the case of *IBM-Fujitsu*, whereby the whole plethora of alternative dispute resolution techniques were employed from structured negotiations, mini-trial, mediation, until final-offer arbitration to have a final decision which could accommodate the technicalities of the dispute.[2] This landmark copyright case is often pitched as the "granddaddy" of Silicon Valley dispute epics, and was the largest commercial arbitration ever conducted in the 1990s.[3] One of the interesting quirks of the IBM-Fujitsu example is the fact that the Panel formed by the American Arbitration Association has acted as both arbitrators and mediators in the process of resolving the dispute, a role that requires a high level of skill and more importantly utmost confidence in the neutral from the parties involved – a role which have come to be subject to both praise and criticism over the coming years.[4]

On this note, parties who have selected to have mediation and arbitration as their dispute resolution mechanism may choose between making them distinct processes, or combining both processes into what is called med-arb.[5] There is also the more positively viewed "facilitation settlement" within arbitral proceedings where arbitrators may take the role of a "mediator" to facilitate settlement and end the dispute[6] - a function which is often seen as a useful tool to resolve disputes efficiently. A distinct mediation arbitration process is more commonplace in practice, whereby the parties may call upon arbitration only where mediation has been unsuccessful after a fixed number of days. This structure is commonly described in a lot of template arbitration clauses. An example would be the template ICC Multi-Tier Arbitration Clause:

> *"ICC Arbitration may be used as the forum for final determination of a dispute following an attempt at settlement by other means such as mediation. Parties wishing to include in their contracts a tiered dispute resolution clause combining ICC Arbitration with ICC Mediation should refer to the standard clauses relating to the ICC Mediation Rules.*
>
> *Other combinations of services are also possible. For instance, arbitration may be used as a fallback to expertise or dispute boards. Also, parties who resort to ICC Arbitration may*

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1 Bühring-Uhle, C., Kirchhoff, L., & Scherer, G. (2006). *Arbitration and mediation in international business*. Kluwer Law International BV., p. 247

2 Mnookin, R. H., & Greenberg, J. D. (1997). *Lessons of the IBM-Fujitsu Arbitration: Now Disputants Can Work Together to Solve Deeper Conflicts*. Disp. Resol. Mag., 4, p. 16; Johnston, R. L. (1990). The IBM-Fujitsu arbitration revisited--A case study in effective ADR. COMP. LAWYER., 7(5), p. 13-17.

3 Mnookin, R. H., & Greenberg, J. D. (1997). *Lessons of the IBM-Fujitsu Arbitration: Now Disputants Can Work Together to Solve Deeper Conflicts*. Disp. Resol. Mag., 4, p. 16;

4 See. Deason, E. E. (2013). *Combinations of mediation and arbitration with the same neutral: A framework for judicial review*. Arbitration Law Review, 5(1), p. 219-249.; Oghigian, H. (2003). *The mediation/arbitration hybrid*. Journal of International Arbitration, 20(1), p. 75-80.; Talbot, P. (2001). Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?. Arbitration: the Journal of the Chartered Institute of Arbitrators, 67(3), 221-229.

5 Nigmatullina, D. (2019). *Aligning Dispute Resolution Processes with Global Demands for Change: Enhancing the Use of Mediation and Arbitration in Combination*. *b-Arbitra| Belgian Review of Arbitration*, *2019*(1), 7-51.

6 Raeschke-Kessler, H. (2005). The arbitrator as settlement facilitator. *Arbitration International*, *21*(4), 523-536.

> *wish to provide for recourse to the ICC International Centre for ADR for the proposal of an expert if an expert opinion is required in the course of the arbitration."*[7]

A combined process is what this paper is attempting to dissect at. In terms, a combined arbitration mediation proceeding is called "med-arb", it is a single process where the arbitrator becomes the arbitrator if mediation does not work. This concept of one neutral taking his "mediator cap" off to switch it for an "arbitration cap" is one that is met with heavy criticism by both practitioners and scholars alike. For the purposes of the article, whenever we refer to "med-arb" we are referring to this dual-role process where the same neutral undertakes both roles as mediator and arbitrator. To understand how the process works, and noting that this paper aims to clarify the practice in Asian countries with a comparative view to the Western viewpoint, we would like to firstly analyze the fundamental principles which make up mediation and arbitration individually. Second, we will take a look into the application of this model in the landmark hybrid IBM-Fujitsu arbitration and will also analyze subsequent awards or practices of med-arb. Third, we will address the commonly brought up concerns regarding confidentiality and impartiality concerns when a mediator switches to become an arbitrator, and how the Asian practice views these concerns.

This ability to vary it's forms and be flexible is one of the perks that draws parties to select alternative dispute resolution ("**ADR**") instead of pursuing judicial proceedings.[8] Other benefits of ADR is it's neutrality, high speed and low cost (even though in some jurisdictions low cost and speed can no longer be used to argue in favor of arbitration as court proceedings continue to also modernize and can be faster and cheaper than arbitration) – and ultimately it's neutrality and enforceability.[9] To understand the possible problems that may arise out of a combination proceeding, we will first have to look into the respective advantages of mediation and arbitration.

a. *Benefits & Goals of Mediation*

Mediation is in current times gaining popularity, diplomat Amb Chowdhury emphasized four reasons for the prominence of mediation in Asia:

a. First, mediation is less costly;
b. Second, mediation is seen as more confidential;
c. Third, parties has the opportunity to communicate with the mediator privately;[10] and

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[7] Arbitration Clause - ICC - International Chamber of Commerce. (n.d.). Retrieved from https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/

[8] Blankley, K. M. (2011). *Keeping a Secret from Yourself-Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case. Baylor L. Rev., 63*, 317., p. 326; Brewer, T. J., & Mills, L. R. (1999). *Combining mediation & arbitration. Dispute Resolution Journal, 54*(4), 32., p. 34; Phillips, Phillips, G. F. (2005). Same-neutral med-arb: What does the future hold?. *Message from the Chair*, *75*.

[9] Gerbay, R. (2014). *Is the End Nigh Again? An Empirical Assessment of the'Judicialization'of International Arbitration*. American Journal of International Arbitration, *25*(2).,p. 246–247 Greenwood, L. (2011). A window of opportunity? Building a short period of time into arbitral rules in order for parties to explore settlement. Arbitration International, *27*(2), 199-210., p. 204-204; Drahozal, C. R., & Ware, S. J. (2010). Why do businesses use (or not use) arbitration clauses. *Ohio St. J. on Disp. Resol., 25*, 433., p. 451-452.

[10] Caucuses are a feature of mediation which enables the parties to communicate privately with the mediator without the presence of the other party, while this does indeed benefit in the format of a pure mediation as the parties can be more open and honest with the mediator – allowing the mediator to create a solution which may be more suited for their specific situation. However, this paper will also later on discuss the dangers of caucuses in a med-arb format due to the arising confidentiality and impartiality concerns once the dispute enters the arbitration phase.

d. Fourth, a court's caseload means that a longer time would be taken to resolve disputes through court.

Furthermore, it must be noted that the main point is that mediation is efficient and saves time, as it can be done and dusted within a few days. The author herself has attended mediations where it took a mere week to settle an issue which could potentially take up months if submitted through litigation or arbitration. However, more importantly even, mediation settlements are a result of the parties' own solutions to their own problems – they essentially structure their own mediation settlement based on party autonomy. [11]

This is highly beneficial because of two main reasons:

a. Firstly, it results in lower chances for the mediation settlement to be challenged by the parties. Even if there is still grounds for challenge if the mediation have not been done properly, the what is important is that instead of having a third party enforce what they think is the correct solution between the two parties as in arbitration or court, the parties can decide for themselves what the right solution is. In mediation the third party mediator exists solely to facilitate the parties creation of their own solution, thus the final arbitration settlement is a product of the parties' own formulation – based on their own consensus and agreement.[12] Effectively, mediation outcomes does not rely on existing legal principles, rather on the private consideration of the parties.[13]

b. Secondly, the parties having resolved their issues on their own are more likely to be able to continue their business relationship, whereas in arbitration or litigation their contradictive positions may mean that their work relationship is completely over and they may never work together again.[14]

However, one of the disadvantages of mediation is that mediation settlement agreements do not have the same force as an arbitral award, and are treated as mere contracts which have no direct enforcement mechanism. Prior to the Singapore Convention,[15] parties who had a preference for mediation would find themselves in a conundrum – "[it is questionable if] parties who successfully mediate a dispute would want to suggest a risk of future noncompliance by seeking to have a settlement converted into an award while the disputing parties are still on good terms".[16] It seems unfair that parties who have preference for mediation would need to seek other modes of dispute resolution to achieve legal protection on

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[11] Anderson, Dorcas Quek. "*Litigating Over Mediation-How Should the Courts Enforce Mediated Settlement Agreements*." Sing. J. Legal Stud. (2015): 105., p. 107-8 ['Anderson']

[12] Anderson, p. 107

[13] Lee Min Jai v. Chua Cheo Koon [2005] 1 SLR(R) 548(HC), para. 5

[14] Gaillard, E./Savage, J. (eds.), International Commercial Arbitration, Kluwer Law: The Hague (1999), p. 13 et seq., para. 17

[15] The Singapore Convention on Mediation, formally the United Nations Convention on International Settlement Agreements Resulting from Mediation which was adopted on 20 December 2018 and opened for signature on 7 August 2019, is an international agreement regarding the recognition of mediated settlements.

[16] Schnabel, Timothy. "*The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*." Pepp. Disp. Resol. LJ19 (2019): 1., p.10

the outcome of their dispute. The Singapore Convention eliminates these risks and allows mediation settlement agreements to be treated with equal force as an arbitral award.[17]

b. ***Benefits & Goals of Arbitration***

On the other hand, international arbitration is "*simply another form of litigation which is more suited to the needs of international commerce and avoids the pitfalls of litigation in national courts*".[18] The advantages of international arbitration over court adjudication are somewhat different compared to those in domestic commercial arbitration. The main advantages are as follows:

a. The parties' ability to chose a neutral forum;

b. Ease in enforcement of the awards abroad;

c. Confidential procedure;

d. Expertise of the arbitrators;

e. Finality of the decision; and

f. Limited discovery.[19]

Conclusively, in both mediation and arbitration, the neutral acts in a private & confidential forum – all within the framework of consent by the parties involved. An excerpt from the German Kluwer-published journal titled "*May a Neutral Third Person Serve as an Arbitrator and Mediator*" very concisely describes both roles:

> "*In detail, an arbitrator is a neutral third person, appointed by the parties, whose obligation is to judicially resolve the dispute and to make a final and binding decision. His main task is, therefore, to render an award. Apart from deciding the dispute, he also has the competence to promote and encourage the parties to reach a voluntary settlement of the dispute. The parties may also choose to then put this agreement in the form of an award.*
>
> *A mediator, on the other hand, is a neutral third person, appointed by the parties, who assists the parties to negotiate a settlement. He does so by discussing the dispute separately (caucuses) or in joint sessions with the parties, drawing attention to the strengths and weaknesses of each case, thereby attempting to get the process of negotiating going . Ultimately, however, it is only the parties that decide whether they want to reach an amicable settlement or not . The mediator only helps the parties to find their own solution ; he himself has no competence at all to decide the dispute.*
>
> *As a conclusion, an arbitrator and a mediator have very different core-competences : Although an arbitrator has also competences that belong to the mediator's spectrum of tools, the substantial difference is that an arbitrator has the competence to make a binding decision, as opposed to the competence of a mediator to help the parties*

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[17] See. intervention of France, UNCITRAL Audio Recordings: U.N. Comm'n on Int'l Trade Law, 47th Session, July 9, 2014, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/4f35457d-6900-4492-9266-d503badlOf7c.

[18] De Vera, C. (2004). *Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China. Colum. J. Asian L., 18*, 149.

[19] Peter, J. T. (1997). Med-arb in international arbitration. *Am. Rev. Int'l Arb.*, 8, 83-86.

> *negotiate an amicable settlement and forge a deal. This distinction should be kept in mind when determining at what point the neutral third person changes his role, and whether this is legitimate."*[20]

The issues raised in this paper highlights how the combined roles of mediator and arbitrator may cause problems – with a specific focus on an Asian perspective towards the arbitrator's dilemma.

c. *Advantages of Med-Arb with the Same Neutral*

Having a combination process ensures flexibility, fulfillment of interest as well as finality and enforceability. In a combination or a multi-tier setting, the interests of the parties may be accommodated during the mediation session and in case of anything there will always be the option to arbitrate – which is considered to be a more "enforceable" final award as mediation agreements in some jurisdictions are only recognized as contracts and not as a binding decision. This structure is often organized in dispute resolution clauses, but can also be organized by consensus or subsequent agreement between the parties after the conclusion of their contract.

More important is the element of flexibility, as in an ideal med-arb process, both processes ought to contribute to each other in a synergistic way. The mediation process, especially, can serve to streamline the arbitration process or like in IBM/Fujitsu produces a settlement framework which can be utilized in the arbitral process.[21]

B. Variations in Combination of Mediation and Arbitration

a. Med-Arb: Pre-Arbitral Mediation

In designing methods to resolve disputes, parties most commonly place mediation as a precondition to arbitration. This combination of these two modes allows the disputing parties to benefit from the perks of mediation directly – perhaps even preventing them from having to go into expensive and lengthy arbitration. On the other hand, a negative implication of the med-arb is in circumstances where one of the parties intended to enter into arbitration from the very beginning of there being a conflict. A dispute resolution clause with a precondition would in such cases potentially invoke unnecessary costs and added time, and arbitration cannot be activated unless the precondition has been satisfied[22] - and the party that has set his mind on mediation may be uncooperative throughout. This may be problematic in the sense that the parties in dispute may already be at a stage where reconciliation through mediation would simply be a waste of time and costs, or that one party is already set on preparing for an arbitration and would refuse to participate in initiating the mediation, it may also be possible that parties may exploit this precondition to delay proceedings and stretch out costs.[23]

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[20] Pitkowitz, M. M., & Richter, M. T. (2009). *May a Neutral Third Person Serve as Arbitrator and Mediator in the same Dispute*. Zeitschrift für Schiedsverfahren, p. 225.

[21] IBM Fujitsu; NOTE & COMMENT: MED-ARB IN INTERNATIONAL ARBITRATION, 8 Am. Rev. Int'l Arb. 83, *107

[22] Kemiron Atl Inc v Aguakem Int'l Inc 290 F 3d 1287 (11th Cir 2002); "*Waterfalls in the Gulf: Pre-Conditions to Arbitration and Enforcement in the UAE*." Brand, https://www.kwm.com/en/knowledge/insights/preconditions-to-arbitration-uae-20170522.

[23] Bühring-Uhle, Christian, Lars Kirchhoff, and Gabriele Scherer. *Arbitration and mediation in international business*. Kluwer Law International BV, 2006., 251-4 ['Bühring-Uhle/Kirchhoff/ Scherer']

Another concern which may arise with a combination of mediation and arbitration is the "arbitrator's dilemma" aforementioned – that is the question of whether a single person can act as both arbitrator and mediator while still maintaining impartiality and non-bias.[24] Even where both parties have agreed to having the same person act as mediator and arbitrator - this may still possibly taint the confidential nature of arbitration, as the arbitrator will already have been exposed to parties documents from before the arbitration proceedings started – which may affect his/her biases and viewpoints on the case and his/her final decision.[25]

Analyzing the disadvantages and advantages of med-arb, it seems that whether or not this method is effective would be subject to the parties' response to mediation and arbitration respectively in light of the extent their disputes. While if what the parties intended to pursue is an arbitration – the med-arb process is disadvantageous as it would incur additional costs, and prevent the parties from moving on into arbitration, may sabotage any future arbitration process due to the 'arbitrator's dilemma'[26]and may result in the parties having a mediation settlement that they did not want in the first place. It would be up to the mediator to accommodate the parties' needs, and to move the process into arbitration if it seems further mediation efforts are futile. On a more positive note, if the parties do not desire to enter into arbitration, the 2019 Singapore Convention regime would help them achieve a safe, enforceable and cost-effective method to settle the dispute.

b. Arb-Med: Post-Arbitral Mediation

A more unorthodox design of dispute resolution is one where mediation comes after the commencement of arbitration had already undergone and an award had already been rendered. Before the parties were given the opportunity to glimpse the final award, the arbitrator gives an opportunity for the parties to mediate their dispute with him/her acting as a mediator.[27] This would benefit the parties in the sense that having gone through the arbitration process beforehand, they would have a better understanding of their roles and what they're bargaining. However, while it may achieve the fairest final decision, in no means is this a cost-effective method to resolve disputes.

If the mediation is found to be successful, then the mediation settlement becomes binding as the final award. If unsuccessful, then the arbitral award becomes binding.[28] This is known as the "envelope technique" as the arbitrator will have to keep the final arbitral award in an envelope through the process of mediation.[29] The more common "envelope technique" what is known as the "Caldrbank Offer" where a party makes an offer of settlement and if it is not accepted, he notes it a sealed envelope and gives to the Tribunal. When they have made their award, if the award is less than the offer, the Respondent has to pay the Claimant's

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[24] Bühring-Uhle/Kirchhoff/ Scherer, p. 248-51

[25] Deason, Ellen E. "*Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*." Arbitration Law Review 5.1 (2013): 219-249., p. 220; Blankley, Kristen M. "*Keeping a Secret from Yourself-Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*." Baylor L. Rev.63 (2011): 317.

[26] Talbot, P. *Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute*?. Arbitration: the Journal of the Chartered Institute of Arbitrators 67.3 (2001): 221-229. ['Talbot']

[27] Oghigian, Haig. "*The mediation/arbitration hybrid*." Journal of International Arbitration 20.1 (2003): 75-80., p. 77-79

[28] Arnold M. Zack, The Quest for Finality in Airline Disputes: A Case for Arb-Med, 58-JAN. DISP. RESOL. J. 34, 37 (Nov. 2003/Jan. 2004).

[29] Bühring-Uhle, Christian, Lars Kirchhoff, and Gabriele Scherer. *Arbitration and mediation in international business*. Kluwer Law International BV, 2006., p. 254

costs. If the award is more, then the costs are apportioned appropriately by the tribunal.[30] An arb-med process avoids concerns that a party may not genuinely mediate in fears of revealing information which could compromise their position in the possibility of the case going into full-arbitration.[31]

c. *Mediation Windows/Arb-Med-Arb: Hybrid Dispute Resolution Proceedings*

In complex and highly technical disputes, it is even possible for the commencement of arbitration to be halted in the middle of proceedings, and for the arbitrator – with the consent of parties – to commence mediation. This is possible due to the length of arbitration proceedings, which may take up months and weeks in between proceedings. It is relatively easy for parties to convene and establish a mediation proceeding while they are still in the middle of an arbitration process.[32] It should also be noted that the parties may suspend an arbitration at any time, upon their mutual desire, to try to mediate.

An arb-med-arb process is one that allows for the most flexibility and creativity in resolving disputes. A successful application of the model – as well as one of it's most complex applications - would be the case of *IBM v. Fujitsu*.[33] Hundreds of millions of dollars in damages was claimed by IBM when Fujitsu allegedly copied an IBM program to create an operating system compatible with IBM frame – hereby violating IBM's intellectual property rights.[34] Subsequent negotiations resulted in an operational agreement called the Washington Agreement between the parties, which is the foundational agreement which shall be utilized in their future arb-med proceedings.

However, while it fully utilizes the benefits of flexibility in the alternative dispute resolution context and provides for maximum effectiveness in terms of the final award rendered, this method of dispute resolution is incredibly niche – requiring an incredibly skilled neutral third party and utmost confidence from both parties.[35] These are luxuries which are often unavailable in more conventional disputes.

A select few arbitral institutions have rules which encompass arb-med-arb processes,[36] and even there commentators and practitioners have been reluctant to employ this method as it is seemingly "mediation in disguise, and an abusive attempt to legitimise what would otherwise be an "unenforceable" mediated settlement".[37] However, with the entry into force of the the Singapore Convention in 2019, this may no longer be necessary as mediation settlements are

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30 The Caldrbank Offer is a method of envelope technique that is noted by the reviewer of this peer-reviewed article; *Risse/Altenkirch*, 10 German Arbitration Journal ("SchiedsVZ") 2012, 5 (7) (in German)

31 Oghigian, Haig. Discussion On Arbitrators Acting as Mediators, 2001.

32 Bühring-Uhle/Kirchhoff/ Scherer, p. 259-60

33 Bühring-Uhle, Christian, and Christian. "*The IBM-Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution*." Am. Rev. Int'l Arb. 2 (1991): 113.

34 International Business Machines Corporation v Fujitsu Limited, Respondent and Counterclaimant, Award, p. 156

35 As spoken by an in-house counsel who participated in the procedure: "… the I.B.M.-Fujitsu arbitration showed that it is possible for the arbitrator to facilitate agreement where possible and to break log jams through adjudication … there can be serious problems but it can also be the optimal process, it all depends on the personality of the neutral who needs a very rare skill and a strong character and absolutely needs a very high degree of confidence from both parties …"

36 The Singapore International Arbitration Centre and the Singapore International Mediation Centre are the only two institutions offering model clauses for this type of dispute resolution.

37 Arbitration, Mediation, and the Singapore Convention on Mediation. *5* Aug. 2019, http://arbitrationblog.practicallaw.com/arbitration-mediation-and-the-singapore-convention-on-mediation/.

enforceable even without having to undergo the complex processes of arb-med-arb in jurisdictions which have ratified such convention .

A process can be fully independent of one another, being adjudged by a different person as mediator and arbitrator, or there is the possibility that the parties may choose to have the same third party neutral in both their mediation proceedings and the arbitration proceedings.

C. Confidentiality & Impartiality Concerns in Med-Arb Proceedings with the Same Neutral

A concern with having the same neutral is that the neutral – who will eventually take on the role of arbitrator - then may be affected by the knowledge that they obtained from the mediation process. Again mediation and arbitration are fundamentally distinctive,[38] one of the features of mediation which would be utterly inappropriate in arbitration is caucuses. Caucuses are a procedure which allows the mediator to communicate privately with each respective party. When the mediator then switches to become an arbitrator – this is immediately inappropriate[39] as he/she is meant to render an impartial award and should not engage in *ex parte* communications with the parties.

One might say that a skilled individual may differentiate between his role as a mediator and his role as an arbitrator – but this does not change the fact that the situation is one that raises concerns. Or as put very neatly by Halg Oghigian: "*I am impartial; you are capable of being impartial; he is probably biased.*"[40]

The issue is summarized as follows:

> "*It is difficult to believe that the med-arbitrator will remain unaffected as an arbitrator, after becoming privy to private, perhaps intimate, emotional, personal, and other "legally" irrelevant information or compromise positions.*"[41]

On another note, there is also the concern that if they knew that eventually the mediator would have the capacity to act as an arbitrator and would consciously or subconsciously take into consideration the private content of caucuses and other discussions during the process of mediation into the final considerations in making a decision for the final arbitral award.

D. Recognition & Validity of Med-Arb in Indonesia

a. *Enforcement*

Indonesia is a country that is infamous for it's apparent "unfriendliness" towards enforcement of foreign arbitral awards.[42] This concern arose out of the enforcement procedure in Indonesia

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[38] Supra, p.

[39] Elliot, D. C. (1995). Med/arb: fraught with danger or ripe with opportunity. *Alta. L. Rev.*, *34*, 163., p. 176; In the 24 September 2019 event in Seoul discussing the topic of facilitation settlements organized by KCAB International, SCAI and ASA titled "*A Fresh look at an old concept: Facilitation of settlements in arbitral proceedings*", the panelists explored how and when arbitrators should act as settlement facilitators. The panelists agreed that caucusing - i.e. separate discussions between the arbitrator and the parties and the arbitrator going back and forth between the parties - would in most cases not be appropriate.

[40] Oghigian, H. (2003). The mediation/arbitration hybrid. Journal of International Arbitration, 20(1), p. 75

[41] De Vera, C. (2004). Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China. *Colum. J. Asian L.*, *18*, 149.

which requires courts to release an exequatur or a writ of execution.[43] However, this is a myth that has been debunked by local foreign legal consultant Karen Mills in her article entitled "Debunking the Myth: Enforcement of Foreign Arbitral Awards in Indonesia", where she pointed out that to her knowledge "no application for an exequatur of a registered foreign award has been rejected".[44] Thus, it is presumable that if a med-arb proceedings have been conducted correctly with consent of the parties – there ought to be no issue with it's enforcement should the med-arb process be conducted properly.

b. ***Annulment***

Challenging the rendered award on the other hand is a different concern, the Undang Undang No. 30/1999 on Arbitration and Alternative Disputes Resolution ("**Arbitration Law**") allows parties to challenge, or request recusal of an arbitrator "*there is found [to be] sufficient cause and authentic evidence to give rise to doubt that such arbitrator will not perform his/her duties independently or will be biased in rendering an award*" under Article 22. This is further elucidated in Article 22(1) that removal may also be subject to '*if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.*"[45] To this author's knowledge, no arbitral award has been challenged on grounds of impartiality because of an arbitrator's dual role – however this remains an issue which may arise if the same person acts as both arbitrator and mediator.[46]

c. ***BANI Centre Rules on Med-Arb***

Indonesia, however does seem to recognize med-arb procedure with the same neutral in it's domestic arbitration practice, where the Badan Arbitrase Nasional Indonesia ("**BANI**") Centre's rules and procedures have included mediation procedure, which can be enforced as an arbitral award.[47]

E. Conclusion

Conclusively, med-arb proceedings is a unique and flexible way for parties to settle their dispute in a cost effective way – however the concerns that arise out of med-arb should still be taken into account by parties if they are considering using this method of resolution in Indonesia. Even though in most cases a submission to enforce an arbitral award is granted by Indonesian Courts, it is still important for parties and counsels alike to be aware of the possible risks when submitting an enforcement of a med-arb award in Indonesia. This is especially important, noting the lack of precedence and the possible loopholes that may end

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[42] See generally. Rubins, N. (2004). The enforcement and annulment of international arbitration awards in Indonesia. *Am. U. Int'l L. Rev.*, *20*, 359.; Nurhayair, I. (2006). Legal Issues in the Annulment of International Arbitral Award in the Himpurna and Karaha Bodas in Indonesia. *Mimbar Hukum*, *18*(2006).

[43] Budidjaja, T., & Ilyas, R. B. (2019, February 1). Enforcement of judgments and arbitral awards in Indonesia: overview. Retrieved from https://uk.practicallaw.thomsonreuters.com/2-619-0724?transitionType=Default&contextData=(sc.Default)

[44] Mills, K. (2015). Debunking the Myth: Enforcement of Foreign Arbitral Awards in Indonesia. *LawyerIssue*.

[45] Mills, Karen. "Arbitration Guide." *IBA Arbitration Committee*. (2018)., p. 10

[46] Notably, one of the grounds for challenge under the Indonesian Arbitration Law is a violation of public policy – a provision that has been criticized for it's broadness in application. This is why in the Author's opinion there remains the risk that med-arb awards may not be safely enforceable in Indonesia.

[47] Widnyana, I. M. (2015). Rangkaian Proses Arbitrase. *Indonesia Arbitration Quarterly Newsletter*, *7*(5), 1–42., p. 17-18

up costing them more for undergoing a med-arb process rather than if they had made use of more conventional dispute resolution procedures.

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