Land, Property, & Good Governance

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FOREWORD

Property, land, and governance issues have always been fascinating to analyze, especially those related to legal and governance aspects. This book was written as a form of academic collaboration between Universitas Djuanda Bogor Indonesia, Universiti Utara Malaysia, and Universiti Kebangsaan Malaysia, which presents ideas and analysis on several property/ land issues, good governance and their management in Indonesia and Malaysia. This anthology provides a discourse on property and land by offering an in-depth analysis written by experts in the field. The presence of a collection offers a new perspective and paradigm on property, land issues, and their management.

Thanks to all the authors who have contributed to the publication of this book. Martin Roestamy, Abraham Yazdi Martin, Nuarrual Hilal Md Dahlan, Tuan Pah Rokiah Syed Hussain, Hamidi Ismail, Sharifah Sofiah A'tiqah Syed Ibrahim, Jady Zaidi Hassim, Nadhilah A.Kadir, Rita Rahmawati, Bambang Widjojanto, Kurniawan Zein, Michael Josef Widijatmoko and Nurwati, At different stages of preparation and in different ways, all of these writers helped make this book possible.

We would be very interested in Your opinion of this book. Therefore, we invite you to send comments, suggestions, and questions to rita.rahmawati@unida.ac.id (editor of this book).

Bogor, 12 January 2023

Prof. Dr. Suhaidi, S.H., M.H.
Rektor Universitas Djuanda

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THE REBUS SIC STANTIBUS CLAUSE IN A HOUSING LOAN CONTRACT FACES UNFORESEEN CIRCUMSTANCES (POST-PANDEMIC COMPARATIVE STUDY)

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Abstract

Unforeseen circumstances in the contract, something that cannot be predicted that has been anticipated in two clauses, namely force majeure and default. The effect of both is that the contract cannot be executed. In the last decade, there have been many situations and conditions that made contracts unenforceable, especially Home Ownership contracts, particularly the MBR. Some of the most recent causes of unforeseen circumstances are the Covid-19 pandemic which next year will also be faced with the issue of a recession in 2023. This situation is not the will of the parties and cannot be categorized as force majeure, but the circumstances and conditions, both creditors and the debtor is in an unequal position at the time the contract is signed. This can be categorized as rebus sic stantibus. The worst impact of the pandemic and recession is the increase in problem loans, especially in the mortgage sector. Many factors cause the inability of consumers or debtors to repay debts. The relaxation policy is taken as one of the considerations so that customers are not categorized as bad. It is feared that the 1998 financial crisis, like the pandemic, will also repeat itself. The law must take anticipation to overcome the deadlock to achieve a win-win solution. This research is a normative juridical research with a case approach and a legal dogmatic approach. Data collection was carried out using bibliometric instruments to be able to carry out comparative studies from other studies that have similarities. The research aims to

provide a legal comparison between force majeure, default, and rebus sic stantibus.

Keywords: Rebus sic stantibus, force majeure, the default of achievement, housing loan (KPR) contract.

Introduction

The need for housing is a basic need and a human right (Terminsky, 2011), which is guaranteed constitutionally under Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia. So there are reciprocal (obligatoir) rights and obligations between the government as the executor of the state and its people. Based on statistics, people who live in their own homes are in the range of 61,306,635 households out of an estimated number of households of 75,615,091 or around 81% (Ministry of Public Works and Public Housing, 2021), but until 2022 only 60.66% will have access to decent and affordable housing (BPS, 2022a). During the era of President Susilo Bambang Yudhoyono's leadership, a million affordable housing program was launched, to meet the needs and supply of houses. At that time, the target was low-income people or known as MBR. The program has been running since 2014 until now.

What is meant by affordable houses are houses that can be purchased at reasonable prices for low incomes people as the main object of housing provision in the one million houses program. The inability of people to buy affordable housing is caused by the standard housing prices being too high, which results in a backlog that does not decrease from year to year and even increases. You can see the development of the backlog as illustrated below (HREIS Team, 2020).

Table 1. Housing Backlog Distribution 2018–2020

Province	Backlog		
	2018	2019	2020
1. Aceh	210,572	228,647	228,836
2. North Sumatra	1,034,428	1,047,184	1,025,084
3. West Sumatra	338,440	338,451	349,765
4. Riau	453,120	452,009	482,838
5. Jambi	132,346	149,207	129,240

Province	Backlog		
	2018	2019	2020
6. South Sumatra	373,530	355,022	358,264
7. Bengkulu	77,190	80,117	81,273
8. Lampung	237,620	233,013	240,419
9. Bangka Belitung Kep.	47,120	47,829	50,877
10. Riau Islands	157,232	174,125	188,485
11. DKI Jakarta	1,270,456	1,327,574	1,498,954
12. West Jawa	2,674,921	2,648,019	2,816,412
13. Central Jawa	997,166	913,676	937,892
14. IN. Yogyakarta	221,618	250,575	265,482
15. East Jawa	1,189,322	1,155,172	1,267,187
16. Banten	523,181	533,602	524,557
17. Bali	227,650	224,297	267,532
18. West Nusa Tenggara	182,180	151,758	161,100
19. East Nusa Tenggara	140,941	131,729	135,221
20. West Kalimantan	111,394	116,332	118,752
21. Central Kalimantan	138,685	134,973	125,898
22. South Borneo	223,830	235,071	227,418
23. East Kalimantan	221,218	237,348	265,905
24. North Kalimantan	43,605	39,077	38,235
25. North Sulawesi	115,862	123,710	115,875
26. Central Sulawesi	99,880	86,495	100,637
27. South Sulawesi	282,304	288,420	304,268
28. Southeast Sulawesi	85,963	78,877	74,621
29. Gorontalo	53,361	51,968	52,019
30. West Sulawesi	34,450	34,817	34,196
31. Maluku	59,363	59,835	68,103
32. North Maluku	32,337	37,826	39,425
33. Papua	50,716	47,487	50,313
34. West Papua	128012	133,841	125,073
Indonesia	**12,170,031**	**12,148,099**	**12,750,172**

The main cause of the backlog is high house prices (Gofur R. and Jumiati IE, 2021), plus there are several burdens that must be borne by the buyer which are charged in the unit price of the house including

infrastructure financing, infrastructure facilities, and the existence of a proportional comparison value (NPP), accounts, and interest expenses from housing loans as well as interest expenses that do not come directly from construction loans. The high house prices have had a direct impact on consumers' ability to pay off house purchase transactions, which in turn lead to bank loans.

Especially for the area of Jakarta, Bogor, Depok, Tangerang, and Bekasi (Jabodetabek) areas, a comparison of the prices of MBR houses can be described as follows.

Table 2. Comparison of House Prices in the Jabodetabek Region

No.	City/District	Most Selling Price /m2 (IDR)	Most Selling Price /Unit Type 36 m2 (IDR)
1.	West Jakarta City	8,900,000	320,400,000
2.	South Jakarta City	9,200,000	331,200,000
3.	East Jakarta City	8,800,000	316,800,000
4.	North Jakarta City	9,600,000	345,600,000
5.	Central Jakarta City	9,300,000	334,800,000
6.	City/District Tangerang and South Tangerang	8,400,000	302,400,000
7.	Depok City	8,500,000	306,000,000
8.	City/District Bogor	8,600,000	309,600,000
9.	City/District Bekasi	8,400,000	302,400,000

Source: Decree of Minister of Public Works and Public Housing No. 552/KPTS/M/2016

From the table above it can be seen that housing prices for the MBR cluster are still relatively expensive, so they are not affordable. Therefore, low-income people need assistance with housing loans, especially from banking institutions, in this case, banks that provide housing loans, which in practice in Indonesia are banks that have a special focus on providing housing loans (KPR). However, faced with people's purchasing power that is not yet stable and the threat of economic fluctuations due to the Covid-19 pandemic has caused many mortgages, especially the MBR to experience congestion, so that as of August 2022 there have been Non-Performing Loans or Non-Performing Financing for residential house ownership of IDR 1.107 trillion (OJK, 2022, p. 115).

Table 3. NPL/NPF of Commercial Banks to Third Parties Not Housing Sector Banks Until August 2022

Information	2022												
	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug
For Residential Home Ownership/For Home Ownership	-	-	30,230	27,305	27,851	27,752	27,828	28,119	28,404	28,525	30,580	30,740	31,916
NPL/NPF	-	-	1,529	950	866	942	961	954	976	1.032	1,056	1,087	1,107
For Flat or Apartment Ownership/ For Apartments Ownership	-	-	2,630	2,535	2,868	2,864	2,894	2,867	2,856	2,891	2,967	2,962	2,986
NPL/NPF	-	-	49	37	34	32	36	36	35	40	41	41	44
For Shophouse or Home Office Ownership/For Shop House Ownership	-	-	1,265	1,182	1,242	1,238	1,230	1,283	1,289	1,311	1,392	1,402	1,424
NPL/NPF	-	-	112	109	77	79	77	77	76	85	83	88	80

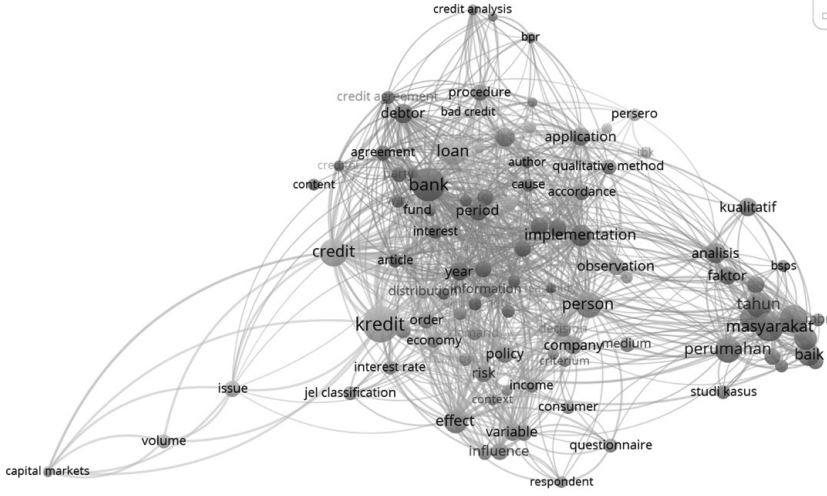
Source: OJK, 2022

NPL can be caused by unhealthy business activities (Firmansyah and Sari Sam, 2022), in terms of home ownership loans, the ability to repay housing loans is closely related to business development, both the place of business and the place of work (Latif Adam, 2009). For commercial loans, a person's business affects the ability to make repayments and in these conditions, the health of a bank is also disrupted and the debtor is declared in default because he has fulfilled the criteria in the contract to be declared in default. In addition to the default, there are other causes that result in an increase in NPL, such as natural disasters, floods, fires, riots, and earthquakes which are stated as force majeure, between the two legal events there are circumstances that are different from the original which were unexpected by the parties which in this paper are categorized by the term rebus sic stantibus.

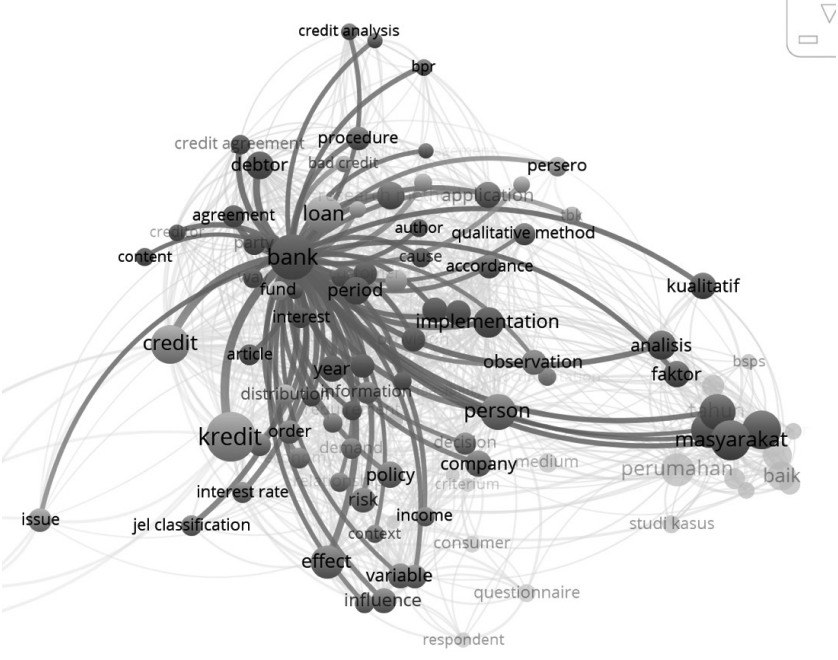
This article aims to formulate and at the same time provide alternative solutions to unexpected events that befall the state and society which have an impact on the people's economic capabilities, such as job loss, a drastic decline in business, or situations resulting from uncertain government political and economic policies that make society must deal with banking responsibilities, while on the other hand, this is not the will of both parties, both the community as banking consumers and the banking itself. With this article, it can be seen that there is interference with the principle of freedom of contract when compared with the justice felt by the community which is a consideration in taking credit security measures.

Methods

This research is a normative juridical research with two approaches, namely the case study approach and the legal dogmatic approach. Data collection was carried out using bibliometric analysis to be able to carry out comparative studies from other studies that have similarities to the object of this research. From the results of the bibliometric analysis, the following diagram can be seen.

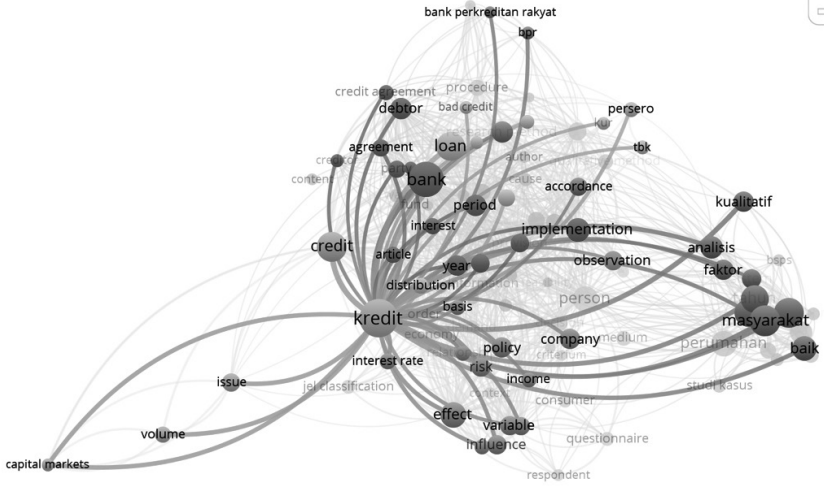


Picture 1. Network Visualization on Housing Credit in Indonesia through Google Scholar Search Engine during Last Decade (2013–2022)



Picture 2. Network Visualization of Housing Credit Based on the Terminology of "Bank"

The term "Bank" is the core keyword and is most frequently cited in publications related to housing credit, with a total link strength of 849 with 134 occurrences. Other keywords related to banking terms include: credit analysis, BPR, debtor, procedure, Persero, bad credit, agreement, content, qualitative method, according, fund, period, qualitative, interest, credit, implementation, analysis, observation, year, factor, analysis, order, society, rate, risk, jelly classification, income, effect, variable, and influence.



Picture 3. Network Visualization of Housing Credit Based on the Terminology of "Credit"

The second most cited keyword in publications on housing credit is the term "credit" with a total link strength of 637 and 163 occurrences. Keywords related to credit terms in the 10 years of Google Scholar publications include Rural Banks, BPR, Debtor, Loan, Agreement, Tbk, Persero, Bank, Period, Article, Interest, Implementation, Qualitative, Analysis, Year, Distribution, Observation, Factor, Basis, Company, Policy, Community, Good, Interest Rate, Risk, Income, Effect, Valuable, Issue, Influence, Volume, and Capital Markets.

Based on the three bibliometric analyzes in the form of image visualization, the authors have not found in the last 10 years, especially in Google Scholar publications, related to research on agreements that

discuss in detail the clauses rebus sic stantibus, especially agreements in the banking world that discuss housing loans.

Bibliometric analysis (Donthu, et.al., 2021; van Eck and Waltman, 2010) was presented in order to see the interests of the researchers, the specifications of the research carried out, as well as the research linkages between one variable in this paper to make comparisons in processing publication data so that the conclusions drawn are more accurate and the references referred to are more measurable. So that the data collected is legal material in the form of valid and authentic data.

In addition to bibliometric analysis, it can be obtained from contracts obtained from the notary's office in the form of authentic documents and also credit documents from implementing banks for Housing Ownership Credit (KPR) or Apartment Ownership Credit (KPA), in this study the author also introduced it to Flat Ownership Credit (KPRS).

Some primary data was also obtained from the Ministry of Public Works and Public Housing, the Central Bureau of Statistics, Bank Indonesia, the Financial Services Authority (OJK), the National Library, and the Djuanda University Center for the Study of Property Law and Residential and Housing Areas.

The nature of this research is a descriptive analysis by combining inductive and deductive thinking, which sees legal issues arising from contracts which are also laws of the parties developed into related clauses such as force majeure and default clauses namely indications, causes, consequences, and risks for the parties.

Results and Discussion

Indonesian Housing Issues and Challenges

Housing issues and challenges in Indonesia are always focused on the following matters.

1. Limited land: Limited land is the biggest obstacle in providing adequate and affordable housing for people, especially in urban areas. As an economic commodity, besides the limited amount of land in urban areas, it also has a very high price, so the provision of land for housing development is very difficult to realize. As a

result, urban sprawls occur, resulting in an urgent supply of land to suburban (suburban) areas, which in turn causes land on the outskirts of cities to be controlled by land speculators. According to Shaibani (Shaibani and Harvard, 1988, p. 409), there are several effects on land prices, but the important ones are:

a. the government interfered in land sales and this led to an increase in the price of land available for building;
b. structural planning raised land prices because by providing infrastructure land became worth more;
c. in spite of the high demand for land much land remains unused because of the absence of laws that punish people who let land unused;
d. most agricultural land around the city has turned into housing land, so the prices have increased in those areas.

2. Low socio-economic conditions of the community: the socio-economic conditions of the community will greatly determine access to adequate housing. There are still many inadequate housing and settlement conditions, enough to show an illustration that there are still many low-income people who are powerless to meet housing needs. As of March 2022, the number of poor people in Indonesia is 26.16 million people, including 11.82 million urban poor people, and 14.34 million rural poor people (BPS, 2022).
3. Limited information: information is one of the important issues in efforts to provide adequate housing. Information on housing construction will be closely related to the technology of building materials, land prices, and the licensing mechanism for housing construction. Access to information, especially for people with low incomes, is one of the obstacles in efforts to provide decent, adequate, and inexpensive housing. Lack of information for low income people regarding the procedures and mechanisms for providing housing is of course a separate obstacle in the construction of public housing.
4. Limited government capacity (central and regional): the government and local government have an obligation to provide housing for the people as a constitutional obligation based on the 1945 Constitution. However, in reality, the limitations of the

government and local government, especially in terms of funding, prevent the government and regional government from optimally providing housing for the people. In this case, the role of the private sector has a strategic position. Regarding the limited ability of the government to finance this, the Ministry of Public Works and Public Housing (PUPR) notes that the 2020–2024 state budget is only able to cover around IDR 623 trillion. This figure is equivalent to 30% of the total budget required for infrastructure provision of IDR 2,058 trillion, it says CNBC (2019). In the 2022 National Revenue and Expenditure Budget (APBN), central government spending is recorded at IDR 17,3 trillion or 0.9% of the total 2022 APBN (Ministry of Finance, 2022, p. 19).

5. Population growth rate: the high rate of population growth results in the need for housing to increase. The demand for housing continues to increase every year, which if it is not matched by an adequate supply of housing will cause new problems in efforts to meet the demand for housing. The current population of Indonesia is 275,773,800 people (BPS, 2022b), with a population growth rate of 1.17% per year (BPS, 2022c). Population growth is driving the increasing need for quality and affordable livable housing in the future.

In addition to the general housing issues and challenges in Indonesia above, specifically related to the issue of low socio-economic conditions of the community, the government has actually issued a Housing Financing System policy for a long time. But again, the financing system is not free from challenges and problems.

Financing is one of the most critical issues in housing problems. From the financing side of the supply and demand for housing, limited financing is the main obstacle. Although many banks in Indonesia offer mortgage products, they generally have high costs because they are not supported by long-term funds. Broadly speaking, there are four factors related to financing issues, namely affordability, namely regarding the financial ability of the Indonesian people for home ownership; availability, namely related to the availability of funds and the gap between supply and demand for housing; accessibility, namely related to the access of the Indonesian people to housing finance; and

sustainability, which is related to the sustainability of funds (PUPR, 2018, p. 30).

Housing Provision

In Indonesia, the provision of housing is carried out by both government and private institutions. Government agencies in this case are carried out by the Ministry of PUPR as a regulator and several institutions such as the Regional Government, the Ministry of Social Affairs, PERUM Perumnas, and BUMN KARYA Companies in the housing sector. In addition to the government providing housing carried out by the private sector, in general housing provided by the government is rental flats (RUSUNAWA) which are not discussed in detail, then the government also provides houses to be purchased through PERUM Perumnas.

The provision of housing for low income people is generally carried out by the private sector, even though the local government in Law Number 23 of 2014 adds that one of the local government affairs is housing. However, in reality, for one reason or another, it seems that the regional government is experiencing problems in carrying out the task of providing housing. In the end, the activity of providing housing is more dominated by the private sector, both those who are members of various housing development organizations, both commercial and low income housing, and even subsidized housing. In this paper, commercial housing and subsidized housing are not discussed in detail.

The process of providing houses by developers is part of the one million houses program which inevitably becomes the responsibility of private developers which is growing quite rapidly, especially in the Jabodetabek area with a population of approximately 29 million people. From the number of residents, if you look at the data above, the backlog in Jabodetabek is illustrated as follows (HREIS Team, 2020).

Table 4. Jabodetabek Backlog 2022

Regency/City	Backlog		
	2018	2019	2020
South Jakarta	273,263	280,223	333,145
East Jakarta	322,782	363,962	367,544
Central Jakarta	128,502	139,508	161,801

West Jakarta	326,304	311,983	374,970
North Jakarta	218,774	231,242	260,745
Total	**1,269,625**	**1,326,918**	**1,498,205**
Bogor Regency	291,483	252,795	278,077
Bekasi Regency	205,088	184,514	261,126
Bogor City	73,319	89,357	93,885
Bekasi City	216,873	259,125	252,336
Depok City	166,614	204,962	204,709
Total	**953,377**	**990,753**	**1,090,133**
% Backlog to Province	**35.64**	**37.41**	**38.71**
Tangerang Regency	151,453	124,571	130,331
Tangerang City	201,342	211,620	195,994
South Tangerang City	78,949	85,521	96,394
Total	**431,744**	**421,712**	**422,719**
% Backlog to Province	**82.52**	**79.03**	**80.59**

Source: PUPR

If you pay attention to Table 4 for the Bodetabek area, the percentage of backlog in the Tangerang Regency, Tangerang City, and South Tangerang City areas reaches around 80% of the Banten Province backlog. Meanwhile, the percentage of the Bodebek area to the total backlog of West Java Province was 35.64% in 2018 and 38.71% in 2020. The absolute backlog figure for the Bodebek area reached 1,090,133 in 2020 and the Tangerang area and its surroundings amounted to 422,719 in 2020. The backlog in DKI Province is almost evenly spread across all municipalities in Jakarta except Pulau Seribu Regency, and the total backlog in DKI Jakarta Province in 2020 has reached 1,498,954. The backlog in DKI Jakarta and West Java Province is in the red zone, while the Banten Province backlog is in the yellow zone.

Day by day, the housing supply program is increasing according to quality and quantity. This can be seen from the data on the increasing number of backlogs for the Jabodetabek area, while the center for property development, especially flats, is in the Jabodetabek area. From this problem, it was found that there were several indications why supply and demand were not in line, among others, due to high house prices, declining incomes, because there were several regions in

the region that received job offers for wages that were not in line with the Provincial Minimum Wage (UMP). This is also an indication of the declining ability to repay housing loans among the MBR.

In addition to these two things, there is another side, namely housing subsidies that are not on target where the subsidies are given not related to reducing house prices but to encourage the purchase of houses, both down payment on houses and reductions in other state obligations such as taxes, which are also factors that cause low power buy. In another study, we proposed that the existence of provision by the state as compensation for housing ownership subsidies becomes subsidized land provision, both by the central government and local governments (Roestamy, et.al., 2022, p. 120).

In the process between supply and demand, the authors see that there has been a situation where each other has the same goal, but on the other hand, the parties concerned are not trying to provide a way out of the obstacles that arise from the one million house project or a contradiction in terms between the provision of housing and the ease of access to housing as a buyer so that supply and demand are not in line.

For example, in 2020 the one million house program will reach 856,758 units (PUPR, 2020), namely the construction of housing for low income communities (MBR) of 661,715 units and houses for non-MBR of 195,043 units. The percentage of houses for MBR is 77% of the total achievement, while the remaining 23% are houses for non-MBR. However, its uptake of steps to reduce the backlog does not have a strong correlation because it is still struggling from price games in which there are lucrative business elements, namely land prices, the target of housing subsidies by developers, and unfavorable agreements.

Purchaser and End-user

In the scheme of the apartment law, the users of the apartment, as well as the buyer, are known, so in the management of sustainable flats a legal entity is formed called the Association of Flat Owners and Users (PPPSRS). In terms of security and comfort for the users of the flat, their rights are legally guaranteed based on the rental contract agreed between the buyer as the owner and the user as the tenant. In the event of bad debt, the lease agreement will protect the interests of the

user from outside legal actions, such as forced sales or auctions, due to bad credit.

Based on the Civil Code Article 1576, buying and selling do not break the existing lease, it is stated that: "By selling the leased goods, a lease made previously is not decided unless this has been agreed at the time of renting the goods." In the case of problem loans, and the bank taking civil legal action, the tenants are also always at a disadvantage so Article 1576 is set aside, even though the bad debt occurs not at the will of the tenant or the lessor.

Housing Ownership Contracts and Loans

1. Housing Financing

Home Ownership Credit (KPR) is a financing product or loan provided to prospective home buyers provided by banks and secondary housing finance institutions. KPR helps the community because they do not have to provide funds for the price of the house purchased at the time the purchase is made, but it is enough to submit an application and complete the requirements for buying a house so that it can be financed with a KPR.

In 1974, the government appointed BTN to assist the community in obtaining KPR assistance. KPR is the name of the housing loan product that was first developed by BTN, at this time there are quite some mortgage lending banks, such as state-owned banks, national private banks, to foreign banks.

To help MBR, the government provides a Housing Financing Liquidity Facility, hereinafter abbreviated as FLPP, which is carried out based on PUPR Ministerial Regulation No. 35 of 2021 concerning Housing Financing Facilities and Assistance for Low Income Communities.

Housing financing is carried out by 38 banks consisting of 7 national banks, namely BTN and BTN Syariah, BNI, BRI, Mandiri, BSI, Artha Graha, and Mega Syariah, as well as 31 Regional Development Banks (BPD) spread throughout Indonesia which have collaborated with BP -Tapers. Apart from that, to encourage the formation of quality KPR volumes, the government established PT. Sarana Multigriya Financial/ SMF (Persero), a State-Owned Enterprise (BUMN) under the guidance

and supervision of the Minister of Finance is engaged in secondary financing. PT. SMF facilitates the flow of medium or long-term funds from the capital market to the housing sector through mortgage lenders.

2. Contract Performance

a. Before granting a loan; the provision of mortgage facilities by banks to debtors begins with submitting mortgage applications from debtors to banks by including, among other things, the purpose and objectives of the credit application, the object being financed, the amount of credit requested, the source/list of income that will be the source of installment payments, the installment schedule and so on. Upon this application, the bank will study it, then respond to the application letter with a letter of rejection or a letter of approval for granting credit with the conditions determined by the bank.

b. When granting a loan; the parties to the mortgage contract. In providing mortgage loan facilities, there are 3 parties involved as part of providing mortgage facilities, namely, the homeowner as a seller, the seller can be an individual or a legal entity, and the buyer is an individual who meets the requirements as a mortgage debtor, including married or at least 21 years old. An agreement between the seller and the buyer forms the basis for the mortgage contract. Then the seller and buyer will sign the deed of sale and purchase (AJB) together with the signing of the mortgage contract which is then followed by the signing of the deed of collateral binding in this case the Power of Attorney for Imposing Mortgage Rights/ Deed of Imposing Mortgage Rights (SKMHT/APHT).

c. Loan amount; the loan amount will be clearly stated in the mortgage contract. The loan amount is the value of the credit facilities approved by the bank, namely the price of the house after deducting the down payment. The amount of the mortgage down payment ranges from 10%–20% of the buying and selling price of the house. The down payment must be paid in advance from the debtor's funds before the signing of the AJB, KPR, and the binding of collateral is carried out. How much the price of the house will be listed in the AJB, while the mortgage contract will include the price of the down payment which will be the portion of the debtor's payment and the amount of the credit facility and the remainder will be the

portion of the bank financing the purchase of the house, so the price of the house will be the total of the down payment plus the value of the credit facility provided by the bank.

d. Loan allocation; in the KPR contract, the loan designation is explicitly stated, namely to buy a house by including a certificate (proof of title) of the house and a complete description of the house being financed for the purchase. The money from the mortgage facility is not received directly by the debtor from the bank, but the bank pays it directly to the seller's account as a settlement of the house based on the sale and purchase deed. The term of the KPR given by the bank to the debtor is between 5 to 25 years, with a maximum age limit of when the credit period ends is 60 years for employees or 65 years for professionals.

e. Mortgage installments; the amount of the installment amount each month is adjusted to the ability of the debtor to repay each month and is adjusted to the period and is also associated with the age of the debtor. The bank's concern about the ability and amount of monthly installments is to approve the debtor's mortgage application.

f. Mortgage guarantee; in the implementation of mortgages that serve as collateral for mortgage loan facilities to ensure payment in an orderly manner, credit installments are by the installment schedule until they are paid off, namely houses financed by the purchase of banks with mortgage facilities.

3. Loan Results

a. The seller is a house owner who sells to debtors financed by a bank with a mortgage facility. The seller will receive payment for the house price from the KPR facility. Sellers can be individuals or legal entities.

b. Buyer: the buyer is a debtor who applies for a loan and gets a mortgage facility. The debtor will pay the price of the house to the bank that has paid off the price of the house.

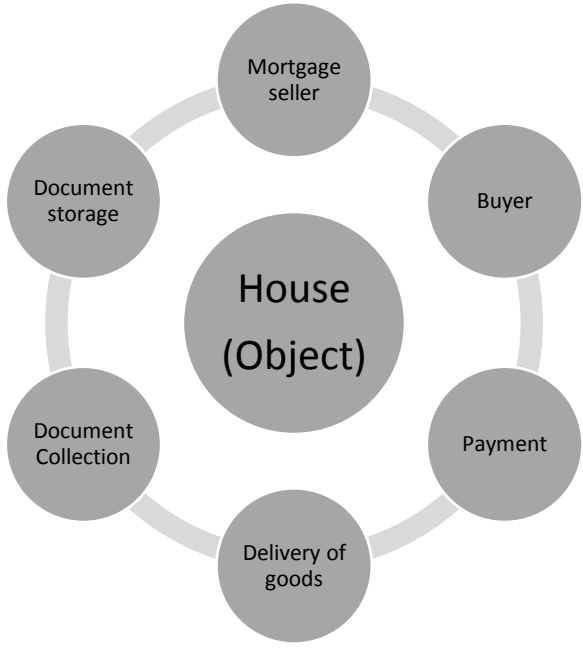
c. KPR objects are houses whose purchases are financed by banks with mortgage facilities, and KPR objects or houses whose purchases are financed by banks become credit collateral.

d. Payment for house prices consists of advances paid by the debtor and settlement of the sale and purchase price of the house paid by the bank from the KPR facility.

e. The delivery of the goods that are the object of sale and purchase occurs when the AJB is signed between the seller and the buyer, while the loan occurs after the KPR contract is signed, while the binding guarantee is carried out after the SKMHT/APHT is signed by the owner/buyer in the AJB or the debtor is against the KPR.

f. The submission of documents to the bank is carried out before signing the AJB, the KPR contract, and the binding of SKMHT and APHT guarantees carried out by the house seller and the debtor.

g. Document storage. All documents related to the implementation of mortgages are kept by the bank until the credit is paid off. After the credit is paid off, all of these documents will be handed over by the bank to the debtor along with a roya letter from the bank, which states that the guarantee is tied again to the bank because the guaranteed credit has been paid off. And for paying off the mortgage, the bank will issue a letter of settlement (SKL).



Picture 3. Loan Result

4. Rights and Obligations

a. Installments and interest; repayment of credit/loans of money is made in monthly installments, consisting of installments of principal and interest in a fixed amount. The amount of money owed by the debtor to the bank is by the records and/or books of the bank and becomes binding evidence for the debtor, for that the debtor will not deny and or submit objections to the amount of money owed by the debtor.

b. Debtor's obligations; to guarantee the implementation of KPR, the debtor is obliged to:

   1. Use the credit solely to give credit.
   2. Pay in an orderly manner until all the debtor's debts are paid off by the schedule and amount of installments agreed upon by the creditor and debtor.
   3. Agree and must bind themselves to submit all letters and documents, which are original and valid, and prove ownership of all objects used as collateral including in Article 6 Paragraph 1 above to the bank to be used to carry out the binding of said objects as collateral for credit, and then controlled by the bank until the entire amount of the debt is repaid.
   4. Insuring his life if the debtor dies, then the sum assured will be used to pay off all debts of the debtor to the bank and insure the collateral object from fire hazard at a designated insurance company and the amount of coverage is determined by the bank, using the banker's clause.
   5. Extending the insurance period when the period ends, until the credit facility is paid off and paying premiums and other insurance costs on time, and submitting the originals of each policy or each of its extensions and each proof of payment to the bank.
   6. If it turns out that the result of execution is more than the debtor's debt, the debtor has the right to request back the difference from the bank, but without the right, for the debtor to claim any interest or loss and only regarding the actual amount received by the bank.

c. Creditor rights; the bank has the right to exercise its execution rights over the object used as collateral. If it turns out that the amount owed by the debtor is more than the result of the execution, then the shortfall remains the responsibility of the debtor and the shortfall must be paid off immediately.

5. Event of Default

Deviating from the provisions stipulated in the KPR contract, if one of the following events occurs, the bank has the right at any time without regard to a certain grace period to terminate this agreement immediately and at the same time for all debtor debt arising under this credit agreement, both principal debt and interest, fees or other expenses, namely in the event of:

a. if the debtor does not make installments for three consecutive months as stipulated in Article 10;

b. if the statements, statements, or other documents provided by the debtor in or in connection with this agreement and/or addition thereto, are untrue regarding matters considered by the bank to be important;

c. if the debtor requests a delay in payment (surseance van betalling), or according to the opinion of the bank from other matters it turns out that the debtor is unable to pay his debts, is declared bankrupt, or if the debtor's assets are taken over, or for whatever reason, he is no longer entitled to manage and control his wealth, either in whole or in part;

d. if the debtor dies;

e. if according to the bank, the debtor is negligent, cannot or does not comply properly with the provisions of this agreement and/or something additional thereof other than what is mentioned in (a) above, if there is an omission/violation according to the conditions described in one of the deeds granting of guarantee including an acceptance that has been issued based on this agreement;

f. if the debtor does not fulfill his obligations based on the agreement with a third party it can result in a third party bill against the debtor being billed prematurely;

g. if any event occurs which in the opinion of the bank will result in the debtor not being able to fulfill his obligations stated in or based on this agreement and/or something additional to it and/or deed of guarantee and/or an acceptance issued based on this agreement.

In the event of default and the bank decides on the credit agreement, the agreement ends immediately without the debtor's right to claim money for losses from the bank, termination of such an agreement does not require a court decision. In this connection, the debtor waives the provisions in Articles 1266 and 1267 of the Indonesian Civil Code.

- Default. If the debtor defaults on the mortgage contract, the creditor can exercise his right to execute the collateral.
- Force majeure. If the default occurs due to force majeure, the debtor must notify and prove it to the creditor.
- Insolvency (bankruptcy and surseance van betalling). If the default occurs due to insolvency, the creditor has priority rights over the mortgage to pay off the debtor's obligations to the creditor.
- Rebus sic stantibus. If default occurs due to rebus sic stantibus, the debtor must notify and prove it to the creditor.

6. Dispute Resolution

In the settlement of cases or dispute resolution, if insolvency or bad credit occurs, the two parties both debtor and creditor generally choose two forums namely arbitration and court. The court is chosen at the domicile of the bank where the case submitted is a credit case or bad credit case, but if the guarantee bank is not in the same location as the place where the agreement was made, then the option is for execution at the place where the collateral is located.

In the case of KPR, arbitration has never been chosen unless it is a construction project, it can choose arbitration, free arbitration, or arbitration contained in the Indonesian National Arbitration Board (BANI). The fact is that in some ways it can mutually harm the parties because it will be costly. Then at the time of the execution, it is carried out if it occurs according to the rejection or mobilization of the masses it will also be detrimental from the banking side.

If the bank is a private bank, it generally uses the second way out, namely by conducting auctions at other auction institutions, in fact,

this is also carried out at state-owned banks through state auction institutions. The function of the rebus sic stantibus clause in this case can provide opportunities through negotiations, for example with management assistants.

Rebus Sic Stantibus

Rebus sic stantibus is a contract clause that is known and developed in international contracts. This clause developed since the 13th century (Tomislav Karlović, 2019). The principle whose full term is "omnis convention intellegitur rebus sic stantibus", is defined as "a name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed" (Henry Campbell Black, Black's Law Dictionary, 1990, p. 1432). Although regarding this principle there are still many legal experts who still do not agree with this principle (Garner, 1927, p. 115). However, at least rebus sic stantibus as a legal principle of contract has been recognized as a general rule of international law and as a government policy of a country (Suraputra, 2014, p. 466).

The clause rebus sic stantibus is closely related to a legal proverb that states that "circumstances alter cases" (Jennifer Speake, 2008, p. 98) or "circumstances change the case", this principle contains the idea that everything that must be carried out and applied in events, relationships, and legal actions in several ways depends on the circumstances, situations, conditions that existed at the time of the events, relationships, and legal actions occur (Kulaga, 2020). The doctrine of rebus sic stantibus is widely known and applied in countries with civil law legal systems such as Germany, Italy, Uruguay, and Mexico. Whereas for countries with a common law legal system, there are no doctrines that are similar and congruent with the rebus sic stantibus doctrine, but with doctrines such as "frustration", "impossibility", and "impracticability", which were developed in common law countries have implemented the same idea (Salib, 2022).

The rebus sic stantibus doctrine is different from the force majeure doctrine, namely due to force majeure or certain circumstances which are also a concept in contract law. Force majeure is a situation where one

of the parties can't carry out the obligations according to the agreement due to the disappearance of the object or purpose that is the subject of the agreement (Suherman, 2016, p. 6). The equation is that both force majeure and rebus sic stantibus are both unexpected events and are expected to occur when the agreement is agreed upon, this occurs beyond the fault and risk of the debtor (Shidarta, 2020).

In Indonesia, the rebus sic stantibus doctrine is known and recognized in international treaty law which is normatively stipulated in Law Number 24 of 2000 concerning International Agreements, Article 18 letter c, that the termination of an international agreement ends for several reasons, one of which is "there is a change fundamental that affect the implementation of the agreement. However, Law Number 24 of 2000 does not provide further limitations regarding the rebus sic stantibus doctrine. Whereas in the Indonesian Civil Code as a source of general regulation of contract law, Indonesia does not recognize this doctrine of rebus sic stantibus.

Furthermore, The UNIDROIT Principles of International Commercial Contracts (UPICC) which was ratified by Indonesia based on Presidential Regulation Number 59 of 2008 concerning the Ratification of the Statute of the International Institute for the Unification of Private Law (Statute of International Institution for Unification of Civil Law), regulates the principles common international contracts include *pacta sunt servanda* and rebus sic stantibus. The doctrine of rebus sic stantibus in the UNIDROIT Principles of International Commercial Contracts uses the legal term "hardship clause" or "difficulty clause". Regarding why the term "hardship" is used in the UNIDROIT Principles of International Commercial Contracts, the consideration is that the phenomenon of "hardship" has been recognized by various legal systems with other concepts such as "frustration of purpose", *"wegfall der geschäftsgrundlage", "imprévision", "excessive onerosità sopravvenuta",* and others. The term "hardship" was chosen because it is widely known in international trade.

In Section 2, Article 6.2.1 it is stated that "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship" heavy for one of the parties, then that party is still bound to carry out its obligations subject to the provisions

(regarding difficulties). It is emphasized that the principle of binding a contract *(pacta sunt servanda)* is not absolute. It is determined that "When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in the principles as "hardship" ….".

According to UNIDROIT of International Commercial Contracts, the definition of hardship based on Article 6.2.2 is:

> *"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party, and (d) the risk of the events was not assumed by the disadvantaged party.*
>
> *There are difficulties where the occurrence of an event substantially alters the balance of the contract either because the cost of performance by either party has increased or because the value of the performance received by either party has decreased, and (a) the event occurred or became known to the injured party after the conclusion of the contract; (b) these events cannot reasonably be accounted for by the injured party at the time of termination of the contract; (c) the event was beyond the control of the injured party, and (d) the risk of the incident is not borne by the aggrieved party".*

In applying the "hardship" clause, it was determined that since the general principle is that a change in circumstances does not affect the obligation to perform, difficulties cannot be created unless the change in the balance of the contract is fundamental. Whether the change is "fundamental" in a particular case will of course depend on the following circumstances.

1. Increase in the cost of performance.
2. Decrease in the value of the performance received by one party.
3. Events occur or become known after the conclusion of the contract.
4. Events could not reasonably have been taken into account by the disadvantaged party.
5. Events beyond the control of the disadvantaged party.
6. Risks must not have been assumed by the disadvantaged party.

Regarding force majeure in the UNIDROIT of International Commercial Contracts, it is determined that based on the principles there may be factual situations which at the same time can be considered as cases of difficulty and force majeure. If this is the case, it is up to the party affected by this event to decide which solution to pursue. If it causes force majeure, then the intention of not carrying it out will be forgiven. If, on the other hand, one of the parties calls for difficulties, it is first aimed at renegotiating the terms of the contract to allow the contract to survive even with the revised terms.

The impact of the implementation of this "hardship" clause is as follows.

1. *In case of hardship, the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based* (in case of difficulties the aggrieved party has the right to request renegotiation. The request must be made without undue delay and must indicate the reasons on which it is based).
2. *The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance* (a request for renegotiation does not in itself give the aggrieved party the right to postpone implementation).
3. *Upon failure to reach an agreement within a reasonable time, either party may resort to the court* (a request for renegotiation does not in itself give the aggrieved party the right to postpone implementation).
4. *If the court finds it difficult it may, if reasonable: (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract to restore its equilibrium* (a request for renegotiation does not in itself give the aggrieved party the right to postpone implementation).

In the contract law system in Indonesia, clauses that describe this situation so far have not been of particular concern to creditors. The event in question is a legal event that can be caused by a country's economic situation, such as the economic crisis in 1998 where almost all banks collapsed. Starting from the monetary crisis that occurred in the Asian region at that time, including in Indonesia, which then resulted in a banking crisis. This was marked by the liquidation of 16 banks and resulted in a decrease in the level of public confidence in the Indonesian banking system. Four state banks, namely Bank Bumi

Daya, Bank Dagang Negara, Bank Ekspor Impor Indonesia, and Bank Pembangunan Indonesia, were merged by Bank Mandiri, a state bank set up by the government for this purpose. Then eight private banks were merged as Bank Danamon. The 1998 monetary crisis gave birth to a new state institution called the Indonesian Bank Restructuring Agency (IBRA) which was formed by the government based on Presidential Decree Number 27 of 1998 and which was subsequently stipulated by Government Regulation Number 17 of 1999 concerning the National Bank Restructuring Agency as amended several times. Finally with Government Regulation Number 47 of 2001, as of January 27, 2004, it was declared to have ended its duties.

In the event of the 1998 monetary crisis, many legal experts urged the government to be declared a force majeure, so that debt settlement could be postponed because the situation was not the will of creditors or banks, but the result of the turbulence of the global economic crisis. Many debtors must be declared in a state of being unable to pay, some of them have even been declared bankrupt and imprisoned, and some have become fugitives. The question is whether such a situation is the will of the debtor. Of course, the answer is no. Then why does the debtor have to bear all the risks, and IBRA accommodates all the assets received by the original bank as the initial creditor as well as the assets of the bank itself which were liquidated? A professor of civil law at a legal scientific meeting, Prof. Dr.

Another recent event, which just happened from 2020 to 2022 when the whole world is experiencing economic turbulence again due to the Covid-19 pandemic. The economic turbulence shut down most businesses, except for the health, pharmaceutical, communications, and food sectors. On the other hand, almost all tourism, hotel, transportation, restaurant, and property services were destroyed. Many hotels in tourist areas are closed and sold because they are not receiving guests, employees have been laid off and some have even been laid off. Everyone understands each other, and agrees to deal with a pandemic, for example, houses of worship are closed and no one protests, shake hands and don't touch each other, always wear a mask and keep your distance. However, on the other hand, according to banking, debt is still debt, and credit is still credit, it's just that interest is relaxed for delays in payment, not written off, because after normal all debts are billed again.

In the author's opinion, if the government does not want to establish a pandemic as a force majeure event, then at least the postponement of interest payments and debt repayments will be a reason for the bank to carry out collateral execution or immediately report to the debtor to court to be declared bankrupt, and this situation, in the author's opinion, can be said to be rebus sic stantibus.

Several clauses can be agreed upon in drafting the contract if the parties use the rebus sic stantibus clause, including credit restructuring, free from Collectability Non-Performing Loans, postponement of interest, or interest recapitalization, namely interest can be used as interest-free principal debt, to avoid charging interest rates, management assistance from banks or independent parties to see other business opportunities within the framework of the mix product concept.

You can also include clauses on avoiding bankruptcy and delaying payments, which are forms of insolvency that can kill the debtor's business career. In this case, restructuring certainly avoids auction actions through court institutions or the Office of State Assets Services and Auctions.

With the rebus sic stantibus clause, the principle of legal certainty or *pacta sun servanda* becomes more flexible and opens up space for negotiation. The principle of *actio pauliana* as long as it is agreed upon by the parties can be developed. The agreed credit contract can be reformed or in the form of additions and changes and reviews as outlined in the renewal of the credit agreement or known as innovation.

The bank is expected to agree that the existing contract to carry out an evaluation, is not solely based on its principles or because it already has legal force.

Conclusion

The state of insolvency experienced by the debtor in a home ownership credit contract is not solely due to business bankruptcy or a change in the attitude of the debtor which was originally positive to negative, or also not due to force majeure, but it could be due to the circumstances and conditions faced by the debtor. By debtors and creditors is unexpected as happened in Indonesia in 1998 with the economic crisis as the impact of the deadly Asian economic crisis on almost all aspects

of the business. Likewise, due to the Covid-19 pandemic, this situation was not wanted by all parties, both debtors and creditors, so the parties were forced or deliberately terminated the contract. On the other hand, the parties differed between the favorable options, whether to choose default or force majeure according to their advantages. Such unexpected circumstances are not the will of both parties but are the effects of social, economic, and political events, as well as coercive circumstances which are not referred to as natural disasters, in this paper referred to as rebus sic stantibus.

To provide a balanced position and avoid legal actions that are detrimental to the parties, for example, the use of a bank's rights as a creditor can apply for bankruptcy against the debtor or the debtor also avoids making debt payments because there is a natural disaster or a state of compulsion, the formula rebus sic stantibus can be used to resolve legal disputes caused by unexpected circumstances that are completely unwanted by the parties.

The agreement is not only binding on the parties to what has been agreed upon, but also for certain reasons through the rebus sic stantibus clause can predict situations and conditions that flex *pacta sunt servanda* to submit a disclaimer against unexpected and unexpected events to prevent creditors from taking legal action, both the execution of collateral and the filing of a bankruptcy decision when the debtor does not carry out his promise under the agreement. With the rebus sic stantibus clause, unilateral actions to protect each other's interests can be prevented without compromising one of the parties so that contract law issues do not only talk about right and wrong or strong and weak.

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CLAIM FOR DAMAGES BY AGGRIEVED VICTIM PURCHASERS IN ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

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Abstract

The licensed housing developers in Peninsular Malaysia are governed by the Housing Development (Control and Licensing) Act 1966 (Act 118) and its regulations. The licensed housing developers are required to use the statutory contract of sale and purchase as prescribed in the Housing Development (Control and Licensing) Regulations 1989 *viz* in Schedules G, H, I, and J (the said agreements). The said agreements provide the duties, responsibilities and liabilities of the vendor developer and the purchasers. It also provides remedies to the contractual parties. According to some case law, the remedies for grievances of the parties are exhaustive in that the remedies are restricted to the ones that are spelt out in the said agreements. Thus, the aggrieved purchasers cannot claim other types of damages such as exemplary, punitive, aggravated and non-pecuniary damages for their inconveniences, troubles, anxiety, mental pressure, distress, humiliation, personal, family and employment problems that have led to their lives being chaotic and miserable and that have been detrimental to their personal, professional, family (including divorce and its consequences) and societal health and overall happiness due to the losses caused by the default of the vendor developer. Nonetheless, there are case law that held otherwise, in that the aggrieved purchasers can invoke general and wider damages affordable by the contractual principles (such as rescission) and equity other than what are provided in the said agreements. This paper highlights and discusses the divergent principles of law decided by case law in Malaysia

concerning the damages and remedies for the aggrieved purchasers in abandoned housing projects. The methodology used in this paper is a pure legal research methodology. This paper finds that the aggrieved victim purchasers are entitled to certain legal and equitable remedies in respect of damages in abandoned housing projects. It follows that the curative rights and interests of the aggrieved victim purchasers are, to a certain extent, arguably, protected, and secured. The end part of this paper will be the conclusion and recommendations of the author in the face of the issues highlighted.

Keywords: Housing sale and purchase; statutory housing contracts; Peninsular Malaysia; purchasers' grievances; legal and equitable damages and remedies

Introduction

It is trite law that the application of the statutory standard formatted sale and purchase agreements (Schedules G, H, I, and J (hereinafter referred to as 'the said agreements')) as provided in the Housing Development (Control and Licensing) Regulations 1989 ('Regulations 1989') is mandatory for all house purchases in Peninsular Malaysia pursuant to regulations 11(1) and 11(1A) of Regulations 1989. This position is cemented in several case law for example *Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd* [1985] 2 MLJ 291 (Supreme Court at Kuala Lumpur), *S.E.A. Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 (Federal Court at Kuala Lumpur), *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In Liquidation) v. Bank Bumiputra (M) Bhd. & Ors* [1997] 2 MLJ 805 (Supreme Court at Kuala Lumpur), and *MK Retnam Holdings Sdn. Bhd. v. Bhagat Singh* [1985] 2 MLJ 212 (Supreme Court at Kuala Lumpur).

Parliament enacted the Housing Developers (Control and Licensing) Act 1966 (Act 118) ('Act 118') to protect the rights of the purchasers. In addition, the aims of Act 118, as enshrined in the preamble and the long title of Act 118, reads as follows: "An Act to provide for the control and licensing of the business of housing development in Peninsular Malaysia, the protection of the interest of purchasers and for matters connected therewith".

Research Methodology

The research methodology used in this research paper is legal research methodology. Legal research aims to explain, find, and analyse the law and the event related to law. The legal research process includes gathering laws, analysing the law, analysing and interpreting certain events, phenomenon issues, ambiguities, and legal weaknesses, identifying the relevant laws to settle and solve the issues, and disseminating the legal findings to others for information advice and judgment. The primary sources are the statutory provisions and case law relating to housing development, i.e., the Housing Development (Control and Licensing) Act 1966 (Act 118) and its regulations. While the case law are the courts' judgments of legal cases reported in the Malayan Law Journal (MLJ), Current Law Journal (CLJ), and All Malaysia Reports (AMR). These cases are available from internet subscription. The purpose of these sources is to provide the relevant laws regarding LAD, the conditions and requirements for this law, the limitation and the courts' decisions and analyses on LAD and its issues. The secondary sources include legal literature, legal article journals and other non-legal materials. In analysing these sources, the author uses textual legal analysis of the primary and secondary legal and non-legal sources (Iedunote, 2021).

The legal research methodology that is carried out is purely doctrinal legal research in that the author will find relevant laws relating to the issues of LAD involving abandoned housing projects. The legal research is simply focusing on finding and analysing relevant primary sources and secondary sources that relate to the LAD and abandoned housing projects. The purposes of this investigation are to identify the law, issues, and analyse the issues and find the best legal answers to the issues (Sharma, 2021).

Discussion

Purchasers in the housing development projects are entitled to claim damages, compensation, or refund from the defaulting vendors on the latter's breaches or failure to carry out some terms and conditions prescribed in the said agreements. For instance, in respect of the breaches and defaults of the vendors to:

1) register Memorandum of Transfer in favour of the purchaser if the purchaser having paid all the required payment pursuant to the Third Schedule. Otherwise, the defaulting vendor must refund all payments made to the purchaser. This is spelt out in clause 4(6) of Schedule G, clause 5(6) of Schedule H, clause 5(6) of Schedule I, and 5(6) of Schedule J;
2) provide the promised building and housing materials and that the workmanship must be in accordance with the description of the said agreements for otherwise, the purchasers are entitled to a corresponding reduction in the purchase price or damages. This is pursuant to clause 13 of Schedule G, clause 12(2) of Schedule H, clause 13 of Schedule I, and clause 12(3) of Schedule J;
3) deliver vacant possession of the housing units to purchasers within 2 years or 3 years as the case made by, if not, the purchasers are entitled to liquidated damages of 10% per annum (LAD) of the purchase price from the expiry date of the delivery of vacant possession until the date the purchasers take vacant possession of the said units. This is spelt out in clause 22(2) of Schedule G, clause 25(2) of Schedule H, clause 22(2) of Schedule I, and clause 25(2) of Schedule J;
4) duly construct the said housing units. If the building works are defective not in accordance with the terms and conditions in the said agreements and the law, for instance, the requirements under the Street, Drainage and Building Act 1974 and Uniform Building By-Law 1984, that these are discovered during the defect liability period, the purchasers are entitled to claim damages and/or entitled to a right to request the vendor to repair the defective works. This right is stated in clause 25 of Schedule G, clause 29 of Schedule H, clause 25 of Schedule I, and clause 29 of Schedule J.

Issues

There are 2 issues pertaining to the aggrieved victim purchasers claiming damages in abandoned housing projects:

1) Can the aggrieved victim purchasers claim other damages apart from what has been prescribed under the said agreements? These damages may include exemplary, punitive, aggravated,

and non-pecuniary/pecuniary damages for their (purchasers) inconveniences, troubles, anxiety, mental pressure, distress, personal, and employment problems that have led to their lives being chaotic and miserable, and that have been detrimental to their health and overall happiness.

2) Can the purchasers claim LAD from the defaulting abandoned housing developers for not completing the construction of the housing units on time and claim to offset the balance purchase price?

Issue 1: Can the aggrieved purchasers claim other damages apart from what has been prescribed under the said agreements? These damages may include exemplary, punitive, aggravated, and non-pecuniary/pecuniary damages for their (purchasers) inconveniences, troubles, anxiety, mental pressure, distress, personal and employment problems, that have led to their lives being chaotic and miserable, and that have been detrimental to their health and overall happiness.

In respect of the rights of the purchasers to claim other relief than the relief provided by the said agreements, in *Limmewah Development Sdn. Bhd v. Dr Jasbir Singh s/o Harbhajan Singh* [1993] 1 AMR 29; [1993] MLJU 296 (High Court of Malaya at Muar) and *S.E.A Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 (Federal Court at Kuala Lumpur), the High Court and the Federal Court held that, in the event of late delivery of vacant possession, the aggrieved purchaser could only be entitled to the compensation and damages as stipulated by the said agreements as the statutory contracts. He is not entitled to damages for pain, anxiety, distress, and humiliation. This is because the statutory provisions are intended to be comprehensive and preclude the aggrieved purchaser from recovering under any other head of damages in the event of delay in delivery of the vacant possession.

In *Limmewah Development Sdn. Bhd*, the respondent, who was a government servant, bought a bungalow (the said property) from the appellant housing developer pursuant to a contract (the said contract) governed by the Housing Developers (Control and Licensing) Act 1966 (Act 118). The appellant knew that the respondent had applied to the government for a housing loan. The respondent claimed liquidated

damages due to the appellant's failure or refusal to deliver vacant possession of the bungalow within the contracted time and damages for pain, anxiety, distress, and humiliation. Although the date for completion and delivery of vacant possession under the contract was August 25, 1991, vacant possession was only given to the appellant on January 16, 1985. The appellant argued that the respondent had delayed the scheduled instalment payment and counterclaimed interest for late payment. Furthermore, it was contended that the appellant was estopped from relying on the schedule of payments and terms governing payment of interest provided in the contract as the appellant had accepted the government's schedule of payments. Judgment for liquidated damages only for late delivery of vacant possession was given to the respondent. Both parties appealed.

One of the issues raised in the court is whether the respondent was entitled to liquidated/non-liquidated, pecuniary, and non-pecuniary damages for late delivery and damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family and other problems?

The court held that the provision in the contract of sale and purchase for late delivery of vacant possession is comprehensive and precludes a purchaser from recovering damages under any other head.

Notwithstanding the above, there is an opposite judicial policy to the above principle. The high court has decided this in *Charanjit Singh a/l Ver Singh @ Veer Singh & Anor v. Mah Seow Haung* [1995] 1 AMR 204 (High Court of Malaya at Johor Bahru). In this case, the court decided that 'the court of equity will grant relief notwithstanding certain terms to the contrary have been stipulated, if such relief can do justice between the parties'. In this case, the defendant entered into an agreement to sell his property to the plaintiffs for the sum of RM 97,000/-. PW2 was appointed as common solicitor for both parties. Although the 10% deposit was paid, the transaction was not completed by the completion date of December 10, 1979. The plaintiffs entered into possession with the defendant's consent. On December 31, 1979, the defendant advised the plaintiff that as the plaintiffs had failed to complete the agreement, he had a right to forfeit the said deposit and treat the agreement as null and void. This is the plaintiffs' action for specific performance alleging that the defendant has refused to complete the sale and

purchase agreement. The defendant counterclaimed for possession and contended that they are willing to complete the agreement. Clause 4 of the agreement states that the transfer was to be executed by the defendant upon payment of the balance of the purchase price. The court allowed the plaintiff's claim.

The above principle is further cemented in *Thomas a/l Iruthayam & Anor v. LSSC Development Sdn Bhd* [2005] 4 MLJ 262 (High Court of Malaya at Shah Alam). In this case, the High Court had granted the plaintiff purchasers the right to rescind the contract of sale and recover the money paid to the defendant developer on the defendant developer's default to deliver vacant possession, failure to connect the water and the electricity and to deliver CF to the plaintiff purchasers. The right of the plaintiff purchasers is not only restricted to the provisions as provided in the said agreement but also to the general and wider rights affordable by the contractual principles (such as rescission) and equity. In this case, the plaintiffs were purchasers of a house from the defendant, who were the developers of a housing project. A sale and purchase agreement was executed between them. It was one of the sale and purchase agreement conditions that the handing over of the house was to occur within 24 months from the date of the agreement. Subsequently, the plaintiff sent a letter of rescission of the sale and purchase agreement to the defendant. The plaintiffs had stated that the defendant had failed to deliver vacant possession of the property due to its failure to connect the water and the electricity and deliver the certificate of fitness for occupation. The plaintiffs had filed an originating summons, praying amongst others, a declaration that the defendant had breached the impugned sale and purchase agreement and that the plaintiffs had rightfully rescinded that agreement, or in the alternative a declaration that the said agreement was rescinded by reason of breach of the contract by the defendant. **Further, the plaintiffs had sought liquidated damages, a refund of the consideration sum, incidental charges and other damages. The Court allowed the plaintiff's application** and held *inter alia* when the plaintiffs executed the sale and purchase agreement and the defendant, time was intended to be of the essence of the agreement. The defendant had failed to deliver vacant possession as the water and electricity mains had yet to be connected, and the certificate of fitness was never handed over to the plaintiffs.

Secondly, the court held that the plaintiffs had the additional right to resort to **any law or right in equity, though outside the provisions of the sale and purchase agreement**, for remedies. Clause 12 (b) of the sale and purchase agreement allowed the plaintiffs the right of rescission in the event of any failure by the defendant to deliver vacant possession.

Thus, it appears that in a case, pursuant to the above High Court's *Charanjit Singh a/l Ver Singh* and High Court's *LSSC Development Sdn Bhd* where the housing project is abandoned, the purchasers may also invoke other legal and equitable principles apart from the provisions provided in Act 118 to claim compensation such as exemplary, punitive and aggravated damages for the pecuniary and non-pecuniary troubles leading to their chaotic and miserable lives, which has been detrimental to their health and overall happiness, consequent to the abandonment of the project and persistent defaults of the developer.

This principle was also adopted by the High Court in *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308 (High Court of Malaya at Ipoh), the Court of Appeal in *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor* [2007] 4 MLJ 1; [2007] 2 AMR 438; [2007] 2 CLJ 434 (Court of Appeal at Putrajaya) and *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554 (High Court of Malaya at Kuala Lumpur).

In *Chye Fook*, the High Court was of the view that the aggrieved purchaser might apply the provisions in the Contracts Act 1950, *viz* sections 56 and 76, to rescind the sale and purchase agreement and to claim compensation for any damage and losses which he sustained through the non-fulfilment of the agreement, apart from the provisions in the agreement and Act 118. In this case, by a consent order following a summons for directions, the plaintiffs and the defendant asked for the preliminary issue of 'whether the plaintiffs can sue for rescission on the agreement of 8 August 1984 as the house is not completed by 7 August 1986 which is the completion date' be first determined by arguments in open court. The agreement was signed on 8 August 1984, and the completion date was on 7 August 1986, which was 24 months after. The building was not completed on the completion date, and the plaintiffs sent a notice to the defendants on 19 January 1987 to rescind the agreement in view of the non-compliance with the 24-month period.

The building was finally completed in May 1987, and the certificate of fitness was issued on 9 December, 1987. Clause 7 of the agreement provides, inter alia, that "time shall be the essence of the contract in relation to all the provisions of this agreement". Clause 18(2) of the agreement stipulates that "if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price". The court inter alia held that as provided by Section 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. The plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

The remedies granted to the aggrieved parties in these cases were the right to rescission and the right to claim compensation due to the rescission of the contract of sale pursuant to the provisions in the Contracts Act 1950 (*LSSC Development* (in the high court and in the Court of Appeal), *Chye Fook* and *Gan Hwa Kian*), and the right of the aggrieved purchaser to initiate a civil claim under the common law for the breach of contract against the developer being a remedy outside the purview of the statutory standard sale and purchase agreement and Act 118. Nevertheless, these remedies **are not** tortious remedies, i.e. in respect of damages for inconveniences, pain, anxiety, distress, and humiliation. Thus, it can be said that until now, the courts in Malaysia (*Chye Fook* (high court), *LSSC Development* (high court and court of appeal), and *Gan Hwa Kian* (high court)) are only ready to apply certain contractual remedies (rescission and damages under the Contracts Act 1950) being 'outside remedies' other than what are afforded by Act 118 and the standard statutory sale and purchase agreement. However, even though certain case law are of the view that these 'outside remedies' may include other equitable remedies (for example, *Charanjit Singh a/l Ver Singh* and High Court's *LSSC Development)*, which may also include, it is opined, the right to claim tortious damages and remedies, for example, damages and remedies for inconveniences, pain, anxiety, distress, and humiliation, based on case law, these damages and remedies would not be granted by the courts (*Limmewah Development* and *S.E.A Housing*

Corporation). Thus, based on the above case law, aggrieved purchasers in housing projects, particularly in abandoned housing projects, would not likely get these types of damages and remedies (tortious) from the courts.

As the decision in *LSSC Development* was made by the court of appeal and the other remaining cases were decided by the high court, it is opined the decisions of the court of appeal are binding on the lower courts, including the high courts' in the future and should be given more weight. Nonetheless, the court of appeal is divided on whether to treat the delay in delivering vacant possession as entitling the aggrieved purchaser to damages or to a recession of the contract of sale and claim the refund of all monies paid and costs. However, it is in the opinion of the author that when a housing project is abandoned and there is no delivery of vacant possession, and the rehabilitation is too difficult or might be impossible, added to other difficulties faced by purchasers, there is a fundamental breach of the contract of sale which entitles the aggrieved purchasers to a rescission of the contract of sale and claim to all the monies paid to the developer including the return of all monies paid by the financiers and other incidental costs and damages. These rights are evident in *Diong Tieow Hong & Anor v. Amalan Tepat Sdn. Bhd.* [2008] 3 MLJ 411 (High Court at Kuala Lumpur) and law cases below.

So far, no case law in Malaysia involve purchasers' application for damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family, and other problems resulting from defaults and breaches of the defaulting vendor developers in abandoned housing projects.

The author hopes that in the near future, aggrieved purchasers in abandoned housing projects should claim damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family, and other problems resulting from defaults and breaches of the defaulting vendor developers as well, apart from the damages that are prescribed under the said agreements.

In the author's view, the aggrieved purchasers in abandoned housing projects are entitled not only to the damages as spelt out in the said agreements but also to all other damages that are not provided under the said agreements. These damages include general damages, non-pecuniary damages, punitive/exemplary damages and damages for

inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family, and other problems as consequences of abandonment of their housing projects by the defaulting vendor developers.

This view is grounded on the court must do justice and equity as enshrined under Order 92 Rule 4 of the Rules of High Court 1980 and Rules of Court 2012 (inherent power of the court) and Section 23(1) of the Courts of Judicature Act 1964. Secondly, it is submitted, the purpose of judicial proceedings is to achieve justice and comply with the maxim that when the law against equity, equity prevails.

It is submitted these types of losses can be pleaded under 'exemplary damages' or 'punitive damages' or 'aggravated damages'.

Many cases allowed the aggrieved parties to claim for damages due to inconvenience, distress and anxiety resulting from defaults and breaches of the defaulting parties. Below are examples of the cases:

1) *Hong Leong Co Ltd v Pearlson Enterprises (No. 2)* [1968[1 MLJ 62 (HC Singapore).
2) *Jarvis v Swan Tours Ltd* [1973] 1 QB 233.
3) *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.
4) *Heywood v Wellers* [1976] QB 446.

In Hong Leong the Court, in dealing with the counterclaim of the defendant, took into consideration the inconvenience caused to the defendant by the breach committed by the plaintiff and ordered that the plaintiff pay the defendant the cost of retrial and the original trial of the counterclaim to be taxed on the lower scale.

In Jarvis and Jackson cases, damages may be granted for emotional distress and upsets caused by a breach of contract. In contracts to provide a holiday, it is clear that the plaintiff intends to have some peace of mind, and thus any 'damage' caused to him by a breach of the contract by the defendant should be compensated for.

In Heywood, the plaintiff brought an action against her solicitors for breach of contract in negligently failing to obtain an injunction to restrain her former boyfriend from molesting her. The court allowed the recovery of damages for the emotional distress the plaintiff had suffered due to the breach. Lord Denning said that the damage which

the plaintiff suffered 'was within their (defendant) contemplation' within the rule in *Hadley v Baxendale*.

Similarly, in *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1995] 4 All ER 745; [1996] 1 WLR 38 (Privy Council) on appeal from Hong Kong, another case dealing with breach of contract for a package tour. In this case, it was held that the tour operators were liable for damages for breach of an implied term to use reasonable skill in rendering services relating to the package tour. It was held that the tour operators were liable for their failure in providing the requisite skill and care when crossing a lake in China when the plaintiff's daughter drowned.

In short, the law relating to the recovery of damages for inconveniences, distress, and anxiety has been restated in a number of cases. These cases include *Watts v Marrow* [1991] 4 All ER 937, *Farley v Skinner* [2001] 4 All ER 802 (House of Lords), and *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd* [1995] 3 All ER 268 (House Lords).

The author's opinion is that the aggrieved purchasers in abandoned housing projects are entitled to wider and equitable damages for all the inconveniences, anxiety, and distress caused due to the default of the vendor developers to have abandoned the projects, apart from the damages as prescribed under the said agreements.

Alternatively, the terms and conditions of the said agreement should be amended to include non-pecuniary damages and un-liquidated damages as well as to give better protection to purchasers in the event of default by the vendor developers, particularly when the latter abandoned the projects. The purpose of these suggestions has two folds. *Firstly,* to give better protection to purchasers and provide greater confidence to purchasers in the Malaysian rule of law and legal system and the Malaysian housing industry. *Secondly,* to serve as a warning to discourage the vendor developer from abandoning their housing projects and comply fully with the terms and conditions of the said agreements.

Issue 2: Can the purchasers claim LAD from the defaulting abandoned housing developers for not completing the construction of the housing units on time and claim to offset the balance purchase price?

It is submitted if rehabilitation seems impossible and difficult to proceed, it is proposed that the aggrieved purchasers apply to the court for recession of the sale and purchase agreements entered into with the abandoned vendor developers and claim all monies paid and costs as well as the LAD calculated from the date of the promised delivery of the vacant possession of the purported units purchased until the date of the recession of the sale and purchase agreement. This is pursuant to the decision of *Diong Tieow Hong & Anor v. Amalan Tepat Sdn. Bhd.* [2008] 3 MLJ 411 (High Court of Malaya at Kuala Lumpur). In this case, the plaintiffs entered into a sale and purchase agreement (S&P) with the defendant (developer) to purchase a condominium at the price of RM 287,900.00. The S&P was as per the prescribed Schedule H of the Housing Developers' (Control and Licensing) Regulations 1989 (Schedule H). Pursuant to clauses 22 and 24 of the S&P, the defendant should deliver vacant possession of the property, complete with common facilities, on or before 14 October 1998. Unfortunately, the defendant failed to do so, and the project was abandoned. The plaintiffs had paid a total sum of RM 57,000.00 towards the purchase price. The plaintiffs, vide letter dated 8 March 2004, demanded the construction of the property be completed, and that vacant possession be handed over on or before 8 May 2004, failing which the S&P shall be deemed terminated. Again, the defendant failed to do so. The plaintiffs then initiated a claim against the defendant for, *inter alia*, declarations to the effect that the defendant had breached the terms of the S&P and that the plaintiffs had duly terminated the same, the refund of RM 57,900.00 and liquidated ascertained damages (LAD). This project was an abandoned housing project which fell under the jurisdiction and power of the Ministry of Housing and Local Government (MHLG) and was subject to the provisions of Act 118. The court decided that in abandoned housing projects, the aggrieved purchasers need not wait until the delivery of vacant possession of the units they purchased for them to claim damages, as this is impossible for them to obtain. Instead, the aggrieved purchasers can rescind the sale and purchase agreement, claim for the return of all the payment they made to the defaulting abandoned housing developers and **obtain damages for the late delivery of vacant possession**, calculated from the date of the specified date for the delivery of vacant possession until the date of

the recession of the sale and purchase agreement. The plaintiffs were entitled to claim for LAD immediately after the expiry of the contractual deadline for the defendant to hand over the vacant possession. The plaintiffs do not require actual vacant possession of the housing units by the developer for them to claim LAD.

The liability of the defaulting abandoned housing developer to pay LAD to aggrieved victim purchasers despite there is no vacant possession is cemented in the case of *Ganda Selat Sdn Bhd v. Mohammad bin MT Abu @ Ramli* [2019] 1 LNS 1997 (High Court of Malaya at Kuala Lumpur) and *Tan Sri G. Darshan Singh v Loke Kee Development Sdn Bhd & Anor* [2009] 7 CLJ 670 (High Court of Malaya at Kuala Lumpur).

It is noteworthy that if the actual completion and the delivery of VP took a very long time to materialise, this will mean the liquidated damages may outweigh the balance purchase price still unpaid. Can purchasers use this exorbitant LAD to offset the actual purchase price payment and claim the balance of damages in such a situation? In theory, yes, the purchasers can do so, following the principle in *Keng Soon Finance Berhad v MK Retnam Holdings Sdn. Bhd (Bhagat Singh s/o Surian Singh & Ors, Intervers* [1996] 2 MLJ 431; [1996] 3 AMR 3021 (High Court of Malaya at Kuala Lumpur), *Neoh Khoon Lye v. Trans-Intan Sdn. Bhd* [2002] 6 MLJ 8; [2002] 3 AMR 2655; [2002] 7 CLJ 420 (High Court of Malaya at Penang), *S.E.A. Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 (Federal Court at Kuala Lumpur) and *Lee Poh Choo v S.E.A Housing Corporation Sdn Bhd* [1982] 1 MLJ 324 (High Court of Malaya at Kuala Lumpur).

In *Keng Soon Finance Berhad v MK Retnam Holdings Sdn. Bhd (Bhagat Singh s/o Surian Singh & Ors, Intervers* [1996] 2 MLJ 431; [1996] 3 AMR 3021 (High Court of Malaya at Kuala Lumpur) which also involved an abandoned housing project, the high court held that the purchaser did not have to pay the balance of the purchase price as the damages for late delivery of his unit had been far greater than the balance purchase price payable, but not due under the sale and purchase agreement, as the purported purchased unit had been left abandoned indefinitely by the developer. This was because the purchaser was entitled to claim LAD right when the developer failed to deliver the vacant possession of the unit on time. The purchaser need not wait until the actual delivery of the vacant possession to claim the damages. This was because pursuant

to the previously repealed rule 12(1)(r) of the Housing Developers (Control and Licensing) Rules 1970, the developer was obliged to pay LAD immediately after the date of delivery of vacant possession as specified in the contract of sale if the developer failed to deliver the vacant possession on time as promised.

The courts' decisions in *Diong Tieow Hong, Ganda Selat Sdn Bhd,* and *Tan Sri G. Darshan Singh* are commendable as the decisions guarantee the rights of the aggrieved victim purchasers in these cases to claim LAD despite the failure of the defaulting abandoned housing developers to deliver vacant possession. In addition, according to *Keng Soon Finance Berhad, Neoh Khoon Lye, Sea Housing Corporation Sdn Bhd,* and *Lee Poh Choo,* the aggrieved victim purchases can offset the balance purchase price with the unpaid LAD of the defaulting developers.

Closing

The said agreements are statutory that must be used in all housing transactions falling under the meaning of Act 118. The objective of the said agreements is to provide standardised, systematic, and streamlined terms and conditions protective to the rights and interests of the vendor developers and the purchasers. Nonetheless, the objective has been marred by the occurrences of abandoned housing projects. To date, no decisive and comprehensive approach can settle once and for all the problems of abandoned housing projects, including the terms and conditions in the said agreements. This includes the lack of clear terms and conditions in the said agreements that can provide comprehensive relief and remedies to purchasers, for instance, non-pecuniary damages for inconveniences, distress, and anxiety. Thus, it is timely for the court and the Malaysian Government to recognise this type of damages for the better protection of the general purchasers by recognising it in the judgment and incorporating it in the said agreements. This right has also been recognised in other common law jurisdictions, as illustrated in the above case law. In addition, aggrieved victim purchasers should understand and be aware that *Diong Tieow Hong, Ganda Selat Sdn Bhd,* and *Tan Sri G. Darshan Singh* are commendable as the decisions in these cases guarantee the rights of the aggrieved victim purchasers in claiming LAD despite the failure of the defaulting abandoned housing developers to

deliver vacant possession on time. *Keng Soon Finance Berhad*, *Neoh Khoon Lye*, *Sea Housing Corporation Sdn Bhd,* and *Lee Poh Choo* reinforce the right of aggrieved victim purchases to offset the balance purchase price with the unpaid LAD of the defaulting developers.

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LEGAL ADMINISTRATIVE HINDRANCES FOR THE DEVELOPMENT PLANNING OF MALAY RESERVE LAND

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Abstract

Malay Reservation Enactment 1933 (FMS Cap 142) was the first law devised to regulate Malay Reserve Land. This law was applicable to the Federated Malay States of Perak, Selangor, Negeri Sembilan, and Pahang, while the Unfederated Malay States of Kelantan, Kedah, Perlis, Johor, and Terengganu started to legislate their own law. However, due to the inconsistencies in the laws of the various states, the development of Malay Reserve Land was slow. This study aims to examine the existing Malaysian laws regarding Malay Reserve Land in order to identify the challenges that hinder its development. This chapter discusses the laws relating to Malay Reserve Land in Malaysia. It presents a pure legal research or doctrinal research, where references to primary sources such as relevant legislations and court cases are used to identify legal principles and doctrines. The authors found that provisions of law are the main factor that hinders the development of Malay Reserve Land. In addition, other non-legal factors are related to the burden of debt carried by Malay Reserve Landowners, the voluntary release of Malay Reserve Land, and the lack of cooperation between co-owners. The chapter suggests amending the current legal provisions and proposes that the important stakeholders in Malay Reserve Land conservation at the federal and state level support the planning development in consolidating the legal basis through harmonising the existent definitions of 'Malay' in Enactment of Malay Reservation (FMS Cap

142). This study will provide new insights into the laws relating to Malay Reserve Land and the proposed amendments that will benefit the Malay Reserve Landowners.

Keywords: Land Administration, Policy, Malay Reserve Land, Enactment, Planning Challenges, Development

Preliminary

The ownership of Malay Reserve Land is counted among the privileges of the Malay population in Malaysia and a guarantor of their national supremacy (Ali, 2007). Thus, it would be inadvisable to fail to take any proactive efforts to develop these lands. In addition, existing laws governing Malay Reserve Land such as the Malay Reservation Enactment 1933 (FMS Cap 142) and various state enactments need to be strengthened to resolve issues such as legal inconsistencies and administrative policies that result in the loss of their land status as Malay Reserve for the Malays.

In addition, Buang (2019) proposed a new uniform law on Malay Reserve Land to deal with the current and pressing issues such as 'the land swap'. According to Buang, the state government can always take the lead to reform or modernize the law but for many, the federal government should take the initiative to draft the Malay Reservation Act (MRA) under Article 76(4) of the Federal Constitution. This provision significantly allows parliament to make laws on land matters to ensure "uniformity of law and policy". In this regard, if the MRA is enacted, it will apply in the federal territories, and each state authority can later decide when the new MRA should be enforced in each state. This can be seen from the enactment of and preamble to the National Land Code 1965, the Strata Titles Act 1985, and the Padi Cultivators (Control of Rent and Security of Tenure) Act 1967.

Historically, the first law enacted to regulate Malay Reserve Land was the Malay Reservation Enactment 1913 and subsequently amended in 1933. This law became incorporated into the laws governing the Federated Malay States of Perak, Selangor, Negeri Sembilan, and Pahang. This enactment was revised in 1935 and republished as the Malay Reservation Enactment (FMS Cap 142) and applies to this day. The other Unfederated Malay States of Kelantan, Kedah, Perlis, Johor, and

Terengganu soon drafted their own enactments (Wong, 1975). Article 89 (6) of the Federal Constitution defines Malay Reserve Land as land reserved for title to Malays or to natives of the state in which the land is located (Ariffin, 2013).

The main problem for Malay Reserve Land is the lack of a uniform law (Mubarak, 2007). Provision of the Federal Constitution through Article 89 (1) empowers the state government to change the status of Malay Reserve Land to freehold land. Meanwhile, the state government through Article 89 (3) is also permitted to convert land with less commercial value to Malay Reserve Land. However, three conditions must be complied with by the state government, namely the land taken needs to be replaced with similar land (in character), the area does not exceed the area of that taken land, and the replacement should be done immediately. However, on 1 January 1995, the Kedah State Government cancelled the status of some of its Malay Reserve Land measuring 964 hectares (Hussin, et.al., 2014), leaving only 692.77 hectares. It follows that 80% of the available land was Malay Reserve Land, and thus reappropriated for land development (Razak, 2002). However, since the appropriated area of land has subsequently declined, the question arises whether changing the status of the land was made in accordance with the provisions of the law (Sulong, 2016). Thus, although the law allows revocation of Malay Reserve Land or 'the land swap', in reality, the replacement has not been done 'immediately' as prescribed under the provision (Buang, 2019).

Furthermore, the power of declaration to create a Malay Reserve Land area, cancels a Malay Reserve Land area, or amends the limits or boundaries of any Malay Reserve is in the hands of a specific body (Abdul Rashid and Yaakub, 2010). According to Abdul Kadir (1997), the power of declaration of those states which have adopted the Malay Reservation Enactment, such as Perak, Selangor, Negeri Sembilan, and Pahang lies with the First Minister (Menteri Besar) with the approval of the king, and only in Johor, it lies with the Department of Land and Mines with the approval of the king.

Land matters fall under the state government's jurisdiction as stipulated in the National Land Code. Based on Section 7 of the Malay Reservation Enactment 1913, Malay Reserve Land is prohibited from being transacted with non-Malays (Kadir, 1997). However, in 1962,

this provision was repealed by the Malaysian government to allow companies to deal with Malay Reserve Land (Gullich, 1992). In this regard, many companies which were not completely Malay have been declared as Malay to facilitate the development of Malay Reserve Land and to raise the economic status of the Malay owners (Mohamad and Ali, 2009). In addition, the definitions of 'Malay' as enshrined in the Malay Reservation Enactment and state enactments vary (Discard, 2019). Entities in the 'Malay policy' and 'non-Malay' categories are permitted to participate in the Malay Reservation Enactment in various capacities specified in its provisions. These differences, in turn, lead to confusion when determining the ownership and governance of Malay Reserve Land (Kadir, 1992).

Thus, restraints on dealings of the Malay Reserve Land may differ in each state in accordance with its own state enactments. Furthermore, the enforcement of the Malay Reservation Enactment and state enactments is lacking. Malay Consultative Council (MPM) has urged the state governments to establish a secretariat to monitor developments and transactions involving Malay Reserve Land and to properly investigate issues facing such land in which a clearer report may be produced for the purpose of finding solutions (Kamarudin and Bernama, 2018b).

Objectives

This study emphasizes the review and analysis of existing Malaysian laws related to Malay Reserve Land, in addition to the related administrative and planning challenges arising from their amendment. This is because the challenges and impact on society need to be duly considered in this process. Based on this study, the legislature will be able to assess the potential impact on society if the existing issues related to Malay Reserve are not resolved. This study also emphasizes the need for up-to-date legislation in line with current developments. Thus, this study aims to examine the existing Malaysian laws regarding Malay Reserve Land in order to identify the challenges that hinder its development.

Methodology

This study is qualitative in nature and adopts doctrinal legal research. According to the Australian Pearce Committee, doctrinal research refers to a "research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future developments" (Hutchinson and Duncan, 2012). One of the core features of doctrinal legal research is that arguments are derived from authoritative sources, namely existing legal rules, principles, precedents and scholarly works (Gestel dan Micklitz, 2011).

Hutchinson and Duncan (2012) state that the crux of the doctrinal method is locating and analysing the primary documents of the law. This is to establish the nature and parameters of the law. Hence, it requires a trained expert in legal doctrine to read and analyse the legislation and case law. Doctrinal research is also not merely about the locating of secondary information but includes the complicated step of 'reading, analysing and linking' the up-to-date information to the known set of laws. Additionally, the literature review is a step within the doctrinal method. It follows that doctrinal research is not just about a description of the law, but it strives to achieve more than that. As Posner (2007) remarks:

> *The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability … to organize dispersed, fragmentary, prolix, and rebarbative materials* (p. 437).

In order to achieve the validity and reliability of the research, this chapter discusses the relevant legislation applying to Malay Reserve Land in Malaysia. In the initial stage, the authors looked at the available legal provisions relating to Malay Reserve Land. Subsequently, the authors attempted to confirm whether existing weaknesses in the legislation hampered the efforts to develop its status by analysing and linking the relevant provisions to the new information relating to Malay Reserve Land. Further, the authors explored other issues that have contributed to the decline of Malay Reserve Land, along with possible legal solutions. Finally, suggestions and recommendations were formulated to improve the current Malay Reserve Land law.

The issue of Malay Reserve Land has been discussed extensively, from its administrative implementation to legal review (Abdul Manaf, et.al., 2015). The discussion evolves around the existing primary sources in the form of legislation and case law as well as books, published research articles, press reports and official government reports as secondary sources.

Once all the relevant literature was collected, the authors distributed the reference material among four categories. The first category focused on the analysis of the available primary sources such as the legal provisions in the Federal Constitution, the Malay Reservation Enactment (FMS Cap 142), state enactments, and the National Land Code Act. The legal provisions allowed the authors to make general observations related to Malay Reserve Land. The second category studied the jurisprudential and history of the establishment of the Malay Reserve institution as a whole, as reflected in the research discussing its historical aspects since the late 19th century in depth (Mobarak Ali, 2007; Abdullah, 2012). The third category focused on the development of Malay Reserve Land, in particular the factors opposing it (Siwar and Kasim, 1997; Abdul Manaf, et.al., 2015; Hussin, 2014), in addition to the aspect of joint land ownership (Sulong, 2016; Termizi and Ismail, 2018). The focus of the fourth category was directed toward potential improvements, as discussed by Rashid (1979) and Hanif, et.al. (2015).

Discussion

The Malay Reserve Land Enactment is a century-old policy introduced by the British authorities with the view to protect the rights of the native Malays. Since its official announcement in 1913 its implementation and effectiveness in managing the administration of Malay Reserve Land has received various criticisms from academics, Malay right activists, and the Malay public (Ariffin, 2013). At present, six states implement separate state enactments relating to Malay Reserve Land which each state has a different way of administering and managing it. Since these laws were introduced during the British era, it is obvious that they are no longer seen as relevant to the present day (Kamarudin and Bernama, 2018b). The issues surrounding the legislation have been discussed at length and in great detail. Therefore, it is timely to offer solutions. This

chapter suggests improvements to the legal provisions related to Malay Reserve Land issues by identifying the legal administrative hindrances, the related laws, and other factors affecting its development.

Legal Factors

The process of Malay Reserve Land ownership is looked into by examining legal provisions in the form of the Federal Constitution, the Malay Reservation Enactment (FMS Cap 142), and state enactments. It was found that the current legal provisions constitute the most important obstacle to the development of Malay Reserve Land. Among the legal administrative factors are as follows.

(a) Legal Planning Challenges

The first factor hindering the effective management and development of Malay Reserve Land is related to the Federal Constitution, the Malay Reservation Enactment, and the state enactments. The procedure for approving or revoking Malay Reserve Land depends on certain legal provisions. The federal government stipulates through the Federal Constitution that the affairs of the Malay Reserve Land will be managed by the state government. This means that only the state government has the power to declare or cancel Malay Reserve Land once certain conditions have been met, as stipulated in the Federal Constitution (Buang, 2007). However, problems arise when state governments fail to meet those conditions, for example, when the Malay Reserve Land is not replaced as soon as the revocation of status is made, which affects the size of the area in question. Furthermore, the possibility of abuse of power arises when the power to manage the affairs lies with certain bodies (Ali, 2007). In addition, research found that the current land use in Malay Reserve Land areas is not performed in line with the development planning policy apart from agriculture land as it is below the planning curve. The development policy generally does not pay particular attention to the development of Malay Reserve Land (Abdul Jamil, 2021). In this regard, Kuala Lumpur City Hall (DBKL) stated that it would concentrate on planning infrastructure development in Malay Reserve Land areas in order to ensure that those areas do not

lag behind in terms of development. This is because, unlike non-Malay Reserve Land, some owners choose not to engage in or develop the land (Bernama, 2021).

Planning obstacle consists of two variables, namely the land use zoning and the allowed density is low. In this regard, owners feel that the current land use zoning and low density make their land less attractive to potential buyers or developers (Yahya, Adnan, and Hanif, 2017). It follows that the primary cause of the Malay Reserve Land's slow development is the owners' unwillingness to view their property as a strategic economic asset (Chang, 2020). In addition, there is a lack of Malay Bumiputera developers to effectively involve and participate in the development of Malay Reserve Land (Kamarudin and Bernama, 2018a). According to Chang (2020), given the Malay Reserve Land's enormous potential, much more needs to be done to increase the attractiveness of the property development sector among the Malays. This can be seen after the land was turned into housing schemes as they may be used purely for the welfare of Malays and as dwellings for their families. At present, there are various housing developments on Malay Reserve Land. For instance, the million-ringgit residential properties in Sungai Ramal, Kajang and Kampung Padang Balang, Sentul as well as Hotel Tamu in Kampung Baru, and the Bangi Convention Centre (Bandar Baru Bangi) (Kamarudin and Bernama, 2018b). In Pahang, Malay Reserve Land is also developed through housing projects to further facilitate and increase home ownership among the Malay community (Bernama, 2022). Thus, it is imperative that the government looks into this matter as a part of its agenda to improve the economic status of the Malays (Kamarudin and Bernama, 2018a; Chang, 2020; Bernama, 2020).

Secondly, since the main qualification for land ownership is being 'Malay' (Mobarak Ali, 2007), the authors also needed to further examine the definitions as contained in the Federal Constitution, the Malay Reservation Enactment, and the state enactments. The analysis result indicated that the definitions vary across the legislation (Young, 2009). On the one hand, such definitions are necessary to prevent Malay Reserve Land from falling into the hands of non-Malays (Muhammad and Ali, 2009). On the other hand, the same condition of being recognized as 'Malay' as per definition may also limit the group of Malays allowed to own Malay Reserve Land (Kasim, 1993). For example,

if state X stipulates that only Malays of Arab descent can transact Malay Reserve Land, it automatically excludes Malays of non-Arab descent coming from other states to engage in land transactions. Interestingly, the terms 'Malay company' and 'Malay holding' are only defined in the Malay Reservation Enactment (FMS Cap 142) and Terengganu Malay Reservation Enactment 1941 which its legal implication may differ in other states.

Judicial decisions over the last five decades have significantly contributed further confusion and uncertainty in the law on this matter (Buang, 2021). For instance, not all Malay Reserve Lands particularly in the Federated Malay States can be considered Malay holdings. In Perak, the case of *Bebe Sakimah binti Mohd Asrof v Pendaftar Hakmilik Negeri Perak* [2021] 7 MLJ 701 has raised the issue of whether a non-Malay can be registered as the proprietor of Malay Reserve Land. In this case, the plaintiff, a non-Malay was the successful bidder for a piece of land at a court-ordered auction. However, her presentation to register the land under her name was rejected by the defendant, the Registrar of Land Titles of Perak on the ground that it was Malay Reserve Land which could only be transferred to a Malay. The critical issue raised in this case was whether the property although under Malay Reservation, was a Malay holding. Based on Section 6(i) and Section 2(a) of the Malay Reservation Enactment (FMS Cap 142), the Federal Court held that there was a three-step process for land declared under Malay Reservation post the commencement of the Enactment to be a Malay holding. These three steps are: (i) a publication is made in the gazette making notification of the alienated lands that are included in a Malay Reservation; (ii) the collector of the district in which such lands are situated shall then present to the proper registering authority a requisition in Form A in the First Schedule containing a list of all alienated lands included in and affected by such declaration to note in his register of titles the fact of the inclusion of such lands in such Malay Reservation; and (iii) the proper registering authority shall then make a memorial upon every register of document of title included in the lands declared as Malay Reservation.

Significantly, Section 2(a) of the Enactment provides that no such interest shall be deemed to be a Malay holding until it has been registered in the register document of title for such land a requisition

in prescribed Form A in the First Schedule. The defendant's omission in this case to produce evidence of Form A and its registration led to the court's conclusion that the first and second steps had not been carried out and ordered the defendant to register and issue a document of title in the plaintiff's name. Thus, from this case, it can be seen that mere endorsement of the words "Pengisytiharan Rezab Melayu" on an issue document of title does not conclusively prove that the three-step process has been carried out so as to confer the status of a Malay holding on a property. This seems to suggest that not all Malay Reserve Land in the Federated Malay States is necessarily a Malay holding until and unless the three step process prescribed under Section 6 and Section 2(a) of the Enactment has been fulfilled. Due to this court decision, the position of Malay holding may vary in other states and a non-Malay may not be registered as a proprietor since other states may regard all Malay Reserve Land as a Malay holding, a position that seems to be shared by all states before *Bebe Sakimah's* case occurred.

Another example is in Kedah where the issue raised by the case of *Ooi Poh Ean & Anor v Lembaga Pembangunan Langkawi* (2018) 7 CLJ 541 was whether Section 6 of Kedah Malay Reservation Enactment 1931 was applicable to the land in question as it was held by a non-Malay. In this case, the respondent, Lembaga Pembangunan Langkawi (LADA) entered a contract with a company, Pen Pen requiring the latter to buy two double-storey houses on LADA's behalf. Pen Pen bought house No. 72 and house No. 73 from a developer, Landrise Development Sdn Bhd. Although LADA had fully paid the purchase price for the two properties, they remained registered in Pen Pen's name who later unlawfully sold the two properties to the appellants. House No. 72 was successfully transferred while the transfer of house No. 73 was not. The trial court allowed LADA's claims that the two properties fell under Malay Reserve Land in which all the transfers were void and both properties should be transferred back to LADA. However, the Court of Appeal noted that Section 6 of the Enactment prohibits any dealing in Malay Reserve Land held by a Malay to vest in a non-Malay while the land in this case, had not been declared to be a Malay pursuant to Section 19 of the Enactment as they were registered under Pen Pen's name. Thus, LADA's reliance on Section 6 to invalidate the land transactions was misconceived. In addition, the registered title over house No. 72 become indefeasible as

the transfer of the title was protected by Section 340 of the National Land Code and could not be defeated under Section 340(2) of the Code since there was no claim of fraud, forgery or misrepresentation by LADA. Since house No. 72 was transferred to LADA pursuant to the trial court's order, the Court of Appeal ordered LADA to transfer the said property back to the appellant within one month of the date of the order. Concerning house No. 73, it was held that LADA was the beneficial owner of that property since LADA had paid the full purchase price and Pen Pen became the bare trustee of it for LADA's benefit. It follows that Pen Pen had no good title to sell and transfer the property to another appellant. Thus, the Court of Appeal held that the transfer of house No. 73 to LADA was correctly done and that its title had become indefeasible. This case seems to suggest that Malay Reserve Land could be held by a non-Malay provided that the land office does not dispute such transfer when it takes place.

Since the interpretation of the word 'Malay' varies in accordance with the Malay Reservation Enactment and state enactments, this may also affect the restraints on dealing of the Malay Reserve Land. For instance, Malay Reserve Land owned by a Malay is not allowed to be charged in favour of non-Malays and the exception to this is Kedah. In the case of *Affin Bank Bhd v Jamaludin bin Jaafar* (The Association of Banks in Malaysia & Anor, interveners) [2019] 5 MLJ 281, the Federal Court held that Section 6 of Kedah Malay Reservation Enactment 1931 expressly prohibits the sale by a chargee to a non-Malay, but it does not prohibit the creation of a charge over Malay Reserve Land in favour of non-Malays. The court mentioned that if the legislature had intended to prohibit the creation of such a charge, then it would have expressly provided so, for instance, as prescribed under Section 8 of the Malay Reservations Enactment (FMS Cap 142). The court further held that the creation of a charge does not involve the transfer of the ownership of the land to the chargee and the chargor remains the proprietor of the land. The court also stated that Schedule A of the Enactment allows all documents of title except Permits, Banchi Sewa, and Surat Akaun to be charged to a non-Malay without transferring the rights of the land. The reasoning of the Federal Court, in this case, is similar to the reasoning by Alauddin J in the High Court decision of *Sime Securities Sdn Bhd v Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 4 MLJ 585.

Being an apex court decision, this has reaffirmed that Section 6 of the Enactment does not prohibit the creation of charge over Malay reservation land owned by a Malay in favour of a non-Malay. Interestingly, the Federal Court added that even if the Second Schedule which purports to be a list of entities declared as "Malay" under the enactment does not exist since it had never been amended, the court's interpretation of Section 6 of the Enactment remains. This decision is significant in line with the Kedah state government's decision on January 12, 2017, pending the Federal Court's decision to declare all financial institutions established under Malaysian law as 'Malay', as provided under Section 19 of the Kedah Malay Reservation Enactment 1931 for the purpose of accepting or holding mortgage (Sue-Chern, 2017). Thus, it can be seen that the Kedah state government was committed to mending the situation following the Court of Appeal decision in *Affin Bank Bhd's* case in 2016 which would cause the majority of the Malays in the state to be unable to secure a loan for the purpose of financing as it was reported that over 75%–80% of the land in Kedah is Malay Reserve Land (Chia, n.d.). This solution also seems plausible in this modern era considering financial institutions can help with the dealings of Malay Reserve Land.

The legal position in Kedah regarding the creation of a charge by a Malay in favour of a non-Malay or financial institution seems to be followed in the Federated Malay States. The Shah Alam High Court, in the recent case of *Syed Shaharul bin Mohamed Nasir & Anor v Pentadbir Tanah Daerah Kelang & Anor* [2020] 9 MLJ 598 allowed a charge to be registered under the National Land Code over Malay holdings in favour of a licensed financial institution. In this case, the court held that the second applicant does not fall within the phrase 'no Malay holding shall be ... charged ... to any person not being a Malay' under Section 8(i) of the Malay Reservations Enactment (FMS Cap 142). The court was of the opinion that the provision could not have been intended by the lawmaker to apply to the second applicant who is licensed by the Minister of Finance under Section 10(4) of the Islamic Financial Services Act 2013 to carry on 'Islamic banking business'. This is because there was no Islamic bank capable of offering the Islamic financing facility to be secured by way of charges over Malay holdings when Section 8(i) of the Enactment was first introduced. The court also mentioned

that Section 8(i) of the Enactment should be construed in a purposive manner to enable the development of Malay Reserve Land for the benefit of the Malay owners in particular and the Malay community in general. In this case, the court also held that the word 'Malay' in Section 8(i) of the Enactment should have the meaning as defined in Section 2 of the Enactment. Section 2 has expressly stated that the definitions provided therein shall apply to all the provisions in Malay Reservation Enactment. The court did not apply the definition of Malay in Article 89(6) and Article 160(2) of the Federal Constitution in the construction of Section 8(i) of the Enactment.

Therefore, the different interpretations of the word 'Malay' in the Malay Reservation legislation and the latest judicial decisions may cause confusion, especially in a situation when a non-Malay can hold such land. Alternatively, owners of Malay Reserve Land should be allowed to create a charge over such land as security to any bank or financial institution. Buang (2016) pointed out that the old way to force banks or financial institutions to apply to state authorities, for instance, to be listed in the Second Schedule of the Malay Reservation Enactment (FMS Cap 142) in order to be qualified as 'Malay' needs to be abolished. He stated that access to credit can be widened if owners of Malay Reserve Land are allowed to freely charge or create a lien over their land as security to any bank or financial institution like in Kedah. If the owner later fails to pay the loan and the bank decides to foreclose then only Malays are allowed to bid on the auctioned land. This is to ensure that the property remains in the hands of the Malays even if there is a foreclosure action by any bank or financial institution.

(b) Malay Policy on Land Administration and Land Use

To support the development of Malay Reserve Land the term 'Malay policy' was introduced to describe situations where entities or corporations gazetted in the Schedules of the Enactment are allowed to engage in land transactions (Aliasak, 2014). Once these entities were gazetted, they enjoyed the same rights as the Malays. It seems that this effort is a recommendable step to develop Malay Reserve Land and prevent it from falling into disuse (Kasim, 1993). However, the Malay Reserve Schedule includes companies that are not 100% Malay. The

main objective of establishing the Malay Reservation Enactment was to emphasize the importance of Malay Reserve Land to Malay interests. Thus, this measure needs to be updated to ensure that the reserved land can be properly developed and is not released to non-Malay entities (Young, 2009).

Significantly, restraint on dealings of Malay Reserve Land regarding charging as discussed before should be removed particularly when there are development projects involving Malay Reserve Land and its potential investors who are non-Malays. This is similarly applicable to leasing. As Buang (2016) stated that although the idea is difficult to accept, it is necessary to remove all restrictions concerning the leasing and charging of Malay Reserve Land to non-Malays in order to bring the Malay Reservation legislation into the 21st century. In the case of *Abdul Kadir bin Mahmud v Goay Weng Kim* [2003] 6 AMR 413, a tenancy of a Malay reserve land in Kedah to a non-Malay is allowed, but a lease of more than three years to a non-Malay is prohibited. It is proposed that leasing of Malay Reserve Land to non-Malays should be allowed to increase the land's marketability (Bernama, 2018). Besides, Buang (2016) suggested that Malay Reserve Landowners should be permitted to freely lease their land to anyone including a non-Malay, either a person or a foreign corporation. This is provided that the period does not exceed a certain number of years and after that, there can only be one further extension or renewal only. This period of lease is basically sufficient for the lessee to recover his investments and profit (ROI). It is vital that upon expiry of the lease, the land needs to be reverted to the owner. It follows that it is necessary to establish a monitoring body or agency to ensure the fairness of the leases' terms to both parties, the lessors and lessees.

However, the restrictions against alienation and transfer of Malay Reserve Lands as currently stipulated under the law should be maintained. If the Malay Reserve Landowners decide to develop their own lands without developing them under the lease arrangements with the help of others, then the state authorities should develop incentives to encourage them. This can be accomplished, among other things, by reducing premiums, enforcing lower expenses and fees, accelerating, and streamlining the process, providing better densities and plot ratios, and making accessible affordable development financing alternatives (Buang, 2016).

More often than not, Malay Reserve Land is seen from a narrow perspective purely because its dealings are restricted to the Malays (Kamarudin and Bernama, 2018b). According to Ho Chin Soon Research, several case studies of Malay Reserve Land such as Gombak, Semenyih and Puchong showed how the supposed Malay Reserve Land privilege is actually suppressing or restricting its own potential (Chai, 2021). Most Malay Reserve Land remained stagnant or underutilized compared to the rapid growth of the non-Malay Reserve Land located adjacent to it despite its potential to develop (Chai, 2021; Rosman, Nawawi and Majid, 2021). In addition, there are no offers to develop the land since the Malays have very little purchasing power. There are also claims that government-linked property developers and subsidiaries of government agencies are unwilling to take on the development of Malay Reserve Land. If this pattern persists, most Malay reserve land could possibly continue to be classified as "second-class" or "third-class" and remain underdeveloped (Kamarudin and Bernama, 2018b). Subsequently, to increase the land's market value and competitiveness, a number of Malay owners and interested parties voluntarily sought to have the status of their Malay Reserve Land revoked (Kamarudin and Bernama, 2018a).

According to the 2013 Auditor-General's Report, Malay Reserve Land accounted for only 12% as its status was revoked over the years for purposes of development and no replacement was made accordingly (2018a). This is also evident from the data collected by Aliasak (2014). From 1921 to 2009 it fell from 15.87% to 11.99%. Further, only 11.99% of the available land was Malay Reserve Land in 2014, while the status of 39% was changed and reappropriated by the government for development purposes. As of 2017, Peninsular Malaysia has a total land area of 12,910,138 hectares and out of this, 4,295.462 ha or 33.3% was considered Malay Reserve Land (Malaysiakini, 2018). It seems that the absence of data on the overall current size of the Malay Reserve Land areas does not allow proper analysis.

(c) Loopholes in the Legislation

Several weaknesses related to legal aspects that contribute to the decline of Malay Reserve Land in Malaysia were identified. This

especially pertains to the state government jurisdiction where taken land is not being replaced and ownership overlaps (Discard, 2019). The jurisdiction of the state government is, therefore, a loophole in the current legislation. For instance, there is no restriction for the sultan of the state or king *(Yang di-Pertuan Agong)* to transfer the title of Malay Reserve Land to individuals, corporations, or companies listed in the Third Schedule of the Malay Reservation Enactment (FMS Cap 142) (Gullick, 1992). The case of *Zainal Abidin bin Mohd Taib v Malaysia National Insurance* [1994] 3 CLJ 731 has also shown that once a decision has been made by the ruler-in-council, it cannot be questioned. In this case, a charge was created and registered on 6th September 1982 to a non-Malay company, the defendant. The defendant later on applied to the state authority to be included in the Second Schedule of the Malay Reservations Enactment (FMS Cap 142) as a recognised chargee in accordance with Section 17(2) of the Enactment. It was approved on 23rd October 1991 and the State Executive Council through its meeting on 17th June 1992, however, agreed that this effective date was to be backdated to 1st January 1982. Subsequently, a letter dated 21st July 1992 confirming the new effective date was issued to the defendant. On 11th January 1994, a State Government Gazette, Negeri Sembilan Volume 45 No. 21 dated 8 October 1992 (N.S.P.U. 15 dated 4 September 1992) (Appendix 30) was submitted stating in paragraph 3 that the effective date of Syarikat Malaysia National Insurance Sendirian Berhad was amended from "23 October 1991" to "1 January 1982". Faiza Thambi Chik J. held that the charge is valid and the decision of the ruler in council is conclusive.

Further, the issue of unreplaced Malay Reserve Land is closely related to its own implementation by the state government (Gordon, 1963) and urgently requires a solution. Since the provisions require the replacement to be of similar character, it will not be an easy task to do. It was suggested to use the open market value of the land as an alternative (Nik Yusof, 2017). The replacement land can be a non-Malay Reserve land of any category within the same state provided that its value is equal to the land to be degazetted (Asian Property Review, 2021).

Valuation of Malay Reserve Land is another loophole in the legislation that can hinder its development. Prior to an amendment under the Land Acquisition Act (Amendment) 1997 [Act A999], all

compulsorily acquired Malay Reserve Land would be appraised at the current market value as if the land had no restrictions in interest. After the amendment, all Malay Reserve Lands intended to be developed completely for the benefit of Malays will be evaluated as Malay Reserve Lands. The practice of the Department of Valuation and Property Services (JPPH), however, indicates that for all the acquisition of Malay Reserve Land cases throughout the country, valuations were made at current market value without restrictions. It follows that stringent application of the Act A999 can be damaging to Malay Reserve Landowners. In addition, since non-Malays and foreign tourists do visit mosques for social activities, there is an opinion that the feasibility of the amendment needs to be fully examined (Omar and Raji, 2020a).

According to Mohd Hasrol, the revocations were not done concurrently with land replacements due to the weaknesses in the Land and Mines Office's management system. He added that only Negeri Sembilan took immediate actions to enforce the rules regarding Malay Reserve Land following the 2013 Auditor-General's Report. In this regard, there was a provision requiring the land officer to insert a reminder in the Malay Reserve Land title document that the land must be replaced in the event of revocation. In contravention of this provision, a fine of MYR100 will be imposed. Mohd Hasrol was of the opinion that such provision is not assertive enough to protect Malay Reserve Land as the fine is too low. He suggested that the fine should be increased, and the penalty should be in form of a fine or a jail term, or both. He further pointed out that there is no provision in the Federal Constitution with regard to any form of penalty that can significantly serve as a deterrent in terms of enforcement in order to increase the percentage of Malay Reserve Land in Malaysia (Kamarudin and Bernama, 2018b).

As for the ownership of multiple assets, the Malaysian National Land Code fails to take into account small Malay Reserve Land areas and the Malay tradition of determining land inheritance through final wills (Termizi and Ismail, 2018). The State Malay Reservation Enactments are also silent on this matter. The valuers pointed out that small plots of land needed to be amalgamated before any development could commence (Omar and Raji, 2018a). However, this ownership of overlapping assets has not only stunted the development of Malay Reserve Land, but it has also affected the marketability value in the

eyes of potential investors and property buyers. Therefore, legislative amendments are needed to resolve this protracted crisis (Kasim, 1993). In addition, it is imperative that the government could play its part in resolving this issue by re-evaluating Malay Reserve Land in order to increase its value in the future (EdgeProp.my, 2018).

It needs to be noted that the issue of various owners for a single plot makes it hard for authorities to proceed with any development plan without the authorization of all entities having a share in the plot. According to UDA chairman Datuk Seri Dr. Mohd Shafei Abdullah, this issue can be solved by loosening ownership laws, allowing the land to be developed much more quickly. He also recommends that the authorities allow the land to be leased to non-Bumiputeras as this measure would not only enhance the marketability of the land but also encourage banks or financial institutions to provide loans to Malay landowners (EdgeProp.my, 2018).

Similarly, property developer, Mohd Khay Ibrahim, observed that a major impediment to the development of Malay Reserve Land was the multiple ownership of plots. He was of the opinion that the government should review the existing land ownership legislation and propose limiting the ownership of each plot of land (Kamarudin and Bernama, 2018b). Thus, it can be seen that loopholes of Malay Reserve Land law may include revocation and replacement as well as multiple ownership of Malay Reserve Land. Subsequently, the rules pertaining Malay Reserve Land need to be relaxed or certain amendments are necessary to facilitate the development of Malay Reserve Land and further help Malay owners increase their land's value.

Non-Legal Factors

There are factors other than legislation that affect the development of Malay Reserve Land. The debt burden, non-strategic location, and low market price have prompted many landowners to give up their Malay Reserve Land through sales (Hanif, et.al., 2015). Duplicate ownership has also resulted in poor social relations between joint landowners. According to this study, these factors are related to the nonchalant attitude of the Malays themselves who tend to solve their problems in a very short-sighted fashion. Therefore, legal intervention is necessary to

resolve the aforementioned issues. Besides, many reasons contribute to the crisis currently faced in the development planning of Malay Reserve Land, which are as follows.

(a) Debt Burden of Malay Reserve Land Owners

In the late colonial era, most Malays lived in villages and were rarely associated with other ethnic groups. The daily economic activities of the rural Malays included farming such as rice cultivation, while the Chinese were predominantly city dwellers and involved in tin mining, and the Indians earned their living as rubber tappers on the plantations. As a result of the divide and rule policy of the British, the Malays remained in the rural areas and retreated further into the inland (Mobarak Ali, 2007).

To obtain the financial capital necessary for land development, the economically weak Malays chose the easy way. As observed by Hussin and Rashid (2014), the economic situation in Malaya in the early 1900's was very dire and characterized by declining commodity prices, coupled with the rising cost of basic necessities, and incomes not commensurate with the work done. Thus, foreign investors like the Chettiar financers began to play an increasingly important role in offering to fund the cash-strapped Malays. According to Rahim (2018), the Chettiar community came from the Indian Subcontinent attracted by the economic opportunities in Malaya. They provided credit assistance to Malay farmers, rubber smallholders, civil servants, and even the aristocracies. The Chettiar financers provided conditional loan services such as payment in instalments, payment with interest, and land relief in case of failure to make payments.

Since many Malays owned land, they chose to mortgage their land as a convenient way to raise capital for land development (Jusoh, et.al., 2013). This is supported by the statement of JW Birch, a British Resident in Perak, who reported that mortgages were one of the common ways Malay-owned land was released to non-Malays. For example, in Civil Case No. 274/51, Land Office, Kota Star in Kedah the President of the State Council allowed land belonging to Ahmad bin Yusoff to be auctioned among non-Malays in 1934 pursuant to Article 12 of Law 34/51. Thus, Malay Reserve Land owned by the plaintiff located in Mukim Derga, Kota Star, was sold to a certain Meyappa Chettiar.

Although the Malays were generally known to be prudent and cautious spenders, they often decided to mortgage their land to the Indian Chettiar. If a Malay then failed to pay the mortgage on the land, the security land would be released to the money lender (Rahim, 2018). In the eyes of the Malays, the value of land was low compared to cash money, so they had no qualms in mortgaging their land to the Chettiar. Further, Kratoska (1975) observed that most land belonging to the Malays at that time was not cultivated and was often haunted by guarding spirits (*makhluk halus*) who were easily offended by trespassers.

Thus, based on the above discussion, the Malays, who suffered from poverty and were in constant need of cash to improve their living standard, found a quick and easy solution to their problem by making their land as collateral for debts to Chettiar moneylenders. At the time, the Malays did not regard their land as a valuable asset and land ownership as a guarantor of their future status in society.

At present, this issue has arisen because there is no holistic financial model to facilitate the development process for Malay Reserve Land in Malaysia. There is no initial fund and no support from financial institutions due to restrictions of ownership which subsequently affects the marketability of the land (Rosman, Nawawi, and Majid, 2021). Alternatively, by becoming 'artificial Malay' under the amended Section 17 of the Malay Reservations Enactment (FMS Cap 142), financial institutions are allowed to accept Malay Reserve Land as security for loans granted to their owners (Hanif, et.al., 2015). Based on the latest decided cases as mentioned before, even without being listed in the Enactment Schedule, the creation of charge of a Malay holding in favour of a non-Malay or financial institution is allowed, for example in Kedah. Interestingly, bankers have clarified that Malay Reserve Land has an equal chance of securing funds, but they seem reluctant to accept Malay Reserve Land as collateral, especially when the land has multiple owners. Even if the bankers approve the loan, the credit margin is basically low (Omar and Raji, 2020b).

(b) Lack of Cooperation among Joint Landowners

The second factor contributing to the decline of Malay Reserve Land is the conflicts over land ownership among family members. The social

relationship between co-owners is very important because they are the legal owners of a piece of land. Therefore, every transaction or matter related to the land involves the co-owners equally. Joint ownership occurs when the owner of the land dies and leaves the land to several family members by way of inheritance, as determined in their final will, a practice common among the Malays. This joint ownership then leads to overlapping ownership of certain lands while reducing the size of individually owned pieces of land whose cultivation becomes uneconomical (Kasim, 1993; Zain, 1996; Jusoh, et.al., 2013).

As highlighted earlier, overlapping land ownership has a negative impact on the social relations of co-owners (Sulong, 2016). Such negative effects are seen when the co-owners of land have different goals in their ownership of the land and fail to cooperate with each other. Many heirs are only interested in having their name registered as owners but are not interested in working jointly with other owners to develop it. Since each co-owner has an interest in the affairs of a piece of land, difficulties in obtaining cooperation in any land affairs are bound to occur if this aspect is neglected (Abdullah, et.al., 2012). For example, the development of Malay Reserve Land in Kampong Baru, Kuala Lumpur is difficult to implement due to overlapping ownership issues (Discard, 2019), in addition to a weak communal spirit and a lack of initiative further to develop the land (Omar, 2015).

In addition, negative social relationships also affect the owners' efforts to obtain loans from financial institutions. This is because investors and financial institutions do not want to take the risk of investing in land owned jointly by many individuals, as it involves high costs, equally high refunds, and the complexity of obtaining the consent of all owners. As a result, the piece of land is likely to be abandoned and not successfully developed (Omar, 2015).

Another aspect is the conservative attitude of the Malays, who are averse to risk-taking for fear of losing their financial security and ownership rights, thus failing to develop their land properly (Mohamad and Ali, 2009). The same conservative attitude dampens the spirit of entrepreneurship and change, most of them being satisfied with what they have. Thus, it can be seen that there is a lack of development initiatives despite government efforts (Abdul Manaf, et.al., 2015). Furthermore, the Malays lack the know-how to carry out the development. In this

regard, the ministries or government agencies, such as, UDA Holdings Berhad, Majlis Amanah Rakyat (MARA), and the Regional Development Authorities play a significant role in developing the Malay Reserve Land with their own strategies. For instance, nominal fees for conversions, remission of quit rent arrears for Malay Reserve Land identified for development and a nominal increase in premium for conversion are among the means to reduce the costs of development (Nik Yusof, 2017). Following its success in developing idle land in the country, UDA Holdings Bhd wishes to develop around 1.62 million hectares of Malay Reserve Land across the country. It follows that UDA has been surveying Malay Reserve Land in Selangor and Johor with the possibility of development in order to increase its value (EdgeProp.my, 2018).

Thus, as noted before, the issue of multiple ownership significantly hinders the development of Malay Reserve Land, particularly when the various owners have always been indecisive when it comes to developing the land. In this regard, it is vital that the different owners share the same land grant reach an agreement and work together to pave the way for the land's development. It is further proposed to transfer ownership of the land in the form of a shareholding, either under one name or a company jointly founded by them, in order to ensure that the development of Malay Reserve Land could take place (Kamarudin and Bernama, 2018b). Alternatively, apart from leasing, *waqf* could also be one of the means to develop Malay Reserve Land and further help solve some issues, such as multiple ownership, lack of finance, and development risks as it benefits both *waqif* and landowner (Omar, 2020).

(c) Voluntary Release of Malay Reserve Land

According to Jusoh (2013), some owners of Malay Reserve Land give up their property voluntarily. Cases like this usually occur in strategically important areas for development, such as, in towns, city centres, and developing areas where the landowners are offered lucrative prices by the developers of construction projects (Buang, 2001; Buang, 2007). Situations like this also occur in villages where land is located in areas dominated by Malays and has good economic development potential. Landowners in FELDA village areas are often willing to sell their land to anyone who offers the highest price, regardless of the implications for future generations (Jusoh, 2013).

Further, the existence of monopoly elements among capitalists, especially in the fields of land development and commercial agriculture, means fewer opportunities for indigenous people to participate in economic partnerships. In fact, they are more likely to make land transactions that are mandatory or voluntary. If the nonchalant attitude of the Malays, who are only too willing to sell Malay Reserve Land is not overcome soon, the Malay community will not be able to increase their socio-economic position in the future. Capitalists only seek short-term economic opportunities and benefits from the land (Hanif, et.al., 2015).

At present, the value of Malay Reserve Land is still considered low. However, the value will increase when the land is bought by those competent in the business field and can successfully develop the land. In this regard, there are Malays who are competent in business, but their number is very small. Opportunities are also given to Malays who enter the fields of business and enterprise, but unfortunately, they do not know how to optimise these opportunities (Rozlin, 2022).

Interestingly, in Budget Speech 2021, the government intends to boost the value of Malay Reserve Land in strategic locations following the success of Pelaburan Hartanah Berhad in developing a private hospital worth MYR 300 million on Malay Reserve Land in Sungai Penchala. To this end, under the 12th Malaysia Plan (RMKe-12), Pelaburan Hartanah Berhad will invest a total of MYR 750 million to enhance the value of Bumiputera's holdings, especially for commercial development on Malay Reserve Land. This is one of the most important mechanisms to enhance Bumiputera real estate and economic participation (The Malaysian Reserve, 2017; Ministry of Finance Malaysia, 2020). Similarly, it is proposed in the Budget Speech 2022 that idled, and undeveloped Malay Reserve Land be leased for agricultural or business projects to increase agriculture areas and create opportunities to generate income for young people and the low-income groups including graduates. This approach also allows the land to be administered in an optimal and orderly manner (Ministry of Finance Malaysia, 2021). Accordingly, these efforts by the government seem to reflect the need to develop Malay Reserve Land by unlocking its potential as well as to increase the Malays' real estate and economic participation while preserving the sovereignty of Malay Reserve Land.

(d) Location and Market Price

Omar (2020) made reference to Hernando de Soto who likens indigenous land to a 'frozen capital' that is difficult to thaw. In other words, the development process needs to be done carefully to increase the land's value. For instance, research conducted on the developed Malay Reserve Land located in the town of Kuantan found that within a 10 kilometers radius from the city centre, there were only 20 pieces of Malay Reserve Land out of 109 Malay Reserve Land of the entire Kuantan. One of the objectives of the research was to study the suitability of the development on Malay Reserve Land based on its location. It further found that the Malay Reserve Land covered in the research had been well-developed, majorly through housing. Other developments include shop houses, shopping complexes, small industries, or tourist attractions (Ismail, Sauti, and Harun, 2017). It seems that the development in this location seems sub-par with the developments of its surroundings since the location is not far from the city centre.

Historically, under British rule, all the fertile land in Malaya was given to the benefit of British officials (Omar, 2020). The British administrators declared the entire state of Kelantan and the surrounding area as a Malay Reserve, but most of the land was of third—and fourth—class value (Rashid, 1979) and located in rural and jungle areas. Suitability and risks are the challenges to developing Malay Reserve Land located far inland, which require strategic land development by studying and analysing their potential growth in various strategic places (Rosman, Nawawi, and Majid, 2021). Therefore, modern efforts to develop such areas were very expensive and did not make much sense from an economic aspect (Awang, 1994). Although the market value of Malay Reserve Land is guaranteed under the Second Schedule of the Land Acquisition Act 1960, most Malay Reserve Land areas are sold at low and discounted prices. The land value for Malay Reserve Land is estimated to be less than four times the value of non-Malay Reserve Land, and at present, most of Malay Reserve Land is either left idle or underutilised in comparison to its neighbours (Hanif, et.al., 2015; Rosman, Nawawi, and Majid, 2021). In addition, most of the land is swampy and was gazetted as Malay Reserve Land under British rule. The poor physical condition of the land can also affect development. Nik Yusof suggested using the concept of land readjustment to overcome

this barrier. If done successfully, the land readjustment programme would provide the government with a way to handle and finance the unified subdivision of separate private Malay Reserve landholdings for development planning (Nik Yusof, 2017).

Furthermore, even though Malay Reserve Land might be located in developing urban areas, it is still sold below the market price. According to a report in the newspaper Harian Metro, the Secretary General of the Malaysian Malay Chamber of Commerce, Amirhamzah Karim, stated that the government offered MYR 850 per square meter for land in Kampung Baru. At the time, however, land in the Kampung Baru area was valued above MYR 2,000 per square meter. If such practices continue, more and more valuable land will become idle, and thus further widening the gap between Malay Reserve Land and other types of land (Mohamad and Ali, 2009). Moreover, any transactions involving the Malay Reserve Land are restricted to Malays only causing the market to be limited and consequently contributing to a decrease in market value. Due to the land's small size and low market value, the landlord also has low bargaining power to determine the interest in the land (Rosman, Nawawi, and Majid, 2021).

Concerning valuation issues, a study found that the land administrators generally relied on the valuation carried out by the Valuation and Property Services Department (JPPH). It appears that the most valued category of land use was residential, followed by agriculture, and industrial. As mentioned before, one of the reasons that caused a lower value in Malay Reserve Land is that Malays had small purchasing power. However, it needs to be noted that Malay purchasing power is expanding which is why it is vital for valuers to keep track of this trend. The location basically plays a significant impact in determining the value of Malay Reserve Land value in which could have a market value in urban areas, particularly where land is scarce. It was also observed that planning and physical aspects of Malay Reserve Land were not major concerns in valuation issues. It follows that access to facilities appears to be a critical consideration. In addition, other valuation issues were a lack of foreign investment in Malay Reserve Land and only a small number of Malay developers willing to participate in the development (Omar and Raji, 2020b).

In order to improve the value of Malay Reserve Land, it is imperative that the government establishes infrastructure in order to attract developers and investors. In this regard, Kuala Lumpur City Hall (DBKL), as mentioned earlier, will concentrate on planning infrastructure development in the Malay Reserve Land areas, such as Kampung Sungai Penchala, Segambut, and Taman Datuk Keramat in order to ensure that they are on a par with development in the adjacent areas (Bernama, 2021). In addition to undertaking more land development and infrastructure projects, there is a need to create a complete database of Malay Reserve Land for evaluation purposes in order to facilitate the evaluation process. Furthermore, there are public and private partnership development initiatives specifically to promote the development of Malay Reserve Land to increase income and encourage the development of these lands (Omar and Raji, 2020a). For instance, a successful smart partnership between KPJ Healthcare Bhd (KPJ), Pelaburan Hartanah Bhd (PHB), and Nadayu Properties Bhd (Nadayu) in developing KPJ Damansara Specialist Hospital (The Malaysian Reserve, 2017; Ministry of Finance Malaysia, 2020).

Thus, there are a few suggestions that would help resolve the development issues of Malay Reserve Land, which may include permitting long-term leases to non-Malaysians and foreigners, particularly around the high-impact projects, such as Iskandar Malaysia and Pengerang oil and gas hubs. Alternatively, the government may inject capital into high-impact projects, increase the percentage of loans to owners, encourage landowners to participate in land development, expand infrastructure and facilities, and institutionalise Malay Reserve Land by establishing a body or an agency to deal with Malay Reserve Land. Significantly, there is a need to review existing legislation or establish a new statute governing Malay Reserve Land in order to materialise the above suggestions and further facilitate the development of Malay Reserve Land in Malaysia (Bernama, 2018; Omar and Raji, 2020a).

Closing

It is interesting to note that the federal and state governments have been urged to take the first step towards consolidating Malaysia Reserve

Land laws into a uniform law. It follows that the primary definition of 'Malay' for future reference should be clearly set forth in a new statute, removing various confusing definitions in each state statute. A uniform law governing Malay Reserve Land seems to be the way forward in facilitating the development of Malay Reserve land while preserving and maintaining its sovereignty. This is also in line with the words of Tun Abdul Hamid, the former Chief Justice, who stated that Malay Reserve Land must be defended while its owners should be allowed to enjoy the benefits of such ownership. This statement was made by Tun Abdul Hamid during the Course on Legal and Practical Issues Related to Malay Reserve Land, which was held at the Attorney General's Chambers of Malaysia on 3 September 2013.

Alternatively, some amendments need to be made to the legislation governing the affairs of Malay Reserve Land. First, concerning the Federal Constitution, the power of the state government to declare and cancel Malay Reserve Land under the provisions of Article 89 needs to be amended to protect them from being managed independently. In addition, since there are conditions that need to be met by the state government in the amendment to Malay Reserve Land, such as the replacement of land 'similar in nature', there is a need to establish a body enforced under the central government to monitor this process. Furthermore, the different definitions of 'Malay' unnecessarily limit the opportunities for such land transactions among Malay owners. For instance, the Kelantan Malay Reserve Enactment 1930 also requires a native Kelantan in the definition of 'Malay'. This means that Malays from other states is not allowed to deal with Malay Reserve Land in Kelantan. In addition, the latest judicial decisions in *Bebe Sakimah's case* and *Syed Syahhrul's case* show that a non-Malay, either an individual or a company, may in certain situations hold and deal with Malay Reserve Land. It needs to be noted that the legal position in these cases applies in the Federated Malay States only and may not apply in other states. In Kedah, it has been established through judicial decisions and the state government's action that Malay Reserve Land owned by a Malay is allowed to be charged in favour of a non-Malay. In other states, however, the legal position of charge in favour of a non-Malay is prohibited or rather unambiguous due to *Syed Syahrul's case*. Thus, other states may have different ways of managing and administering Malay Reserve Land, and the different interpretations of 'Malay' may further affect its dealings.

In addition, valuable initiatives may be taken in the form of legislative intervention. First, concerning the issue of debt burden and voluntary release of Malay Reserve Land, it is clear that the main driving factor is finance. Taking inspiration from the ideas of Tun Abdul Hamid, the creation of the Law Harmonization Committee (LHC) may help build a legal system that supports Islamic banking contracts and achieves the integrity and application of Malaysian law in Islamic banking transactions. In his position as Chairman, Tun Abdul Hamid has linked the Malay Reserve institution to Islamic banking institutions. However, not all parties can enjoy the benefits of Islamic banking. This situation is similar to the current situation of Malay Reserve Land, where the current law prohibits dealings with non-Malays. Therefore, the LHC's proposal is to loosen such legal barriers while ensuring that Malay Reserve Land does not fall into the hands of non-Malays, either through financial institutions or individuals. Furthermore, if payment has defaulted and an auction is held, the Malay Reserve Land should only be permitted to be purchased by Malays. This is also supported by the suggestion of the late Professor Datuk Salleh Buang in modernising Malay Reserve Land law by removing restrictive provisions in the law regarding the leasing and charging of Malay Reserve Land to non-Malays.

In the meantime, Section 342 (1) of the National Land Code needs to be amended to meet the situation of co-owners of Malay Reserve Land, as proposed earlier by Termizi and Ismail (2018). This amendment resolves the problem of ownership of overlapping assets, especially in the case of co-owners of Malay Reserve Land. In conclusion, the National Land Council can negotiate with the federal and state governments in order to formulate a new policy for Malay Reserve Land. This is in line with the provisions of Article 91 (5) of the Federal Constitution, *"whether for the purpose of mining, agriculture, forestry, or any other purpose, the National Land Council shall form a policy based on any relevant law."*

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DEVELOPMENT PLANNING AND ENVIRONMENTAL GOVERNANCE IN MALAYSIA

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Abstract

Development planning along with environmental governance has to be given priority because the latter sustains the needs of today and the future generation. Besides, it also provides new and updated directions for all development action plans to balance physical and socio-economic needs of development. This essay focuses on the importance of environmental governance in the development planning philosophy in Malaysia. Furthermore, it examines the environmental governance challenges and suggests the methods to strengthen environmental governance in Malaysia. These challenges include land use development that is not environmentally friendly; inefficient energy consumption; inconsistent environmental governance; lack of mitigation and adaptation measures; and a low level of awareness of the environment. While, methods to strengthen environmental governance include managing planning, evaluation, enforcement and monitoring; research and development; leveraging economic values through efficient energy practices; manufacturing green products; strengthening disaster risk management; and raising awareness toward environmental sustainability among Malaysians. In short, development planning guided by environmental governance is the best technique as a development framework which benefits the present and future generations. To implement development planning that considers environmental governance issues, the best development framework,

and benefits both the present and future generations, a comprehensive environmental management framework has been proposed.

Keywords: Development Planning, Environment, Governance, Malaysia.

Introduction

To create an optimal balance of development from all aspects, the planning framework is the main tool to be used as a general guide for the implementing agencies to set targets and achieve development goals at all stages of implementation. This target is important towards driving sustainable development at all stages of planning, implementation, and monitoring (Haliza Abdul Rahman, 2015). In addition, sustainable development planning is also capable of creating a habitable area or city in the future, especially in terms of economics and environmental governance. Malaysia's socio-economic development planning is beginning to move from the conventional development concept of "grow first, clean-up later" to the concept of "green growth", which ensures that socio-economic development is implemented sustainably, starting at the planning stage and subsequently at the implementation and evaluation stage. In addition, the concept of green growth is a leader in change as it is not only a strategic core of its own but is a development concept that encompasses the three pillars of sustainable development, namely economic, social, and environmental governance, as well as enabling the country to better face future challenges (Haryati Shafii et al., 2022).

Green growth will boost economic growth, prevent environmental disasters, transform community thinking and behaviour, and influence the design of government policies in planning future development if it is implemented well. Environmental catastrophes can be avoided by sustainable planning and implementation of development processes, but if the situation is otherwise, environmental disasters will occur at any time and in any location (Haryati Shafii et al., 2022). In other words, the frequency of environmental disasters has the potential to deprive people of their economic comforts, as well as obstruct the population's future economic progress. As a result, environmental governance is an important part of a country's development planning process to improve the country's economic standing.

However, is it true that development involving the environment today is in line with the goals contained in the framework of sustainable environmental governance? This is because, based on a series of natural disasters that have occurred in Malaysia lately, it has been proven that there are flaws in the overall implementation of the environmental governance framework. This includes the major flood disaster that hit Peninsular Malaysia at the end of December 2021; the mud flood on July 4, 2022; and other events that caused significant loss of life and property destruction. Therefore, to deal with this problem, a holistic environmental management framework should be implemented by the government to ensure environmental sustainability is always in the best condition.

Malaysia's Development, Development Planning, And Environmental Governance

The most fascinating topic to debate is the definition of development, because there is unlikely to be a single field that best defines the term "development" comprehensively. So far, several series of development thoughts have developed, starting from the perspective of classical sociology (Durkheim, Weber, and Marx), Marxist views, stages of development by Rostow, structuralism and modernisation that enrich social development studies, and sustainable development. In this context, development can be defined as a concerted attempt to provide a better option for each individual to realise and achieve their full human potential (Nugroho & Rochmin Dahuri, 2004).

The definition of development can be interpreted differently between individuals, regions, states, and countries. But generally speaking, there is agreement that development is the process of making changes (Riyadi & Bratakusumah, 2005). Siagian (1994) defines development as "a business or series of growth and change efforts that are planned and implemented consciously by a country and its government, towards modernisation in the context of the construction of a nation-state". According to Ginanjar (1994), it provides an easier understanding of it as "a process of change towards good through designed efforts". Development is also defined as a process of change that encompasses the entire social system, such as politics, economy,

infrastructure, defence, education, technology, institutions, and culture (Alexander, 1994).

Subsequently, Alejandro (1976) defined development as an economic, social, and cultural transformation. Development is the planned change process to enhance various aspects of human life. According to Tikson and Deddy (2005), the development of the state can also be defined as a deliberate economic, social, and cultural transformation through policies and strategies in the desired direction. Transformations in the structure of the economy can be seen through the rapid increase or growth of production in the industrial and service sectors so that their contribution to national income is getting greater. On the other hand, the contribution of the agricultural sector will be smaller and inversely proportional to industrial growth and economic modernisation. Social transformation can be seen through the distribution of wealth and fair access to resources such as socio-economic, educational, health, housing, clean water, recreational facilities, and community participation in the political decision-making process. Thus, the development process takes place in all aspects of society: economic, social, cultural, and political, at the macro (national) and micro (community/group) levels.

Therefore, the important meaning of development is progress, growth, and diversity. As noted by previous researchers, development is a process of change that is carried out through conscious and planned efforts. Development is a process of change that occurs naturally in an increasingly complex human life that involves various aspects. The idea of modernisation no longer only covers the economic and industrial spheres and has even seeped into all aspects of human life (Riyadi & Bratakusumah, 2005).

In Malaysia, the national development planning philosophy is to take into account the approaches of a country that adopts an open economic policy, a multi-ethnic society, an approach to a mixed economic system, and a federal state consisting of 13 states as well as three federal territories. If recalled, the history of the development planning process in Malaysia began as early as 1950 with the publication of the Draft of Malaya Development Plan. To date, 27 development planning documents have been prepared, comprising long-term, medium-term, and short-term plans. This includes Long-Term Planning;

New Economic Model, 2011-2020; Framework of the Third Long Term Plan (RRJP3), 2001-2010; Vision 2020, 1991-2020; Framework of the Second Long Term Plan (RRJP2), 1991-2000; Framework of the First Long Term Plan (RRJP1), 1971-1990. Long-term planning establishes a comprehensive core and strategy for achieving long-term development goals within the national development agenda (Department of Town and Country Planning, 2021; Malaysia, 2015).

Medium-term planning and five-year development plans, such as the Eleventh Malaysia Plan (RMKe-11), 2016-2020 and the Half-Term Study (KSP), are the main documents for implementing government development programmes. For example, the five-year development plan has set economic growth targets and the allocation ceiling for public sector development programmes and outlines the role of the private sector. The Mid-Term Review (EPF) for the five-year plan is implemented in the middle of a five-year period aimed at revising the performance of macro-economic and sectoral policy plans for the first two years of the plan as well as re-adjust strategies to achieve new target revisions if necessary (Department of Town and Country Planning, 2021; Malaysia, 2015).

Under the Tenth Malaysia Plan, a two-year repetitive planning method was introduced to enable the priority of programmes and projects to be reviewed based on the government's current financial capabilities to be implemented more effectively. The annual development allocation is prepared based on the list of development programmes and projects that have been approved under two years of repeated rolling plans. Overall, the national development planning framework can be seen in Figure 1.1 below.

However, all development plans to be implemented in the future must consider the environmental component as the vision of being a developed and inclusive country will be supported by good environmental governance and development planning. Development that takes into account environmental governance will complement and support the concept of green growth, which is an approach that combines climate change adaptation and mitigation measures in all development sectors. Climate change adaptation and mitigation measures are vital in protecting development outcomes and enabling the economy and people to be ready to adapt and deal with the impacts of climate change and environmental disasters, especially for the poor.

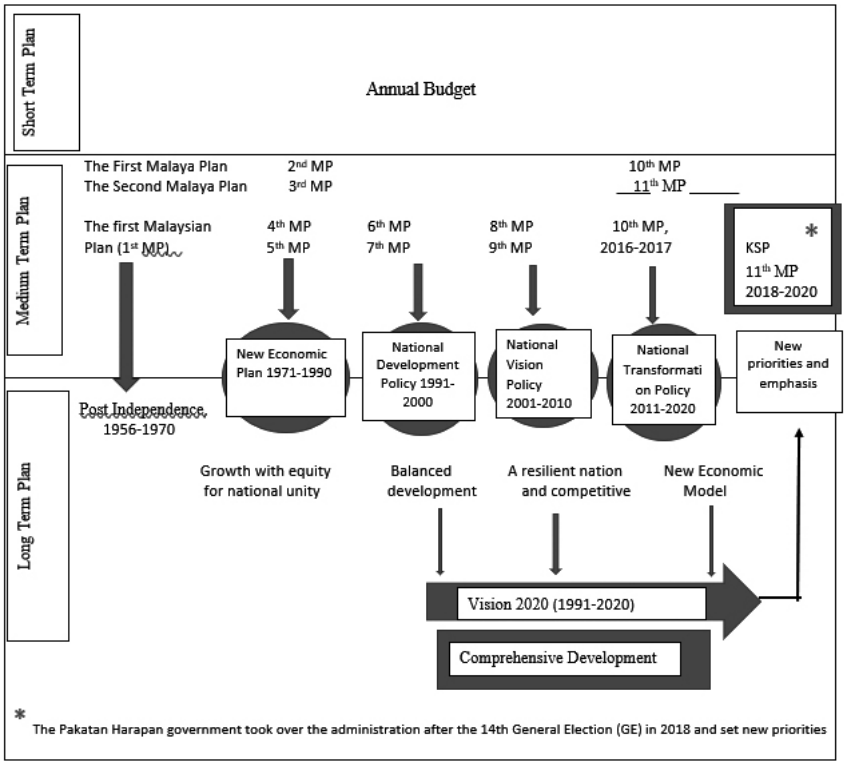

Figure 1.1: Systematic planning in formulating national development policy

Source: Malaysia (2015).

Good environmental governance is the process of formulating and implementing policies related to the environment through mutual agreement between various parties aimed at improving the quality of the environment and the quality of life of a whole society that focuses on the final result. Therefore, good governance is an approach that can be used to achieve a better standard of living, such as good environmental quality, education, health services, social security, political stability, material facilities, and spiritual development. In other words, environmental governance processes that will be able to maintain the stability of the environmental ecosystem and thus minimise the occurrence of natural disasters are needed to protect the environment and the economy of the people (Nurulaisyah Rosli & Roslina Ismail, 2019; Hamidi Ismail, et al. 2012; Imaaduddin Abdul Halim, 2020).

Discussion

The discussion in this section involves several aspects related to environmental governance in development planning, which is in line with the overall implementation of the environmental governance framework. There are two parts discussed, namely: first, environmental governance challenges in development planning, and second, methods of strengthening environmental governance in development planning. A country that practises development based on the concept of environmental friendliness will always be in a harmonious economic situation with a sustainable supply of resources.

i. Challenges in Development Planning for Environmental Governance

The Sustainable Development Goals (SDGs) are crucial characteristics of effective development planning and environmental governance, and they should be given priority in all national development planning and policies. Environmental governance is a critical step in addressing the problem of unsustainable growth that affects the environment to the point where natural disasters occur. The necessity of striking a balance between development and environmental protection cannot be overstated. This is because if we ignore this equilibrium, the slack that humans must tolerate is quite large and goes beyond what can be measured solely in terms of money (Imaaduddin Abdul Halim, 2020; Ninth Malaysia Plan, 2006; Malaysia, 2015).

Based on the SDGs, Malaysia's development will improve, thus becoming a stronger, more resilient, peaceful and prosperous country. The SDGs and the country's performance indicators have been fully drawn up in the country's five-year development plan starting with the 11th Malaysia Plan. But there are certainly issues and challenges for a country in realizing the Sustainable Development Goals (SDGs) (Ninth Malaysia Plan, 2006; Malaysia, 2015). For Malaysia, there are numerous issues and challenges in implementing the SDGs for the benefit of all parties, as well as among the challenges faced by the government are:

a. Development Planning or Change of Non-Eco-Friendly Land Use

Development planning especially involving the development of urbanization areas, less systematic agricultural and industrial activities as well as growing population growth are among the main challenges in the context of environmental governance. In addition, the developer's non-compliance with the development guidelines has also put pressure on the green areas and has led to degradation to the balance of the ecosystem. Such a situation has occurred in the Cameron Highlands highland water catchment area. Large-scale land use development in the area has led to an increase in temperature that can disrupt the natural ecosystem. This has resulted in landslides and mudslides in 2013 which claimed seven lives and the destruction of infrastructure estimated at RM 13 million. A similar incident occurred in 2014, resulting in the deaths of five people and 177 homeless people. In addition, the valuation of total damage to property and public infrastructure is estimated at RM 3.5 million (Bernama, 2013; Ahmad Ismail, 2017; Rohany Nasir, 2014).

The study found that the frequency of landslides and mudslides was due to high silt production due to the opening of forest areas for new agricultural activities. Meanwhile, forest exploration has also had an impact on the reduction in the efficiency of the Sultan Abu Bakar Hydroelectric Dam due to the accumulation of silt, sand, and rubbish from agricultural waste and logging. For example, Tenaga Nasional Berhad (TNB) spent more than RM180 million over the past five years cleaning up Ringlet Lake and Sultan Abu Bakar Hydroelectric Dam. In addition, about 350,000 cubic metres of silt are removed from Ringlet Lake every year. However, the effort was not able to cope with the estimated accumulation of sediment in the lake, which is estimated at 500,000 cubic metres per year. Therefore, TNB had to spend RM300,000 annually to clean the surface and bottom of the lake of 200 metric tonnes of rubbish per year (Bernama, 2013; Ahmad Ismail, 2017; Rohany Nasir, 2014).

Ringlet Lake receives water flow from four rivers, namely Ringlet River, Bertam, Habu, and Tenom. Ringlet Lake is estimated to have a reservoir capacity of 4.6 million cubic metres of water. But the findings found that two-thirds of Ringlet Lake contains sediment, and this means that almost 27 metres deep, the lake is filled with silt, sand and

semi-embossed rubbish. This situation occurred due to the change in land use, which is not environmentally friendly. Land exploration for development and active farming in the Cameron Highlands, especially on steep slopes and hills, has led to erosion, and the situation is becoming more critical as Lake Ringlet (Sultan Abu Bakar Hydroelectric Dam) faces severe sediment. This is due to the fact that the sand and soil from erosion enters the rivers and flows into the lakes, causing the depth of rivers and lakes to become shallower due to sediments that over time become more abundant. For example, if we collected this amount of sediment, its size can be estimated at the size of nine football fields with a height of almost 6.0 meters, equivalent to about 500,000 cubic metres of silt deposit collected per year. This critical silt situation has caused mudslides in the Cameron Highlands, which have occurred every year, for example in 2013 and 2014 (Bernama, 2013; Ahmad Ismail, 2017; Rohany Nasir, 2014).

b. Inefficiency of Energy Consumption and Non-Eco-Friendly Industrial Processes

In a balanced development plan, the efficiency of energy consumption should be focused on the sustainability of energy in the future. However, the process of producing products that are said to be not nature-friendly refers to the use of resources such as raw materials, excessive use of energy and water, the release of greenhouse gases (GHGs), the release of high pollutants and residual income in large amounts. Until now, there are still a large number of small and medium scale industrial companies involved in the manufacturing sector that practise production processes that are not environmentally friendly. This is driven by low tariff rates for energy and water use, which contribute to the use of resources less efficiently and a lack of interest in practising green technology in their industrial operations. In addition, the government also provides subsidies for energy use, also causing low new energy use (TBB) among small and medium-sized industrial entrepreneurs (Ninth Malaysian Plan, 2006; Jahi, 2001).

In the context of good governance, industry should avoid wasting energy and instead practise energy efficiency at their particular locations, taking into account:

- The number of equipment used

  Each industrial premises must have an amount of equipment that is directly proportional to the amount of electricity or energy consumed. This can be observed by the number of uses of equipment such as fans, lamps, computers, and commercial refrigerators. A large number of electrical appliances will certainly have a significant impact on the consumption of electrical energy, and subsequently there will be waste.

- Long-term use of electrical equipment

  The amount of time that electrical appliances are used is directly related to the amount of electricity or other energy sources consumed. If businesses or individuals buy energy-inefficient equipment and utilise it for an extended length of time, the cost of electricity or energy will almost certainly rise (Ninth Malaysia Plan, 2006; Fazli Sabri & Teoh Yong Yong, 2006).

c. Unadjusted Environmental Governance (Constraints in Enforcement, Monitoring, and Evaluation)

Environmental governance has constraints in the components of legislative enforcement, monitoring, and policy evaluation. Constraints on environmental governance are associated with the limited capabilities and abilities of enforcement agencies, and this situation is further complicated by non-compliance with the environmental standards that have been set for industrial operators. In a world that is constantly and rapidly experiencing changes in all aspects, the monitoring and evaluation of policies and programmes related to climate change and the environment today is also said to be insufficient. Hence, when enforcement, monitoring, and evaluation are part of environmental governance, then development planning also experiences problems such as urban area management, industrial activity operation, and so on (Ministry of Natural Resources and Environment, 2016; Hamidi Ismail et al., 2012; Thomson, 2004).

In addition, data collection methods related to environmental governance are also said to be unintegrated, not updated, and not shared between relevant agencies for enforcement and monitoring processes. Existing governance indicators or indicators are also not comprehensive

as they are developed to meet different needs and agencies. This situation shows that the absence of comprehensive enforcement, monitoring, and evaluation mechanisms hinders efforts to improve the implementation of initiatives in environmental governance and sustainable development. However, measures to address this issue are not coordinated and not comprehensive, especially at the federal, state, and local levels due to non-exhaustive policy planning and the absence of a regulatory framework. For example, the National Climate Change Policy enacted in 2009 has yet to be supported by adaptation plans and mitigation actions; and the Environmental Quality Act, 1974 is still not comprehensive in terms of regulation of e-waste from households and contaminated land. In addition, under certain circumstances, differences in priorities in the development agenda at the federal and state levels have undermined planning and efforts to address environmental issues. The success of an organisation to meet the needs of environmental governance is dependent on the staff in each organisation playing an effective role (Hamidi Ismail et al., 2012; Nurulaisyah Rosli & Roslina Ismail, 2019; Farrah Wahida Mustafar et al., 2020).

d. Lack of Mitigation and Adaptation (Measures and Alignment in Risk and Disaster Management)

Mitigation and adaptation efforts to manage the environment in an effort to deal with the issue of climate change need to be implemented in all sectors, including forestry. In adapting to the impact of climate change, easily affected sectors such as agriculture, energy, health, and water resources need to have high resilience. For example, in the agricultural sector, excessive increases in temperature or water will affect crop yields. The design of buildings and infrastructure also does not take into account aspects of climate change and the environment. This causes serious damage when a disaster occurs. The absence of mitigation and adaptation plans also means the steps taken to deal with the impacts of climate change are not aligned and comprehensive. In addition, the research and development aspects related to climate change are still insufficient (Callicott, 2000; Gardner & Stern, 2002).

Aside from research and development, gaps in disaster risk management, particularly the coordination aspect of risk management, are causing problems. Coordination in disaster risk management

(DRM) is still insufficient due to the absence of a policy and regulatory framework. At the same time, hazard and risk management and reduction of vulnerability to disasters are insufficient. Maps of high-risk areas, especially for floods, landslides, and earthquakes, have been implemented but on an ad-hoc basis; development activities also do not take into account the risk of disaster in their planning, assessment, and implementation; communication strategies, especially early warning systems are ineffective; and the involvement of the community and the private sector in DRM is inadequate, thus increasing the risk and extent of damage (Callicott, 2000; Gardner & Stern, 2002).

e. Low Environmental Concerns and Climate Change Awareness

Public awareness of environmental issues and climate change is important to support and ensure the success of government initiatives. Currently, awareness and understanding among the community about environmental issues and climate change is still low. In addition, learning and teaching methods related to climate change and environmental issues, including in schools, have not yet integrated theoretical aspects with practical skills, for which it is important to change the minds and behaviours of society towards an environmentally friendly lifestyle. Increasing public awareness among the community is very important, and the community needs to be more aware of environmental issues. Therefore, the cooperation of all enforcement agencies at the state and federal government levels in addressing environmental pollution issues is vital so that enforcement can be implemented more effectively under their respective jurisdictions (Perkins et al., 2011; Siti Khatijah Zamhari & Christopher Perumal, 2016; Rohaniza Idris, 2021).

ii. Sustainable Development Planning Methods for Strengthening Environmental Governance

Sustainable development planning will be strengthened to enable initiatives and programmes implemented by the government to be implemented effectively. Sustainable development implementation planning requires sound governance to strengthen the planning, evaluation, enforcement, and monitoring; research and development

components; leverage economic values through efficient energy use practices and green product production; and create a shared responsibility. This is because, by strengthening all the components of this plan, it can certainly be used as a guide for the implementation of sustainable development in a systematic manner.

a. Improving Governance to Strengthen Planning, Enforcement Assessment, and Monitoring

The first strategy is to enhance the governance exercise, which includes policy, regulatory, and institutional frameworks, agency capabilities and capabilities, as well as monitoring and evaluation mechanisms to enable comprehensive planning, better enforcement, and systematic management. Among the things that need to be emphasized and implemented are the formulation of new policies such as national disaster risk management policies, national geospatial information management policies, sustainable consumption and production development plans, sustainable development plans, national mitigation plans, and national adaptation plans (Hamidi Ismail et al., 2012; Ministry of Natural Resources and Environment, 2016; Farrah Wahida Mustafar et al., 2020).

Next is the drafting of new laws such as the disaster risk management bill, the national water resources bill, the geospatial information management bill, and so on. In addition, revisions of existing policies and laws such as the Environmental Quality Act, 1974, Solid Waste Management and Public Cleansing Act, 2007 and the National Climate Change Policy, 2009 are necessary for improvements to new matters in ensuring that these laws continue to be relevant in accordance with current developments related to environmental governance. Next, the development and implementation of the Strategic Environmental Assessment guidelines and revision of the Environmental Impact Assessment to ensure that aspects of climate change and the environment are taken into account in all stages of development, i.e., planning, evaluation, and implementation (Hamidi Ismail et al., 2012; Ministry of Natural Resources and Environment, 2016; Nurulaisyah Rosli & Roslina Ismail, 2019).

Therefore, a systematic system of monitoring and evaluation components that includes indicators and databases should be developed

to assess effectiveness and achievement. The availability of databases and indicators in the system can certainly support the planning and decision-making process in the planning and implementation stage and enable continuous improvement. Next, to coordinate all the work of the implementing agencies, enforcement, and monitoring, the need for a one-stop centre to provide access and access to all data in the country in various agencies must be implemented (Jamaluddin Jahi, 2001).

Therefore, the Department of Statistics Malaysia can spearhead this effort and coordinate the development of a mechanism that is compatible with the relevant ministries and agencies. At the same time, new indicators and databases related to environmental governance such as geospatial information management, national GHG inventory, integrated chemical inventory, coastal data and environmental indicators, i.e., green market indicators, green economy and green development indicators, should be developed to complement the existing indicators to provide a more comprehensive overview of the current situation (Hamidi Ismail et al., 2012; Ministry of Natural Resources and Environment, 2016; Thomson, 2004).

b. Enhancing Research and Development

Apart from the appropriate enforcement and law-making components, environmental governance should also be intensified in research and development, which is one of the long-term solutions to environmental issues. This aspect is important and needs to be intensified as the research and development component is a key step towards understanding the impact of development planning on the environment, whether it has a positive impact or otherwise. The components of research and development are also among the measures against human relations in a very complex environment (Jamaluddin Jahi, 2001).

The development of local technology applications is among the important aspects of the research and development component for local or local solutions related to environmental management, especially the cost aspects of adaptation and mitigation of climate change and improving disaster risk management. These include the research and development in climatology (a discipline focused on climate and time series studies), climate change modelling to enable better forecasting for extreme weather and climate, vulnerability assessment and

adaptation to strengthen resilience in key sectors (agriculture), and local technology development. Furthermore, the distribution of research and development results enables the commercialisation of local innovations as a solution step in environmental management (Ministry of Natural Resources and Environment, 2016).

Although research and development in the field of the environment are often labelled as having no economic value compared to other fields, human dependence on the environment and its components is undeniable in survival. However, Malaysia can be proud that the Doctor Philosophy by research and even Professor Emeritus are now in public institutes and universities in Malaysia with a wide range of environmental expertise, such as weather forecasting, geospatial expertise, animals, plants, river and marine ecosystems, as well as various other forest ecosystems. Therefore, this expertise should not be squandered but instead be embroidered and used by the government as a reference expert. They should also be assisted by the granting of research grants that will produce human capital that will be skilled in the field of environmental governance for future generations (Ministry of Natural Resources and Environment, 2016).

c. Utilizing Economic Value Through Efficient Use of Energy Practices and Green Product Production

In the effort of development planning and efficiency of environmental governance, among the important things that need to be taken into account for the well-being of the country in the future is to leverage the value of the economy through eco-efficiency to ensure a more sustainable economy with holistic environmental governance implemented. This is because, through eco-efficiencies, the value of resources such as energy, water, minerals, land, natural resources, and forests will be more appreciated while waste can be reduced. The benefits of eco-efficiencies can be achieved through the practice of sustainable consumption and production practices (SCP) in all sectors, including the public. In this regard, five main initiatives should be implemented, which are to create a green market, increase the contribution of renewable energy (TBB) in the energy mix, improve energy demand management (DSM), promote low-carbon mobility, and manage waste across the board (Fazli Sabri & Teoh Yong Yong, 2006; Robichaud & Anantatmula, 2011).

In the context of eco-efficiency, the green market for local products and green services is led by the Ministry of Energy, Green Technology, and Water (KeTTHA) and supported by other ministries and agencies. The existence of the green market is evidenced by among other things, green procurement, the construction of green buildings and industrial greening. The implementation of the Government Green Procurement Guidelines (GGP), taking into account environmental criteria and cost-of-life analysis, will be implemented to encourage the public sector to acquire and use environmentally friendly products and services. The implementation of GGP will increase demand for green products and services, as well as encourage the industry to comply with product quality standards as a requirement of green criteria. By 2020, the government hopes to achieve a green turnover of at least 20 per cent. Moreover, the business sector is urged to follow the government's lead in green procurement. This is because if a company acquires the designation of a green product or service, the parties benefit in various ways (Fazli Sabri & Teoh Yong Yong, 2006; Ministry of Natural Resources and Environment, 2016).

Apart from acquiring green status for products and services, the government also introduced a green rating and standard system in line with international standards to promote the greening of the industry and its supply chain. This rating is to enable the local industry to become more competitive and able to penetrate the global market. Industrialists are also encouraged to meet international environmental commitments by conducting energy consumption audits and measuring carbon footprint and greenhouse gas (GHG) emissions rates. At the same time, 'MyHijau' Mark and Standard Performance Consumption Minimum Energy have been extended to household products as well as electrical and electronic appliances, including televisions, fans, refrigerators, air conditioners, and light bulbs (Ninth Malaysia Plan, 2006; Fazli Sabri & Teoh Yong Yong, 2006).

Next, in addition to products, new government buildings can also be categorised according to their green rating based on the setting of green features and design as well as using environmentally friendly building materials based on the Green Rating Scheme of the Public Works Department of Malaysia. The existing government buildings will be renovated in stages, while the private sector is also encouraged to

obtain green certification for private buildings such as GreenPASS and Green Building Index (GBI). The green rating of a building is based on the efficient or energy-efficient use of resources and equipment, and therefore increasing the number of green-rated buildings can help to reduce greenhouse gas (GHG) emissions, which can contribute to global warming (Doyle et al., 2009; Glavinich, 2008).

d. Strengthening Disaster Risk Management

For the implementation of good environmental governance, the aspect of DRM should be strengthened to prevent and mitigate the impact of disaster events on people and infrastructure. The comprehensive DRM strategy covers all aspects, including hazard and risk management, preparedness and mitigation of vulnerabilities, as well as response and recovery. Strengthening disaster risk management should ensure a faster and more effective response period (Jahi, 2001). The measures to be implemented by the relevant ministries and agencies at all federal, state, and local levels are as follows:

i. improvement of the institutional framework, policies and legislation of DRM under the National Security Council (MKN) through the establishment of crisis and disaster management centres, the formulation of DRM policies and relevant legislation, as well as the revision of existing standard operating procedures;
ii. ensure compliance with existing environmental standards and development guidelines and take into account aspects of climate change in the planning, evaluation, and implementation of development to reduce the risk of environmental disasters;
iii. implement hazard and risk assessments to assist in making more sustainable development decisions and planning;
iv. strengthen coordination and cooperation between agencies related to disaster management at the federal, state and district levels including distribution of resources and assets;
v. enhance the preparedness, response, and recovery capabilities of all parties involved in disasters;
vi. by updating detecting technologies and forecasting systems, disaster detection and early warning systems would be improved;

vii. joint mapping of hazardous and high-risk areas jointly with relevant departments such as the Department of Irrigation and Drainage Malaysia, the Department of Minerals and Geoscience Malaysia (JMG), the Remote Sensing Agency Malaysia and the Department of Survey and Mapping Malaysia;

viii. improving communication strategies and inter-agencies platforms related to disaster management, as well as between the government and the people;

ix. raise awareness, build capacity, and empower the community to take early steps in dealing with disasters through regular training programmes and scheduled emergency training; and

x. DRM should be made a prerequisite for urbanisation in order to encourage business investment.

e. Raising Awareness to Create Joint Responsibility

To realise development planning and good environmental governance, awareness of caring for the environment is a shared responsibility. For example, Article 13 of the Convention on Biological Diversity directed each country that signed the agreement, including Malaysia, to promote and support efforts towards understanding and developing education and public awareness programmes. This programme is known as "Communication, Education, and Public Awareness" (CEPA) and is often used in biodiversity conservation and other environmental governance efforts (Perkins et al., 2011).

The implementation of CEPA programmes involving all levels of life will be further strengthened to increase the level of awareness and participation of the community, especially on the role of climate change development in addressing environmental issues in the aspect of governance. Thus, the effective CEPA Programme will certainly be successful in fostering a sense of shared responsibility among all stakeholders, including the private sector, academia, civil society associations, and non-governmental associations (NGOs) in complementing and supporting the government's efforts. The platform will be created to share best practices, knowledge, and expertise as well as the cooperation of all parties in environmental governance (Chapman, 2007).

The implementation of the CEPA programme is led by the Ministry of Natural Resources and Environment (NRE) to coordinate with the relevant ministries and agencies to develop a comprehensive and holistic CEPA programme. All these efforts are to foster an environmentally friendly lifestyle as well as raise awareness of the general public's responsibility for environmental governance issues, especially in the aspect of climate change. NRE will coordinate and integrate the CEPA programme, so that information on environmental awareness is well coordinated despite the different themes and implemented by various agencies, such as green products, low-carbon mobility, recycling and waste retrieval, sustainable use of energy resources, management of forests and water supply, and the impacts of climate change to raise public awareness.

Consistent and integrated CEPA programmes can be introduced and implemented in schools and institutions of higher learning, including technical and vocational education, to foster change of mind and behaviour in line with the smart environmental lifestyle (Carr, 2004). In addition, the CEPA programme will also be introduced in training programmes for professionals and skilled workers through continuous engagement with related parties. In other words, the CEPA programme plays an important function in the context of environmental governance by creating a multi-sector network of cooperation and ensuring that any action plans, policies, laws, and so on triggered by the government can be implemented effectively and not isolated from the community (Siti Khatijah Zamhari & Christopher Perumal, 2016).

Proposed Framework For A Holistic Environmental Management Model

Today, effective environmental management necessitates thorough planning and implementation structure that involves the public, the business sector, and the government. To give some groups an easier overview, this article proposes an integrated model of the environmental management framework. This is because ineffective environmental management will inevitably fail to satisfy the requirements of the natural system or the laws and regulations set forth by the government, which results in the occurrence of numerous disasters, as has been the case lately.

The holistic environmental management model is interconnected between one component and another to ensure understanding and cooperation of all parties in all aspects. However, if there is no understanding and cooperation in a holistic environmental management system, then the environmental management model is only a reference and not a guideline in better environmental management planning. Thus, the commitment of all parties is important so that there is no failure of some components within the framework of the integrated environmental management model and they are subsequently able to better maintain environmental sustainability (Figure 1.2).

Conclusion

A balanced development plan is important to ensure the sustainability of environmental governance for the future survival of mankind. If the country's development planning is carried out without regard to the environmental governance aspects, then there will be widespread pollution, and the frequency of environmental disasters will also always increase. For example, the Environmental Performance Index (EPI) has been developed by Yale University and Columbia University, demonstrating the country's performance position in addressing critical environmental issues. There are two main points measured in the EPI, which are environmental health and ecosystem vitality. Environmental health is used to measure the protection of human health from hazardous environments, while ecosystem vitality measures the protection of ecosystems and the management of natural resources. The status of the Environmental Performance Index (EPI) is an important tool for the government that acts as a policymaker to continue to strive to preserve and safeguard the environment to be in better shape in the future. In other words, the transparency of EPI data allows the government to be the starting point for the country's further action to improve environmental performance.

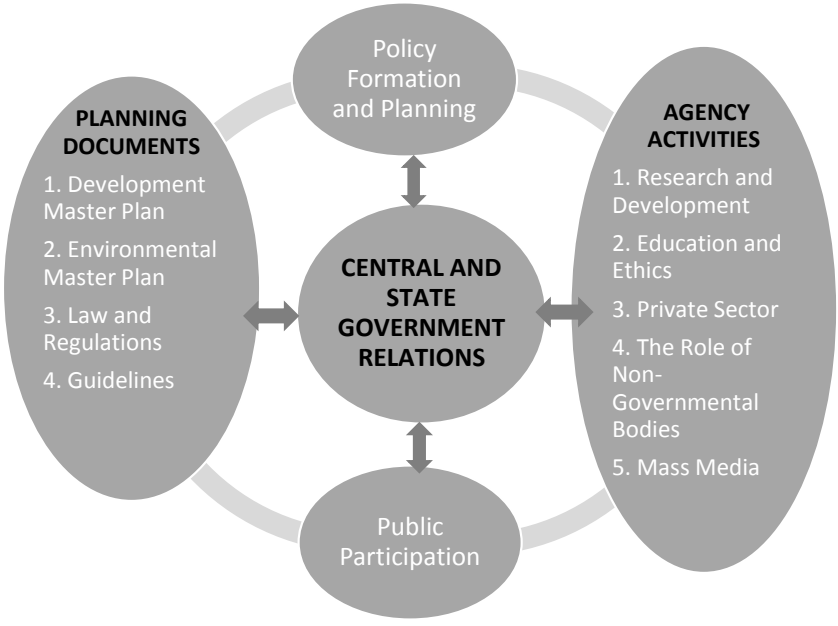

Figure 1.2. Holistic Environmental Management Model

Source: Adopted form Jamaluddin Md Jahi 2001

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LAND CONFLICTS ON FOREST AND PLANTATIONS

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Abstract

Tenurial conflicts occur on the plantation and forestry lands in Indonesia. It is due to overlapping ownership claims. Based on this background, this research was conducted to explain tenure conflicts in plantation and forestry lands, the causes of conflicts, and how to resolve conflicts. This research was conducted using a qualitative descriptive method by taking case examples at two locations in West Java and West Kalimantan. The research results show differences in the causes of conflict in West Java and West Kalimantan. It is related to the historical aspect of land ownership. Conflict resolution in the two regions is also different, influenced by the state of belief of the indigenous peoples who live in the region. The conclusion is that tenure conflicts occur because there is overlapping ownership and because there are overlapping regulations to understand land ownership.

Introduction

Land is a crucial factor for human life. Besides being a food source, the land is also a symbol of power. Who owns the land? He is in power and whoever can own the land. Some communities even associate land ownership with the realization of well-being (K. D. Astawa, 2015).

The importance of the function of land for human welfare causes the land to become a source of conflict between the parties. Land use for constructing government facilities, public facilities, and improving people's welfare through the transmigration program or other development programs mainly contains tenure conflicts—land conflicts due to the struggle over land ownership.

Most tenure conflicts occur on forestry land and plantation land. Forestry conflicts occur in almost every forest area in Indonesia, especially forests that involve local communities in their management. It happens because ownership claims from two or three parties involve the utilization of the forest—for example, claims of ownership by indigenous peoples, the government, and entrepreneurs.

Determination of the status of state forest areas was only carried out in 1970 since the official promulgation of Law (UU) Number 5 concerning Forestry in 1967. This condition led to tenure conflicts between the state and indigenous peoples (local communities), considering that these forests had already been managed and used by indigenous peoples for generations before being designated state forests. "In general, indigenous peoples in Indonesia face the problem of fighting over land and other natural resources" (AMAN, 2010). This condition occurs because indigenous peoples do not formally own land and forest resources. Meanwhile, the state only recognizes land ownership if there is a legality aspect.

Tenurial conflicts have occurred in forest areas so far due to the dualism of the land system, namely the land system regulated in the Agrarian Law and the Forestry Law, as well as the land tenure system according to the Government and the Community. In *de jure*, forest areas are under the control of the state, but *de facto*, they are controlled by communities that have lived and depended on forests and forest products for generations. "The Pulo Panggung land conflict in Lampung which caused people to be displaced because their land was declared a protected forest and wildlife sanctuary, the removal of the Katu indigenous people from within the Lore Lindu National Park through the CSIADCP project, but was rejected by the Katu Community" (Fuad and Maskanah, 2000).

Since the issuance of the Decision of the Constitutional Court (MK) Number 35/PUU-X/2012 regarding customary forests, which annulled

several paragraphs and articles governing the existence of customary forests in Law Number 41 of 1999 concerning Forestry. Customary forests now belong to indigenous communities. However, the existence of MK 35 does not automatically give legal aspects to customary forest ownership. The Constitutional Court's acknowledgment is not constitutional but declaratory. Consequently, all concessions over customary forests must be reviewed for approval from the entitled customary law communities. Despite being strengthened as a legal subject, referring to the Basic Agrarian Law, when customary law communities wish to determine the function of customary forests (protection, production, or conservation), they still need to seek state approval.

An example of an indigenous community having complete control over their traditional territory, including customary forest, is the Baduy community, which was strengthened by "Lebak Regency Regional Gazette Number 65 of 2001 Series C Lebak Regency Regional Regulation Number 32 of 2001 concerning Protection of the Ulayat Rights of the Baduy Community". Unlike the Baduy people, the Kasepuhan indigenous people in Sukabumi Regency do not receive the same treatment. Until now, they are still fighting for access rights to customary forests, which are partly located adjacent to the forests of Mount Halimun Salak National Park.

Conflicts over plantation land in Indonesia have occurred since the New Order era. It is related to the massive development carried out by the state in various places involving land use, the term "land hunger", for example, the development of oil palm plantations which involves conflicts between local communities, entrepreneurs, and local governments. The original aim of developing various plantations was to improve people's welfare, for example, through the plasma nucleus pattern, which involved entrepreneurs as the core and local communities as the plasma. However, in practice, not all of these plantation locations were successfully developed without conflict. Several locations caused conflict, mainly because the community claimed the land that was to be used as plantation land as their land. Some examples of conflicts in the plantation sector include the Kalibakar Plantation. "Farmers are protesting against the issuance of permits for the extension of the HGU for the Kalibakar Plantation by the government, which until now has

not been completed. The conflict emerged in the form of resistance and protest movements" (K. D. Astawa, 2015).

Based on the above background, this research was conducted to describe how tenure conflicts in the forestry and plantation sectors occur in Indonesia, as well as what factors are the source of the conflict, by taking examples from conservation forests and production forests in Indonesia, which involve the local community.

Methods

This study used a qualitative descriptive method, with locations in the Mount Halimun Salak National Park Forest in West Java and the Dayak Iban Sungai Utik customary forest in West Kalimantan. Data collection was carried out in-depth interviews with the traditional heads of Kasepuhan and Tuai Rumah Dayak Iban Sungai Utik, as well as forestry officials at Mount Halimun Salak National Park, West Java and forestry officials in West Kalimantan during the research period from 2013 to 2018. In addition to research data, data from the literature review results were used on several other people's research results.

Results and Discussion

Tenurial Conflict in the Forest Area

Tenurial conflicts do not solely lie in whether the status of a forest area is legal as a state forest. However, the determination of the status of a forest area must accommodate the existence of land and forest areas. Tenurial conflicts in forest areas involve not only the community and the state, but conflicts of power and authority over forest control also occur due to differences in interpretation and understanding of state control over natural resources in Indonesia between various parties. For example, the regional autonomy law, which gives decentralization authority to the regions, has created new problems in tenure conflicts in forest areas.

The central issue of community and state conflicts over forest areas and resources in the two forest areas (GHSNP and Sungai Utik forest) is ownership claims. Claims on land ownership give birth to tenure

conflicts. Forest resource conflicts are conflicts over land, where land includes concessions, plantations, and or protected areas. Subsistence communities have always found themselves in conflict over control of land and forest resources.

Land in the Unitary State of the Republic of Indonesia is regulated in the 1945 Constitution Article 33 paragraph (3) that *"Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people."* The law gives the meaning that the land and the assets in it belong to the state. It becomes a problem when the state wants to use the land rights in conflict with traditional customary rights. Thus, conflicts over forest resources between indigenous peoples and the state occur due to overlapping laws and regulations. On the one hand, they recognize the rights of indigenous peoples. On the other hand, they claim that all land and forest areas are under the control of the state.

Table 1. Territory Claims According to the Kasepuhan and Dayak Iban Sungai Utik Indigenous Peoples

Indicator	Mount Halimun Salak National Park	Sungai Utik Forest
Local actor	Kasepuhan Community	Sungai Utik Dayak Iban Community
Length of stay in the area	Since 634 years ago then	Since 1972
Claim mark over customary territory	Ancestral graves	Tembawai (former longhouse)
Markers claims of individual ownership	Farm and waste field opening	Fields and abandoned fields/fields (Damun)

Based on the table above, it is known that the Kasepuhan community has been in the location since 634 years ago when the Kasepuhan community first moved from Jasinga to Bogor. At the same time, the history of ownership of the Sungai Utik area by the Dayak Iban Sungai Utik has been relatively recent since 1972. Previously the Dayak Iban tribe came from Lanjak in the 1800's. It was recorded that there were 12 tramways (former long houses) before arriving in Sungai Utik Hamlet. Before 1972, the Sungai Utik area was controlled by the Embaloh Dayak. Then the area was given from the Embaloh tribe to

the Iban Dayak with a customary agreement. This area belongs to the Dayak Iban Sungai Utik tribe, including ghosts, as long as one Dayak Iban is living in Sungai Utik. If all the Dayak Iban Sungai Utik people leave the area, then the area belongs to the Embaloh tribe again.

In land ownership, according to *adat*, there is what is called *adat* (collective) ownership, and there is individual ownership. This individual ownership in the Kasepuhan Community and the Dayak Iban Sungai Utik Community is marked by former fields. The person who first opens a field then he will become the owner of the land. In Dayak Iban's terms, the former fields are called "Damun". In collective and individual ownership, the land is called customary land or under customary control.

The problem is that land claims by indigenous peoples need to have black-and-white evidence (certificates) but only historical aspects. This claim will conflict with claims by the state as the ruler of all land-based on state laws and regulations. Land without a certificate is recognized as state land.

Furthermore, the 1999 Forestry Law required Village Governments to implement sustainable forest management practices, while Law No. 22 of 1999 requires them to utilize resources to generate income to finance development programs, encourage short-term benefits and accelerate the exploitation of forest resources. Furthermore, PP No. 34 of 2002 concerning Forest Management and Preparation of Forest Management Plans, Forest Utilization and Use of Forest Areas provides operational guidelines for implementing Law No. 41/1999 concerning Forestry. The regulation gives authority to the central government to make decisions on granting forest concessions for logging with high-profit prospects, a right that the regional government says should be part of their authority. Thus, forest tenure conflicts do not only occur between communities and the state but can also occur between the state and the state.

Under the Basic Agrarian Law, all land must be registered, and land without a title is assumed to belong to the state (MacAndrews, 1986). In concession and conservation areas, many local communities retain land rights. However, these rights are rarely enforced (Barber, 1998), and indigenous peoples must negotiate more concrete terms of protection for their lands. Land claims by indigenous peoples without proof of

ownership cannot be justified. Indigenous peoples can be evicted from the land they have claimed for decades and which has become their livelihood source, if the state issues a different designation policy for the land. The case examples in GHSNP and the Sungai Utik forest show conflicts over land and forest resources where each party claims that the land and forest resources are theirs. The state claims that the forest area is a state forest, TNGHS is a conservation forest, and the Sungai Utik forest is a production forest. Meanwhile, indigenous peoples also claim to be in indigenous forest areas.

Based on the results of previous research, it is known that one of the causes of conflict over forest resources is the existence of interests over land claims in forest areas from each of the conflicting parties (Fuad and Maskanah, 2000). Therefore, conflicts over forest resources can also be described as tenure conflicts. Tenurial conflict is the estuary of conflict between concept and reality between tenure issues that have never been resolved and are only considered as "latent potential conflicts" that are finding their momentum. The conflict between the concept of tenure between the community and the government exploded into a tenure conflict (Iskandar and Nugraha, 2004).

Conflicts in the Kasepuhan and Dayak Iban Sungai Utik communities can also be called tenurial conflicts. Tenure or land is a source of conflict between concepts and reality between issues of tenure rights. The conflict over the concept of tenure between the community and the state becomes a tenure conflict when the conflict has eliminated the right of access to that tenure. Iskandar and Nugraha (2004) see tenurial conflicts as latent conflicts because these issues have never been resolved and find their momentum to erupt into tenurial conflicts. Almost all forest areas are experiencing tenurial conflicts, the intensity, and scale of which tend to increase sharply.

Tenurial conflicts occur starting from territorialization politics. From a historical perspective, the territorialization of forest areas can be explained, starting from the local system run by the community until the inclusion of territorialization politics introduced by the colonial government and the independent Indonesian Government. The reality of forest resource conflicts as territorialized politics was also stated by Maring (2010) in looking at the communities around Mount Noge. Similar to what happened in the Lerokloang Community of Flores,

NTT (Maring, 2010), the territorialization system implemented by the Kasepuhan Community in GHSNP and the Dayak Iban Community in Sungai Utik can be seen in two ways, namely the history of territorialization of land tenure and territorialization of control or utilization of natural resources.

Table 2. Territorialization of the Kasepuhan and Dayak Iban Peoples of Sungai Utik

Indicator	Mount Halimun Salak National Park	Sungai Utik Forest
Land Tenure System	Customary land tenure system and individual tenure	The customary land tenure system and individual tenure
Utilization Natural Resources	Through the zoning concept according to *adat*	Through the zoning concept according to *adat*

Based on Table 2, the land tenure system in the Kasepuhan and Dayak Iban Sungai Utik communities consists of two land tenure systems, namely customary land tenure and individual land tenure (see Chapter 4 for details). According to *adat*, the natural resource utilization system is carried out through zoning. The Kasepuhan community divides the forest into four wewengkon (zonations): Leuweung Titipan, Leuweung Tutupan, Leuweung Cawisan, and Leuweung Garapan. In contrast, the Dayak Iban Sungai Utik Community divides the forest into three areas: Kampung Taroh, Kampung Galao, and Kampung Endor Kerja. Each zone reflects the rights, obligations, and prohibitions the community must obey. The rights owned by the community can be identified as follows: the right to use the area for both direct and indirect economic value; the right to lend or transfer ownership; control mechanisms over the use of rights; obligations and prohibitions for each individual who is bound by these rights; and traditional symbols indicating ownership of forest resources.

In the history of GHSNP, there have been several overlapping ownership/claims by the government from the Dutch East Indies until the time of Indonesia's independence, with claims by the Kasepuhan indigenous people. Several times the community lost their land rights. Finally, in 1957, the government issued Government Regulation No. 64/1957, which stated that forest management activities and

their exploitation, especially in Java and Madura, were handed over to the Autonomous Regional Governments. During this period, the government allowed local communities to carry out activities in the Mount Halimun Salak area by requiring the community to give a portion of their harvest (kabubusuk) to the local government.

The regional government decree marks an agreement between the government (state) and the community, in which the community recognizes the state's "right" in the area. However, they also have "access" to forests for livelihood and economic activities, as well as for the Kasepuhan Customary cultural traditions, which manage forests through the concept of local knowledge about "wewengkon". In 1992, the state, through the Decree of the Minister of Forestry No. 282/Kpts-II/1992, changed the status of a nature reserve forest (Halimun Mountain) to become Halimun Mountain National Park with an area of 40,000 hectares. Outside the Mount Halimun National Park area, the management is carried out by Perhutani and has the status of a production forest. At this time, the community was still allowed to carry out activities in the forest area, managing the forest together with Perum Perhutani by giving a portion of 15%–25% of the harvest to Perum Perhutani. This condition shows that the community recognizes the state's "right" as long as they have "access" to the forest for livelihood, economic activities, and cultural traditions in managing forest areas based on local knowledge.

In 2003, based on the Decree of the Minister of Forestry No. 175/Kpts-II/2003 concerning the Designation of the Mount Halimun National Park Area and Changes in the Function of Protected Forest Areas, Permanent Production Forests, Limited Production Forests in the Mount Halimun Forest Group and Mount Salak Forest Group with an area of 113,357 hectares become Mount Halimun-Salak National Park. Based on the decree, all areas of Mount Halimun Salak became National Parks. The basis for the consideration of the issuance of this decree is forest damage in the area managed by Perum Perhutani and indigenous peoples. Since then, the Kasepuhan Community has not only lost their "rights" but also lost access. This condition, of course, will place the state and society in a conflict situation.

Table 3. Rights of the Kasepuhan Community Before and After 2003

Type of Right (Right)	Before 2003	After 2003
Access right	Yes	No (yes but limited)
Withdrawal right	Yes	No
Management right	Yes	No
Exclusion right	Yes	No
Alienation/diversion right	No	No

Source: Rahmawati, 2013

The experience of the Kasepuhan Community shows that since the colonial period, there has been the appropriation of community lands for the benefit of the state. The state limits the space for the community to move by providing lands designated for public housing. However, in terms of status, the land is state land (Galudra, et.al., 2005). The Kasepuhan people have been involved in conflicts with the state since the colonial era. However, conflicts always subside when the community has access to land for livelihood purposes and access to forest management based on local community knowledge, even though they have lost their property rights over the land. As long as they have access to the area, the community can accept the existence of ownership claimed by the state. Ribot and Peluso (2003) define access as the ability to benefit from something. In this case, that something is a forest resource. However, when there is no access, conflict becomes inevitable.

The history of controlling the Sungai Utik forest area is different from TNGHS. The control of the Dayak Iban Sungai Utik Community in the Sungai Utik forest area only began in 1972. The Dayak Iban people inherited the "rights" and "access" to the area from the Embaloh Dayak tribe. Even though the Dayak Iban Sungai Utik community has full "rights" and "access" to the area, they do not arbitrarily exploit the forest. They manage the forest with their local concept/knowledge of forest governance, where the forest is divided into areas/villages. Only endor work villages can be worked on by the community for their livelihood and economic activities.

In 1984, 1997, and 2004 there were open physical conflicts between the Dayak Iban Sungai Utik indigenous people and people in business

as a reaction from the community on state policy when the state issued IUPHHK permits. Even though the community succeeded in expelling the entrepreneur from the location, the tenure conflict never subsided. The struggle of the people to get the "right" never stops. This fact shows that even though the tenure of Sungai Utik land and forest was not long (since 1972), history has proven that their presence in the area is very dominant. They have all access rights to the forest. Even the existence of government policies (both central and regional) is not able to expel the community from the area. Even though, formally, they do not have property rights, they do have access. They can manage and benefit from forest areas.

IAs in property rights, it focuses on ability rather than rights; the formulation brings attention to the various social relations that can force or enable society to benefit from resources without focusing only on property relations (Ribot and Peluso, 2003). It means that even though the Dayak Iban do not have property rights (in the concept of the state), they do have access to the forest. Access is more akin to a bundle of power than property which is a bundle of rights. So, ownership rights are essential for both the Kasepuhan and Dayak Iban communities to ensure continuity of access, as acknowledged by Bromley (1998; 200), McCay and Acheson (1987), Linch and Harwell (2006) that property rights are an essential factor in natural resource management.

Apart from many differences, the two communities (Kasepuhan and Dayak Iban) have many things in common: they are both highly dependent on forests. Forests are the community's primary source of livelihood, so if access to forests is revoked, it is the same as eliminating their source of livelihood. Tenure conflicts over state rights over land are based on Statutory Regulations Article 33 of the 1945 Constitution and the UUPA.

Community rights to land are based on a historical basis. The Kasepuhan people had been in the forest area about 634 years ago. Meanwhile, the Dayak Iban Sungai Utik Community is based on a historical basis due to an agreement with the Embaloh tribe. The state's rights to land are based on "Legal regulations: Article 33 of the 1945 Constitution; BAL; Article 28 of Law Number 41 of 1999; Article 133 PP Number 3 of 2008".

Tenurial Conflict Settlement

Various forest areas in and around Indonesia have long been full of economic, social, and cultural activities. The Kasepuhan Community in Mount Halimun Salak National Park (TNGHS) is an example of indigenous peoples who are currently in a state of conflict over forest tenure with the state in the context of saving the forest, while the Dayak Iban Community in Sungai Utik Putussibau Kapuas Hulu, West Kalimantan, is one of the examples of community-state conflict involving entrepreneurs in the context of forest utilization.

Tenurial conflicts can be resolved through a formal juridical approach and must consider the historical perspective. In this context, tenurial conflicts do not solely lie in whether or not the determination of the status of a forest area as a state forest is legal. However, the determination of the status of a forest area must accommodate the existence of customary land and forest areas as the rights of indigenous peoples. Forests are not only seen from the aspect of regulation but also must consider aspects of the cultural community who live from and are around or in forest areas.

In both, the community reveals that ownership rights are not based on state grants or formal documentation but rather indicate a dynamic development at the local level, how the community, throughout the history of control over land and forest resources, has developed knowledge and norms that give rights, obligations, and prohibitions of the community, on the management and utilization of forest resources.

Conflict can have good and bad effects depending on how it is managed. Sometimes the use of conflict management strategies for a particular conflict is booming, but it is not successful in other conflicts. Conflict management is a conflict resolution process involving conflicting parties and other parties as mediators—desired resolution (Wirawan, 2013).

In conditions of conflict, when facing his opponent, someone in conflict will behave in a certain way. This behavior is called conflict management or conflict communication style (Stella Ting-Toomey, 1998; Stella Ting-Toomey, 2017). Conflict resolution in a particular society or community will depend on the conflict communication style

of its leaders. Autocratic leaders tend to be repressive, suppressive, competitive, and aggressive and try to defeat their opponents in conflict. Conversely, a democratic leader uses a conflict communication style deliberatively, listens to the opinions of his conflict opponents, and seeks to win and win solutions.

Several factors are indicated as causes that influence the conflict management style of a community. These factors include perceptions about the causes of conflict, patterns of communication in conflict interactions, attitudes of the perpetrators of the conflict, the values of the adopted country, and the power possessed.

Yamauchi examines conflict cases in Thailand, Indonesia, and Malaysia. These three countries have differences in conflict resolution. In Thailand, there is a need for government centralization in natural resource management, including forests, and harmonization between authorities. In Indonesia, the deterrence of the armed forces is significant. In Malaysia, centralization emerged from the state government to the federal government in some issues, such as recognition of local community interests. In conflict resolution, Yamauchi concluded that "to prevent conflict, it is important to clarify and guarantee the basic rights of indigenous peoples through the law, provide land ownership status to local communities, and provide opportunities to participate in decision-making processes at various stages".

In the conflict resolution process, requiring the introduction of an AMDAL would be a valuable method of increasing local community participation. Once a conflict occurs, a neutral and independent mediator who has no interest in the case and the parties must be included in the conflict resolution mechanism. People's rights must be clearly and reliably defined in court. Most of the above elements have been mentioned and discussed in international form. Although the importance of these elements has been recognized at the national or sub-regional level, more concrete action needs to be taken to realize these concepts.

Conclusion

Tenurial conflicts occur on forest land and plantations. Both types of conflict involve parties, at least involve the state and local communities. Generally, conflicts occur because of claims over the area. The community claims the land based on historical aspects, while the state claims the land based on juridical aspects. All land without ownership certificates is state land.

By taking the examples of conflicts in two regions, namely in West Java and West Kalimantan, the differences in the causes of the conflicts and the resolution of these conflicts are known. In West Java, the conflict occurred because the customary forest area was duplicated with the Gunung Halimun Salak National Park area. When the state expanded the area of the Gunung Halimun Salak National Park, the location for the expansion took a forest area claimed by the Kasepuhan people as customary forest. Meanwhile, conflicts occurred in West Kalimantan because the state issued permits for using timber products in forest areas claimed as customary forests Utik River. The conflict in West Kalimantan is between the community and the state and involves business people.

Conflict resolution in the two regions is different. The Kasepuhan Community resolves conflicts by way of deliberation. For the Kasepuhan people, access rights are more important than ownership rights, so the demands of the Kasepuhan indigenous people are access to forest management even though the forest still belongs to the state. Meanwhile, ownership rights are the most important for the Dayak Iban Sungai Utik Community, so access to forest management and claims to forest ownership is fully implemented according to the customary concept. This difference is due to differences in the state of belief.

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LAND REGISTRATION OF CUSTOM LAND POST GOVERNMENT REGULATION NUMBER 18/2021 JUNCTO GOVERNMENT REGULATION NUMBER 24/1997

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Abstract

Ulayat land is often a source of conflict because there is no legal ownership. This study aims to explain the procedures for land registration, especially customary land. This research uses Normative Legal Research Methods. Normative legal research is legal research conducted by examining literature or secondary data. Normative legal research is also called doctrinal legal research. The study results found that the UUPA and its implementing regulations do not regulate the timeframe and limits for changing and registering ex-ulayat lands, instead enforcing the provisions of Article 96 of Government Regulation Number 18 of 2021, which require registration customary land, former customary land, traditional land for a certain period. The legal consequence is that there is written evidence of former communal land, which is currently only a legal entity as a guide in land registration.

Introduction

Based on the provisions of Article 11, paragraph 1 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) that the legal relationship between people (including legal entities) with earth, water, and space as well as authorities originating from legal relations it will be regulated to achieve the maximum prosperity of the people (as Article 2 paragraph 3 of the UUPA). The people's wealth means nationality,

welfare, independence, sovereignty, just, and prosperity, without control over the lives and work of other people that exceed the limits.

To guarantee legal certainty, Article 19 of the UUPA stipulates that the government shall conduct land registration throughout the territory of the Republic of Indonesia according to provisions specified in government regulations. Arrangements for land registration are regulated in Government Regulation Number 10 of 1961 concerning Land Registration, which has been amended by Government Regulation Number 24 of 1997 concerning Land Registration, and further arrangements are regulated by Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1998 concerning Provisions Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, which has been amended successively by Regulation of the Head of the National Land Agency Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1998 regarding Provisions for Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 7 of 2019 concerning the Second Amendment to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1998 concerning Provisions for Implementing Government Regulation No. 24 of 1997 concerning Land Registration and Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 16 of 2021 concerning the Third Amendment to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1998 concerning Provisions for Implementing Government Regulation Number 24 of 1997 regarding Land Registration.

Land registration is a series of activities carried out by the government continuously and regularly, which include collection, processing, bookkeeping, and presentation and maintenance of juridical data and empirical data in the form of maps and lists of spatial land parcels, basements, and housing units. Flats, including issuing certificates of proof of rights over plots, basements, and space above land that already has rights and ownership rights to flats units and certain rights that burden them. Land registration consists of two

types: systematic land registration and sporadic land registration. Land registration is carried out on all land parcels within the territory of the Republic of Indonesia. Land registration conversions are also carried out on land rights on former western rights and also on land rights on former customary land, including land registration on land parcels originating from clearing land or clearing of the forest.

The conversion of the former western land rights based on the provisions of Presidential Decree No. 32 of 1979 ended on August 8, 1979, and therefore the land rights of the former western rights which did not convert the land rights stipulated in the BAL became land directly controlled by the state, this is then reaffirmed in Article 95 paragraph 1 of Government Regulation Number 18 of 2021, which stipulates: *"Structural evidence of the land of former western rights is declared invalid and its status is land directly controlled by the state"*. Meanwhile, the conversion of rights to former customary-owned land as regulated in the Conversion Provisions in the UUPA is then emphasized and limited in Article 96 of Government Regulation Number 18 of 2021, which stipulates: *"Written evidence of former customary-owned land owned by individuals registered within a maximum period of 5 (five) years from the enactment of this Government Regulation"*.

Suppose the period ends as referred to in paragraph (1) of Government Regulation Number 18 of 2021. In that case, written evidence of former customary-owned land is declared invalid and cannot be used to prove land rights and only as a guide in land registration. And for new plots of land originating from land clearing or forest clearing, Article 97 Government Regulation Number 18 of 2021 stipulates: *"Land certificates, compensation certificates, village certificates, and other similar means which are meant as certificates of ownership and land ownership issued by the village head/lurah/sub-district head can only be used as a guide in the framework of land registration"*.

Indirectly, the provisions of Article 96 and Article 97 of Government Regulation Number 18 of 2021 reduce the status of written evidence of former customary-owned land and written proof of land from land clearing or forest clearing, that is, from a means of proving land rights, it only serves as a guide in the context of registration land. Article 3 of the UUPA provides recognition of the existence of customary land owned by ordinary law communities, namely traditional rights. However, the

UUPA needs to regulate in detail regarding traditional land owned by individuals. Arrangements for land rights that were customary land owned by individuals are only found in the Conversion Provisions in the UUPA. Therefore, there are two types of traditional land, namely customary land owned collectively by ordinary law communities and ancestral land owned individually. This study will discuss the registration of former customary land belonging to individuals. The formulation of the problem is as follows: (1) how to regulate the time limit for land conversion and registration of land rights that were formerly customary lands; (2) what are the legal consequences of the provisions of Article 96 of Government Regulation Number 18 of 2021 regarding the conversion and registration of land for land rights that were formerly customary lands.

Research Methods

This research used Normative Legal Research Methods. Normative Legal Research is legal research conducted by examining library materials or secondary data. Normative legal research is also known as doctrinal legal research. Peter Mahmud Marzuki explained that normative legal research is a process to find the rule of law, legal principles, and legal doctrines to answer legal issues. In this type of legal research, the law is often conceptualized as what is written in laws and regulations or as a rule or norm, a standard of human behavior considered appropriate. The data collection technique uses library research, namely data collection techniques, by conducting literature studies on both primary, secondary and tertiary legal materials.

Result and Discussion

Conversion and Registration of Customary Land Rights

The legal basis for the conversion of land rights that existed before the UUPA (24 September 1960) is the second part of the UUPA concerning conversion provisions consisting of nine articles, specifically for the conversion of lands subject to customary law regulated in Article II, Article VI, and Article VII Provisions for Conversion in the UUPA which were later confirmed by Regulation of the Minister of Agriculture and

Agrarian Affairs Number 2 of 1962 and Decree of the Minister of Home Affairs Number 26/DDA/1970 concerning Affirmation of Conversion and Registration of Former Indonesian Rights on Land.

Conversion of land rights is a change in the status and form of land rights that existed before the enactment of the BAL, namely land rights subject to western law and customary law are changed to land rights contained in the BAL. Arrangements for land rights in the UUPA are contained in Article 16 paragraph (1), namely property rights, usufructuary rights, building use rights, usufructuary rights, rental rights, land clearing rights, rights to collect forest products, and other rights that are not included in the abovementioned rights which will be determined by law as well as temporary rights as referred to in Article 53, namely lien rights, production sharing rights, boarding rights, and agricultural land lease rights which are regulated to limit the characteristics that contrary to the UUPA, and these rights are endeavoured to be removed in a short time. Land conversion registration aims to provide legal certainty and protection to holders of land rights or to issue certificates of proof of land rights that are valid as a powerful means of evidence per the provisions stipulated in the UUPA.

The conversion of former customary land is carried out following Article II of the UUPA Conversion Provisions, which stipulates: "(1) the rights to land that give the authority as or are similar to the rights referred to in Article 20 paragraph 1 as referred to by the name below, which existed at the time this law came into force, namely: *agrarisch rights*, *eigendom*, property foundations, *anderbeni*, rights to druwe, rights to village druwe, *jesini*, *grant sultans*, *lenderjenbezitrecht*, *altijddurende erfpacht*, business rights to bekah private land and other rights under any name which will be further confirmed by the Minister of Agrarian Affairs, since they come into effect this law becomes the property rights referred to in Article 20 paragraph 1, except if the owner does not meet the requirements as stated in Article 21; (2) the rights referred to in paragraph 1 belong to foreigners. These citizens, besides Indonesian citizenship, have foreign citizenship and legal entities not appointed by the government as referred to in Article 21 paragraph 2 become usufructuary rights or building usufructuary rights by the designation of the land, as will be further confirmed by the Minister of Agrarian Affairs".

While the Conversion Provisions in Article VI and Article VII stipulate as follows: "Article VI: The land rights that give the authority as or are similar to the rights referred to in Article 41 paragraph 1 as referred to by the names below, which existed at the time this law came into effect, namely: *rights vruchtgebruik, gebruik, grant controleur, bruikleen, ganggam bauntuik, anggaduh, bengkok, lungguh, pituwas,* and other rights under whatever name which will be further confirmed by the Minister of Agrarian Affairs since the entry into force of this law become the usufructuary rights referred to in Article 41 paragraph 1 which gives the authority and obligations as which is owned by the right holder at the time this law comes into effect, as long as it does not conflict with the spirit and provisions of this law; Article VII: (1) The existing permanent rights of gogolan, pekulen, or sanggan shall, at the time this law comes into effect, become the property rights referred to in Article 20, paragraph 1; (2) The non-permanent rights of gogolan, pekulen or sanggan become the usufructuary rights referred to in Article 41 paragraph 1, which the rights holders own at the time this law comes into effect; (3) If there is doubt whether a right of gogolan, pekulen or objection is permanent, then the Minister of Agrarian Affairs decides".

Conversion of former customary land as stipulated in Article II, Article VI, and Article VII of the UUPA Conversion Provisions mentioned above can be concluded as divided into three types, namely (1) the *erfpacht altijdurend* right is an *erfpacht* right given as a replacement for business rights on former private land, according to Staatdblad 1913–702. This right can be converted into property rights, usufructuary rights or building use rights, depending on the subject of the rights and their designation; (2) the *agrarische eigendom* right was an artificial right during the Dutch Colonial Government, which gave the natives a new solid right over a piece of land. *Agrarische* and *eigendom* rights can also be converted into property rights, usufructuary rights or building use rights by the subject of the rights and their designation; (3) gogolan rights are the rights of a gogol (coolie) over a communal village. Gogolan rights are also often called rebuttal rights or pekulen rights.

Gogolan rights can be divided into two types, namely (1) gogolan rights that are permanent if the gogol continuously owns the same land and the land can be passed on to his heirs; (2) gogolan rights that are not permanent if the gogol does not continuously hold the same

gogolan land and if he dies, the gogolan land returns to the village. Gogolan land that is permanent can be converted into property rights. Meanwhile, Gogolan land, which is not permanent, can be converted into usufructuary rights.

The implementation of the conversion is carried out following the provisions of Article 88 of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997, namely by confirming the conversion and recognition of rights, which is preceded by the announcement of empirical data and juridical data and their approval by the provisions of Article 86 and Article 87 of the Regulation of the Minister of State Agrarian Affairs/Head of the National Land Agency Number 3 of 1997, namely based on the Minutes of Ratification of Physical Data and Juridical Data on the land parcels in question then carried out the following activities:

(a) Rights over land parcels with complete written evidence as referred to in Article 60 paragraph 2 or Article 76 paragraph 1 of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997, namely accompanied by original documents proving the existence of the rights in question as referred to in Article 24 paragraph 1 of Government Regulation Number 24 of 1997, namely (1) grosse deed of eigendom rights issued based on the *Overschrijvings Ordonanntie* (Staatdblad 1834–27), which has been affixed with a note that the *eigendom* rights concerned are converted to property rights, or (2) grosse deed of *eigendom* rights issued based on the *Overschrijvings Ordonanntie* (Staatdblad 1834–27) since the enactment of the UUPA until the date the land registration was carried out according to Government Regulation Number 10 of 1961 in the area concerned, or (3) letter of proof of ownership rights issued based on the relevant Swapraja Regulation, or (4) certificate of ownership rights issued under the Regulation of the Minister of Agrarian Affairs Number 9 of 1959, or (5) Decree on the Granting of Property Rights from an authorized official, either before or since the UUPA came into force, which is not accompanied by an obligation to register the rights granted but has fulfilled all the duties mentioned therein, or land/landrante tax certificate, girik, pipil, kekitir, and Indonesian verponding before the enactment of Government Regulation

Number 10 of 1961, or (6) land/landrante tax certificate, girik, pipil, kekitir, and Indonesian verponding before the enactment of Government Regulation Number 10 of 1961, or (7) deed of transfer of rights made underhand signed by the head of customs/village/kelurahan head made before the enactment of Government Regulation Number 10 of 1961 accompanied by the basis for the rights transferred, or (8) deed of transfer of land rights made by the PPAT, where the land has not been recorded along with the reasons for the rights transferred, or (9) waqf pledges/waqf pledges made before or since the implementation of Government Regulation Number 28 of 1977 accompanied by the basis for the rights being donated, or (10) minutes of the auction made by the authorized auctioneer, whose land has not been recorded yet, accompanied by the reasons for the rights transferred, or (11) letter of appointment or purchase of plots of land to replace land taken by the government or local government, or (12) a certificate of land history that was made by the land and Building Tax Service Office accompanied by the basis for the rights transferred, or (13) other forms of written evidence with any name as referred to in Article II, Article VI, and Article VII of the UUPA Conversion Provisions, and whose written evidence is incomplete but there is witness testimony or the statement concerned as referred to in Article 60 paragraph 2 or Article 76 paragraph 2, that is, if the proof of ownership of a plot of land referred to in Article 60 paragraph 2 or Article 76 paragraph 1 is incomplete or not exist, proof of ownership of the parcel of land can be done with other evidence supplemented by the statement concerned and credible statements from at least two witnesses from the local community who have no family relationship with the person concerned to the second degree both in vertical and horizontal relations, stating that the person concerned is the valid owner of the land parcel, and the land is controlled by the applicant or by another person based on the applicant's approval, then the Chair of the Adjudication Committee or Head of the Land Office confirms the conversion to become property on behalf of the right holder which finally by giving a note on the filling list 201 with the sentences regulated in Article 88 paragraph 1 letter a.

(b) Land rights for which there is no proof of ownership but the fact that physical ownership has been proven for 20 years as referred to in Article 61 or Article 76 paragraph 3, the application must be accompanied by:

1. Statement letter from the applicant stating the following: (1) That the applicant has controlled the land in question for 20 years or more consecutively or has obtained such control from another party or parties who have managed it so that the time of possession of the applicant or his predecessors is 20 years or more; (2) that the land tenure is carried out in good faith; (3) such control has never been contested and therefore is considered to be recognized and justified by the customary law community or by the village/kelurahan concerned; (4) that the land is not currently in dispute; (5) if the statement contains things that are not following reality, the signatory is willing to be prosecuted before a judge criminally or civilly for giving false information.
2. Information from the village head/lurah or at least two witnesses whose testimony can be trusted because of their function as customary local elders and residents who have long lived in the village/kelurahan where the land is located and have no family relationship with the applicant to the degree both in terms of vertical and horizontal kinship, which justifies what was stated by the applicant in the statement above according to the form as indicated in Attachment 14.

Then the Chair of the Adjudication Committee or the Head of the Land Office recognizes it as a property right by placing a note in checklist 201 as stipulated in Article 88 paragraph 1 letter b. For such recognition, there is no need to issue a decision acknowledging the right.

In addition to the process of confirming the conversion and recognition of these rights, land registration for former customary land can be carried out in two ways, namely:

a. Systematic land registration, with stages of implementation as stipulated in Article 46 to Article 72 of the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 3 of 1997.

1. Location determination.
2. Preparation.
3. Formation of an adjudication committee and task force.
4. Completion of existing applications at the commencement of systematic land registration.
5. Counselling.
6. Collection of physical data.
7. Collection and research of juridical data.
8. Announcement of physical data and juridical data and their ratification.
9. Confirmation of conversion, recognition of rights, and grant of rights.
10. Bookkeeping of rights.
11. Issuance of certificates.
12. Submission of activity results.

b. Sporadic land registration, with stages of implementation as stipulated in Article 73 to Article 93 of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997.
    1. Sporadic application for land registration.
    2. Measurement.
    3. Collection and research of juridical data.
    4. Announcement of physical data and juridical data and their ratification.
    5. Confirmation of conversion, recognition of rights, and grant of rights.
    6. Bookkeeping of rights.
    7. Issuance of certificates.
    8. Submission of certificates.

With the enactment of Law Number 11 of 2020 concerning Job Creation and the subsequent issuance of Government Regulation Number 18 of 2021, the granting of ownership rights to former customary land must follow and fulfil the requirements stipulated in

Article 52 to Article 60 of Government Regulation Number 18 of 2021, the granting of building use rights to former customary-owned land must comply with and fulfil the requirements stipulated in Article 85 to Article 110 of Government Regulation Number 18 of 2021, and for the granting of use rights to former customary-owned land must comply with and fulfil the requirements stipulated in Article 111 to Article 134 of Government Regulation Number 18 of 2021.

Meanwhile, regarding the timeframe for converting and registering land for formerly owned customary land, until now, there is not a single law and regulation in the field of land and land registration that regulates this matter, but with the enactment of Law Number 11 of 2020 concerning Copyright Working with the issuance of Government Regulation Number 18 of 2021 in Article 96 as described above only regulates the validity period of written evidence of former customary land owned by individuals which can be used as evidence of land rights in land registration, namely a maximum of five years since the enactment of Government Regulation Number 18 of 2021 (February 2, 2026). If the time limit has passed, the written evidence of the former customary land no longer has legal status. It can be used as evidence of land rights but only as a guide in the framework of land registration. It will, of course, bring legal consequences to the position and function of written evidence of the former customary land in the legal rules of land registration.

The legal consequences of the provisions of Article 96 of Government Regulation Number 18 of 2021 regarding the conversion and registration of land for land rights that were formerly owned by customary land.

With the enactment of Government Regulation Number 18 of 2021, based on the provisions of Article 96 paragraph 2, written evidence of former customary-owned land within 5 years of the entry into force of Government Regulation Number 18 of 2021 is officially recognized as evidence of land rights, which during this in the land registration administration system is only used as a guide in the context of land registration for the first time on former customary-owned land, because the evidence is only land tax evidence issued during the Dutch colonial period, which is recorded in tax collection. The taxpayer is the owner of the land, so in the administration of land registration, it is used as

an indication that the name listed in the written evidence of the former customary land is the owner of the land. With the recognition as a "means of proving land rights" as described above, the written evidence of former customary-owned land is the primary basis for converting land rights into the provisions of the BAL.

Even though the UUPA and its implementing regulations do not regulate the deadline for the obligation to convert and register land for formerly owned customary land, Article 96 paragraph 1 of Government Regulation Number 18 of 2021 can be interpreted as a deadline for converting and registering land for formerly owned traditional land. This can be seen from the legal consequences if the provisions stipulated in Article 96 paragraph 1 are not implemented, then the legal sanctions specified in Article 96 paragraph 2 apply, where written evidence of former customary land is only a guide in the framework of land registration so that the granting of rights for land as stipulated in the conversion provisions in the UUPA for former customary-owned land will follow the conditions for granting land rights defined in Government Regulation Number 18 of 2021 as the implementing regulation of Law Number 11 of 2020 concerning Job Creation which has a position the same law as the UUPA.

Of course, with the sanctions contained in Article 96 paragraph 2, in the conversion and registration of land for former customary-owned land, other evidence or instructions are needed besides written proof of the former customary-owned land. It can be seen from the provisions in granting property rights as regulated in Article 54, granting usufructuary rights in Article 64, granting usufructuary rights in Article 88, and granting usufructuary rights in Article 114 have handled the existence of provisions regarding a statement or statement letter as required in Article 95 paragraph 2, thus if Article 96 paragraph 1 is not implemented, then by law this matter must be fulfilled by the owner of the former customary land in applying conversion and land registration of the former traditional land.

Conclusion

The UUPA and its implementing regulations do not regulate the timeframe and limits for converting and registering land on the former

customary-owned ground, but with the enactment of the provisions of Article 96 of Government Regulation Number 18 of 2021, which requires land registration of former customary-owned land within a certain period. At most, 5 years since the enactment of Government Regulation Number 18 of 2021. Article 96 is a time limit for written evidence of formerly owned customary land having legal standing to prove land rights to formerly owned traditional land.

Article 96, paragraph 2 of Government Regulation Number 18 of 2021, strictly provides legal sanctions for written evidence of former customary-owned land that does not convert and register land within 5 years, a maximum of 2 February 2026. The legal consequences are written evidence of former customary land that currently only has legal status as a guide in land registration. In the context of granting rights over land, other proof is required, including a statement of physical ownership of the land known by two witnesses as stipulated in the rules for granting property rights, usufructuary rights, building usufructuary rights, and usufructuary rights defined in Government Regulation Number 18 of 2021.

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MAPPING THE INTEGRITY OF KELURAHAN GOVERNANCE IN DKI JAKARTA PROVINCE

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Abstract

Kelurahan is part of the DKI Jakarta Provincial Government structure on a micro basis to serve the community. Its presence represents the face of government performance. Implementing the integrity principle in governance is an urgent aspect as part of a strategy to improve organizational performance and quality of public services; effective, transparent, and accountable. This study aims to describe the vulnerability of implementing the principle of integrity in governance at the village level and the integrity implementation score. The survey conducted in five regions, North Meruya, Tanah Tinggi, Setiabudi, Kramat Jati, and Warakas, illustrates that the integrity principle has been adequately implemented. This study used mix-method to collect qualitative and quantitative data addressing the vulnerability description and integrity implementation scores. The study results show that the principle of integrity has been applied at the *kelurahan* government level. However, several problems still need to be fixed, especially concerning the importance of coordination and transparency.

Keywords: Local Governance, Good Governance, Clean Government, Integrity

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Introduction

Kelurahan has a very strategic role in administering government and public services. Territorially, the *kelurahan* (the village in urban areas) is closer and has direct contact with the community. Regulation of the Minister of Home Affairs (Permendagri) Number 73 of 2005 stipulates that the sub-district is an apparatus of the district/city regional government within the sub-district working area and responds to the regent/mayor through the sub-district head. The *kelurahan* is led by a *lurah* (village head in urban areas) who has the main task of carrying out regional government, development and community affairs in his working area, including carrying out all other government affairs delegated by the regent/mayor.

The duties and functions of sub-districts in DKI Jakarta Province have been regulated in four regulations, namely (i) Governor Regulation (Pergub) Number 286 of 2016 concerning the Organization and Administration of City Administration; (ii) Regional Regulation (Perda) Number 12 of 2013 concerning Implementation of Integrated Services; and (iii) Governor Regulation (Pergub) Number 47 of 2017 concerning Guidelines for Implementation of One Stop Integrated Services; and (iv) Pergub Number 286 of 2016 concerning the Organization and Work Procedure of the Administrative City, places the sub-district as part of the administrative city regional apparatus. Meanwhile, DKI Jakarta Regional Regulation Number 12 of 2013 and Governor Regulation Number 47 of 2017 place sub-districts as part of the hierarchy of authority for implementing One-Stop Integrated Services (PTSP), which functions as a technical service unit (UPT), subordinate to DPMTSP. Article 74 in Pergub 286 of 2016 explains that PTSP at the *kelurahan* level is referred to as the Kelurahan PTSP Implementing Unit and is a work unit of the Kecamatan PTSP Implementing Unit in the *kelurahan* which is led by the Head of the Implementing Unit who is responsible to the Kecamatan PTSP Implementing Unit. The Head of the Kelurahan PTSP Implementation Unit is proposed to appoint, transfer and dismiss him by the Head of Service through or without written consideration from the *lurah*.

Based on the explanation above, *kelurahan* in DKI Jakarta Province has two main tasks and functions, namely (i) governance run by the *lurah* in order to assist the mayor in carrying out the delegation of authority

from the governor; and (ii) licensing and non-licensing services as a technical implementation unit, subordinate to DPMPTSP DKI Jakarta Province. Based on Permendagri Number 73 of 2005, this function can be categorized as carrying out other government affairs delegated by the Regional Head. *Kelurahan* in DKI Jakarta Province, as an instrument of the DKI Jakarta Provincial Government, is the front and bottom line in serving the public. That is why it can be a reflection to find out the government's performance and how the principles of integrity are implemented in the governance of the Provincial Government of DKI Jakarta.

The government, in the 2015–2019 National Medium-Term Development Plan (RPJMN), has understood and realized that governance and eradication of corruption are 2 of 4 development challenges that must be anticipated within the framework of accelerating national development. This understanding and awareness will continue in the 2020–2024 RPJMN. For this reason, the government continues to strive to implement transparency and good government governance where all people can access services. One of the programs must be carried out is bureaucratic institutional reform for quality public services.

The government's efforts to improve the integrity of government administration, development and public services can be seen in the issuance of Law Number 28 of 1999 concerning State Administration that is Clean and Free from Corruption, Collusion and Nepotism; Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001; and Regulation of the Minister of Administrative Reform and Bureaucratic Reform (Permenpan RB) Number 52 of 2014 concerning Guidelines for the Development of Integrity Zones Towards Areas Free from Corruption and Clean Bureaucratic Areas and Serving Within Government Agencies. This regulation was revised through Permenpan RB Number 10 of 2019. Within the framework of increasing the integrity of governance, development and public services in DKI Jakarta Province, the provincial government has set an activist agenda aimed at realizing government agency performance accountability (AKIP) with AA predicate as one of the Regional Strategic Activities stipulated in the Governor's Decree (Governor Decree) Number 1042 of 2018.

Gjalt de Graaf, Leo Hubbert, and Tebbine Struwe, in an article entitled *"Integrity Violation and Corruption in Western Public Governance: Empirical Evidence and Reflection from The Netherlands",* define the notion of integrity in governance as the quality of governance by moral values and norms which includes: (i) consistency, (ii) coherence, and (iii) legal compliance (Graaf, Hubbert, and Struwer, 2018). In addition, Gjalt de Graaf, Leo Hubbert, and Tebbine Struwer stated that there were nine typologies of integrity violations, which included: (a) corruption and bribery, (b) fraud, (c) theft and embezzlement, (d) conflict of interest in the form of giving, (e) conflict of interest in the form of side activities, (f) abuse of authority (including abuse of violence), (g) misuse of information, acts that are not commendable to other parties in the form of discrimination, intimidation and others, (h) misuse of resources, and (i) improper placement of personal time (use of working hours for personal gain) (Graaf, Hubbert, and Struwer, 2018).

The study of the integrity of governance at the kelurahan level in this article is based on the definition developed by Gjalt de Graaf, Leo Hubbert, and Tebbine Struwer to map and assess whether there have been acts of violation of integrity in the implementation of the duties and functions of the *kelurahan*. Which will be identified in several principles, namely (i) transparency of information and procedures, (ii) ease and speed of service, (iii) service behaviour, (iv) accountability, (v) maintenance of public order and the environment, (vi) empowerment community, (vii) community participation, (viii) handling public complaints, and (ix) conflict of interest.

Several articles discuss good governance at the *kelurahan* and village levels, among others, as written by: (i) Apphia Rantapesang, Johannis E. Kaawoan, and Franky R. D. Rengkung which discusses the role of the *lurah* in realizing good governance with a locus study of the Sagerat Village, Matuari District, Bitung City (Rantapesang, Kaawoan, and Rengkung, 2017); and (ii) Weny A. Dungga, Abdul Hamid Tome, and Apriyanto Moha regarding the application of sound governance principles in village governance in Telaga Jaya District, Gorontalo Regency (Dungga, Tome, and Moha, 2017).

The difference between this paper and the two articles lies in the aspects that are the focus of the discussion. Apphia Rantapesang, Johannis E. Kaawoan, and Franky R. D. Rengkung see and pay attention

to leadership in realizing good governance. Meanwhile, Weny A. Dungga, Adbul Hamid Tome, and Apriyanto Moha discussed and focused on how to apply the principles of good governance and described the factors that support and hinder the application of the principles of good governance. The research conducted and the results written in this journal are intended to complement other previous research, in particular, to complete the study of governance, specifically at the local level, especially in sub-districts, so that the study of governance at the local level will have various views and perspectives.

This research is expected to provide academic and practical benefits because the indicators in the research can be further developed and at the same time, criticized to develop concepts and indicators of the integrity of governance by various other parties, including universities. The results of the study referred to, then, can be used by the central and regional governments to strengthen the integrity of governance.

Research Method

The locus of this research was conducted in five sub-districts, DKI Jakarta Province, consisting of North Meruya Sub-District, Tanah Tinggi Sub-District, Setiabudi Sub-District, Kramat Jati Sub-District, and Warakas Sub-District. The selection of five kelurahans as sample research locations was based on two criteria, namely: (i) each selected kelurahan was representative of five administrative areas of DKI Jakarta Province, and (ii) based on institutional performance rating criteria compiled by the Organizational and Bureaucratic Reform Bureau of the DKI Jakarta Provincial Government; high, medium, and low, and (iii) a map of social problems in the selected area.

The method in this study uses a mixed methods approach. John W. Creswell initiated this approach in his book "Research Design, Qualitative, Quantitative, and Mixed Methods Approaches" (Creswell, 2003). This method is used to collect research data using various approaches, namely by conducting observations and interviews, which produce qualitative data in the form of narratives, combined with the survey tradition, which produces quantitative data in the form of figures (Creswell, 2003).

The mixed methods approach was used to obtain a description of the implementation and a map of integrity issues in implementing kelurahan functions and services in five kelurahan in DKI Jakarta Province. Based on the mixed methods approach, the stages of reviewing the integrity of governance are carried out by carrying out: (1) document review of some regulations and decisions of the Provincial Government of DKI Jakarta regarding the domain of sub-district authority and the necessary resource support; (2) in-depth and structured interviews with kelurahan officials to obtain an overview of institutional capacity, human resources, budget, workload, and problems faced in carrying out the duties and functions of the kelurahan; (3) Focus Group Discussion (FGD) to obtain an assessment (quantitative data) of the implementation of the principle of integrity from stakeholders on the integrity of urban village governance based on their experiences. The integrity assessment measure in this study adopts the value scale developed by Likert. The value scale used in this study is 1 to 5. A low rating indicates a very bad or lousy integrity value. Thus it can be interpreted that there is a potential violation of the principle of integrity. On the other hand, a high stakeholder assessment indicates good or excellent integrity implementation. Thus it can be interpreted that there is no violation of the principle of integrity in village governance. The integrity value is a composite value of several assessment factors for the nine principles of integrity. Thus each principle has several assessment factors.

Results and Discussion

Assessment of the integrity of kelurahan governance in DKI Jakarta Province is based on nine principles, which consist of: (1) transparency of information and procedures, (2) ease and speed of service, (3) service behaviour, (4) accountability, (5) community participation, (6) complaint handling mechanism, (7) conflicts of interest, (8) maintenance of public order and the environment, and (9) implementation of community empowerment programs. The composite value of the nine principles shows a value scale of 4.01 from a rating scale of 1 to 5. Based on this assessment, integrity in urban village governance in DKI Jakarta Province has been carried out correctly. Nevertheless, several other issues still need attention and improvement. The details for this matter are as follows.

1. Transparency of Information and Procedures

Government Regulation Number 81 of 2010 concerning the Grand Design of Bureaucratic Reform 2010–2025 stipulates that developing a transparent bureaucratic culture is essential as part of a bureaucratic reform strategy to prevent corruption, collusion, and nepotism. Assessment of the transparency of information and procedures for kelurahan services and PTSP is based on six factors. Based on this assessment, it was found that services at the kelurahan level are still considered to have a low level of information disclosure and procedures, with a value scale of 3.80 to 3.49. The low assessment was due to the low socialization of the requirements and procedures for licensing services to the community, both from the kelurahan and PTSP. Based on the situation referred to, the community must need time to know and obtain information about the service procedures they want. For this reason, the community must first seek and obtain information regarding the requirements and procedures from the counter staff so that the community can return to the service counter several times. This condition can also be assessed. There needs to be more clarity in in-service information. In some cases of business license services, such as in the Kramat Jati Village, the lack of clarity of information can create opportunities for 'motorcycle taxi services' services from certain members of the public to 'help' other people who have limitations and do not have enough time to come to the service counter themselves.

2. Ease and Speed of Service

In the indicators of ease and speed of service, there are indications that governance has been running effectively. The ease and speed of service provide efficiency to the community by increasing their opportunity cost. Business and other opportunities have become more open because they already have the necessary permits or administrative requirements.

3. Service Behavior

Service behaviour is one of the aspects in the Regulation of the Minister of Administrative Reform and Bureaucratic Reform Number 14 of 2017 to measure community satisfaction. The 2015–2019 National Medium-

Term Development Plan (RPJMN) has defined *public service* as a challenge for effective and efficient bureaucratic governance. Integrity in service behaviour shows a rating scale which can be interpreted that integrity has been going well (4.09). Kelurahan stakeholders' assessment of the behaviour of kelurahan officers in providing public services to the community is based on four factors, which consist of excellent and friendly service behaviour; the attitude of helping officers when the community submits population administration services at PTSP; the attitude of helping officials when the community submits a request for licensing services at PTSP; officers' attitude helps the community apply for land registration services for the first time (PTSL), which is delegated as a sub-district task. From the four assessment factors above, the community assesses the low integrity of service behaviour when the community requires licensing services (3.98) and PTSL (3.78). Even though the community, in general, has felt that the service behaviour of PTSP and kelurahan officers has been satisfactory, there are still service behaviours that have the potential for integrity violations in the service behaviour of officers related to licensing services PTSL implementation.

4. Accountability

Stakeholder assessment of the accountability of kelurahan governance shows that kelurahan governance has been implemented accountably (4.41), and there are no unofficial fees, which have been a problem faced by the bureaucracy in Indonesia. The assessment is based on five factors, consisting of the absence of a PTSP licensing service fee; the absence of administrative service fees; the absence of fees for managing PTSL in the kelurahan; the absence of unofficial fees for licensing services, and the absence of unofficial fees in the management of PTSL. The community no longer incurs costs when processing permits and population administration in the kelurahan, including obtaining permits and non-permits issued by the kelurahan, which consist of: a) crowd permits, b) managing differences, c) domicile/moving information, d) certificate of birth/death, e) certificate of introduction to marriage/divorce, f) issuance of a will, g) certificate of land status, and g) certificate of parole. Accountability problems occur outside the sub-district service zone. Illegal levies still occur at the neighborhood

unit (RT) level, such as when the community requires an introduction from the RT for PTSL arrangements.

5. Community Participation

An essential aspect of strengthening good governance is how to involve the community, from making decisions on policies and supervising the implementation of policies. Evaluation of participation in decision-making and supervision of policy implementation by the kelurahan is on a scale of 3.82, which indicates that there is still an obstacle to community participation. Institutionally, the channel for community participation can be carried out through the Kelurahan Deliberation Institution (LMK). DKI Jakarta Regional Regulation No. 5 of 2010 has established the Kelurahan Deliberation Council as an institution recognized to accommodate aspirations, a forum for community participation and empowerment. Participation in these regional regulations is limited in the form of participation in development planning meetings (musrenbang) at the sub-district level.

Evaluation of community participation is based on five factors, namely LMK's involvement in program implementation; LMK's involvement in Musrenbang; involvement of LMK, RT, W, PKK and Karang Taruna in supervising program implementation; the active participation of the community in the Musrenbang; and clarity on the follow-up of musrenbang results. Among these five factors, the clarity of follow-up information on Musrenbang results received a low rating (2.56). This low rating illustrates that the community's anti-certain attitude towards implementing the Musrenbang is only a formal activity that cannot accommodate residents' suggestions submitted through the RW Rembuk. Hence, the results of the Musrenbang are not on target. As a result of the unclear results of the Musrenbang, it causes an assessment from the community. Implementing the Musrenbang is more a political decision than a technocratic one. In the end, it is not the proposals resulting from a process of community participation that will later determine a policy.

6. Handling of Public Complaints

Presidential Regulation Number 76 of 2013 concerning Complaint Management, Article 1 point 8 explains that complaint management functions for the public to submit complaints about services that are not by Public Service Standards; submit a complaint about the neglect of obligations by the operator of obligations, and submit complaints about violations of the prohibition by service providers. In terms of handling public complaints in DKI Jakarta, the Governor of DKI Jakarta, through Governor Regulation Number 128 of 2017, has organized the handling of public complaints through the Citizen Relations Management (CRM) application which is enhanced through Governor Regulation Number 39 of 2019, by giving sub-districts authority to handle public complaints according to their duties and functions.

The value of integrity in handling public complaints indicates that the mechanism for handling public complaints has been appropriately implemented (4.00). Among the four factors that form the basis of the assessment, the score for the effectiveness of the implementation of handling public complaints is on a low scale (3.74) compared to the other three factors, consisting of: (i) socialization of handling public complaints; (ii) the use of handling public complaints in PTSP services and government affairs in the kelurahan; and (iii) the speed of response to complaint handling, which is on a scale of 4.0.

The low score for the effectiveness of handling public complaints is due to incoordination in terms of coordination between village PTSP implementing unit officers at the village level and village officials, causing the community not to get the expected complaint-handling services.

7. Conflict of Interest

The Corruption Eradication Commission (KPK) defines a conflict of interest as a situation in which a state administrator who is granted power and authority based on laws and regulations has or is suspected of having a personal interest in any use he has so that it can affect the quality of performance that should be (KPK, 2009). From a regulatory standpoint, according to Law Number 30 of 2014 concerning Government Administration, in Article 1 paragraph (14), it is stated that

a conflict of interest is defined as a condition of government officials who have personal interests to benefit themselves or other people in the use of authority so that may affect the neutrality and quality of the decision or implementation.

At the kelurahan level, the value of integrity is on a scale of 3.93. This value indicates that, in general, the implementation of services and governance at the kelurahan level has little potential for conflicts of interest between the kelurahan apparatus and PTSP. The potential for integrity violations is due to the difficulty for the community to submit complaints about sub-district officials or PTSPs who are considered to have a conflict of interest due to ignorance of the mechanism for reporting conflicts of interest. On the other hand, the public still needs to believe in the follow-up of their complaints.

8. Implementation of Maintenance of Public Order and the Environment

The implementation of maintenance of public order and the environment by the kelurahan could have improved with a score of 3.80. The main problems related to public order consist of: (i) illegal housing and prostitution; (ii) brawls; (iii) drug abuse; (iv) theft; (v) monitoring boarding houses; and (vi) waste handling. The issue of boarding houses is structural because PTSP Kelurahan, the party that has the authority to issue construction permits, is only authorized to issue IMBs for class D buildings with an area of or located on land with an area of less than 100 m^2. In comparison, the average boarding house is a building with an area of more than 100 m^2. This condition has not been handled because the mechanisms and roles of RT/RW officials have yet to support monitoring boarding houses' existence in their environment.

9. Implementation of Community Empowerment

Assessment of the implementation of empowerment is on a scale of 4.01, which means that community empowerment has generally been carried out following the principle of integrity. Community-based on six factors, namely: (i) fulfilment of health needs through Posyandu, (ii) implementation of the supplementary food program

(PMT), (iii) openness of the kelurahan budget for Posyandu and PMT implementation programs, (iv) implementation of early childhood education programs (PAUD), (v) kelurahan support for PAUD implementation facilities, and (vi) openness of the kelurahan budget for PAUD implementing programs. Budget transparency from the kelurahan for implementing PMT and PAUD programs, as well as support for PAUD implementation facilities, still needs to be solved in implementing community empowerment in the five kelurahan areas that are the locus of research. Hence, the community assesses that community empowerment has yet to be achieved optimally.

Closing

A conclusion can be drawn from a study on the implementation of integrity principles in kelurahan governance in five kelurahan areas that the implementation of integrity principles in kelurahan governance has generally been going well. However, on the other hand, several problems can still be found, so various improvements are needed to increase the integrity capacity of kelurahan governance, namely as follows.

1. Coordination between kelurahan and Satlak PTSP in providing services, program socialization, and complaint handling.
2. Data transparency between agencies in the kelurahan environment, namely between the kelurahan apparatus and PTSP and the PTSL Team related to the implementation of licensing, non-licensing services, and the implementation of PTSL needs to be built into a system.
3. The formulation of Musrenbang procedures and mechanisms must be accompanied by the availability of a system that can be accessed and explained to the public regarding information and follow-up on the results of the Musrenbang process.
4. Regulations must be made to coordinate and consolidate the implementation of kelurahan tasks and functions with other tasks and authorities owned by other agencies or higher regional apparatus structures.
5. Availability of educational programs for information and socialization of various procedures and service requirements so that people have convenience and access to certain public services.

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