

August 29th 2018

THE 4th INTERNATIONAL AND CALL FOR PAPER

Legal Construction and Development in Comparative Study
The Role of Indigenous and Global Community in Constructing National Law

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INFORMATION OF THE CONFERENCE AND CALL PAPER

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THE 4th INTERNATIONAL AND CALL FOR PAPERS

"Legal Construction and Development In Comparative Study"
The Role of Indigenous and Global Community in Constructing National Law

29-30 August 2018

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

INVITED SPEAKERS :

- 1. Prof. Henning Glaser
Thammasat University, Thailand
- 2. Dr. Hilaire Tegnau, LL.M.
Faculty of Law, Sorbonne University
- 3. Prof. Shimada Yuzuru
Nagoya University, Japan
- 4. Prof. Dr. Topo Santoso, S.H., M.H.
Indonesia University (UI), Indonesia
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This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

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Faculty of Law, Sultan Agung Islamic University

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584

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AND CALL FOR PAPER**

“Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)”

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.**

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fifth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, August 31th 2018

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah is an absolute act that we must say after conducting the International Conference and Call for Paper by theme : “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” which was held by Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang, on August 29th 2018.

This conference tried to reviews different theories of legal development focusing on The Role of Indigenous and Global Community in Constructing National Law in order to highlight their similarities and differences. In the field of law, the substance of the discussion does not lie in 'whether the law is traditional because of the heritage of the past or not', but on the meaning of justice contained in the law. Often in discussing legal matters, we are caught up in the understanding of law in a procedural sense, not a law in a substantive sense-that satisfies the sense of justice. So it is not realized, there is a reduction of the meaning of the law substantively (which meets the sense of justice) becomes law procedurally. Especially when human life enters the era of globalization characterized by modern, as well as loaded with contemporary challenges and issues.

Globalization, in general people understand it is a process in the life of mankind to a society that covers the whole globe. This process is possible and facilitated by advances in technology, especially communication and transportation technology. Such understanding is not much different from the understanding of globalization as a process that refers to "a single interdependent world in which capital, technology, people, ideas, and cultural influences flow across borders". With such understanding, we are gradually going to live in a one world where individuals, groups and nations become more interdependent. In the global human society there will be patterns of social relationships that are different from before. And that too is a portrait of social life not found before.

Therefore, to discuss more about legal construction and development, Faculty of Law, Sultan Agung Islamic University was confidence to conduct a conference by the theme “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who had contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, August 31th 2018

Dean,

A handwritten signature in black ink, consisting of a long horizontal stroke with a small upward tick at the end, and a shorter horizontal stroke below it.

Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

TABLE OF CONTENTS

Front Page	i
Information of the International Seminar	ii
Committee Composition	iv
Preface	v
Greeting From The Dean Faculty of Law	vi
DEVELOPMENT OF THE CONSTITUTION AND CONSTITUTIONALISM IN JAPAN: TRADITIONALISM VERSUS MODERNISM (FIRST DRAFT, PLEASE NOT QUOTE WITHOUT THE CONSENT OF THE AUTHOR)	
Shimada Yuzuru	1
COMPARATIVE LAW, LEGAL REFORM AND LEGAL POLICY: HOW TO HANDLE ECONOMIC CRIMES IN GLOBALIZATION ERA?	
Topo Santoso	13
THE IMPLEMENTATION OF FLEXIBILITY PUNISHMENT PRINCIPLES IN ISLAMIC LAW IN THE RENEWAL OF INDONESIA'S CRIMINAL CODE	
Sri Endah Wahyuningsih.....	24
THE ROLE OF INDIGENOUS AND GLOBAL COMMUNITY IN DEVELOPING NATIONAL LAW IN FRANCE	
Hilaire Tegnau.....	34
INDIGENOUSNESS AND THE GLOBAL IN THE CONSTRUCTION OF MODERN STATE AND LAW IN THAILAND	
Henning Glaser.....	41
THE ROLE OF INVESTIGATOR IN CRIMINAL OFFENCE COMMITTED BY SOMEONE INDICATED BY MENTAL DISORDERS	
Kadek Pande Apridya Wibisana.....	56
EFFECTIVENESS OF NARCOTIC ADDICT REHABILITATION SHARE TO SUPPRESS CRIME NARCOTICS (STUDY IN LOKA REHABILITATION OF THE NATIONAL NARCOTICS AGENCY RIAU ISLANDS PROVINCE)	
Alwan Hadiyanto.....	64
THE IMPACT OF GLOBALIZATION ON THE PREVENTION AND THE SUPPRESSION OF AIRCRAFT HIJACKING IN INDONESIA	
Adya Paramita Prabandari, Agus Pramono, Supanto.....	81

THE COUNTERMEASURES OF THE PROLIFERATION OF RADICALISM IN INDONESIA IN THE NATIONAL SECURITY PERSPECTIVE Airlangga Surya Nagara, Isharyanto, Hartiwiningsih	89
THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA: THE BASIS OF THE HIGHEST NORMATIVE ARRANGEMENT OF MASS ORGANIZATIONS IN INDONESIA Elizabeth Ayu Puspita Adi, I Gusti Ayu Ketut Rachmi Handayani, Supanto.....	96
INVESTIGATION PROCESS OF FIDUCIARY CRIMINAL ACT IN SPECIAL CRIMINAL UNIT, POLRESTABES OF SEMARANG CITY Bambang Purwanto	102
REINFORCEMENT OF REGIONAL REGULATION ON ERADICATION OF PROSTITUTION CONDUCTED BY SATPOL PP, BATANG REGENCY Bibet Wiwia Reno	111
ADULTERY LEGAL REVIEW IN ISLAMIC CRIMINAL LAW AND INDONESIAN CRIMINAL LAW Fahri Sundah	121
IMPOSITION OF SANCTIONS ON INVESTIGATORS WHO COMMIT VIOLENCE IN THE INVESTIGATION PROCESS AT KUDUS POLICE STATION Fenny Wulandary	133
EFFECTIVENESS OF THE IMPLEMENTATION OF THREATS OF ADDITIONAL CRIMINAL SANCTIONS TO RETURNS THE STATE FINANCIAL LOSSES IN CORRUPTION CRIMINAL ACT Kasmanto.....	143
LEGAL'S ROLE POLITICS AND THE EFFECT OF POLITICAL PARTIES IN GOVERNMENT (Legal Politics of the Role and Interest of Political Parties in Government) Moureta Vitria Loreent.....	153
THE EFFECTIVENESS OF LEGAL ENFORCEMENT ON BLESPEMNY OF RELIGION IN CIREBON POLICE AREAS Mustamid.....	160
ACHIEVING ETHNICS ORIENTED BUSINESS THROUGH LAW ENFORCEMENT Syafudin Makmur	169
LEGAL PROTECTION FOR DEBTORS IN SELLING OF IMMOVABLE GUARANTEED OBJECTS BELOW THE MARKET PRICE IN INDONESIAN POSITIVE LAW Redy Handoko.....	186

A MALAYSIA OF CITIZENS: ETHNICITY, MEMBERSHIP AND POLITICS OF MERGER	
O. Argo Victoria.....	194
THE DOCTRINE OF PUBLIC POLICY AS A GROUND FOR THE ANULLMENT OF ARBITRAL AWARD IN INDONESIA	
Anang Shophan Tornado, Yati Nurhayati , Ifrani	204
RECONSTRUCTION OF SAVING FINANCIAL STATE LOSSES IN HANDLING CRIMINAL ACTION IN INDONESIA THROUGH JUSTICE-VALUE BASED	
Bastian Lubis	211
IMPLEMENTATION OF RISK MANAGEMENT ON SHARIA BANKING	
Faisal	222
CRIMINAL POLICY TOWARDS INSULTING AND DEFAMATION THROUGH SOCIAL MEDIA BASED ON JUSTICE VALUE	
Gomgom TP. Siregar.....	236
IMPLEMENTATION OF THE CORRECTIONAL SYSTEM IN INDONESIA BASED ON JUSTICE VALUE	
Syawal A Siregar.....	244
COMMUNITY PARTICIPATION IN THE SETTLEMENT OF CHILDREN CONFLICT WITH LAW THROUGH DIVERSION BASED ON JUSTICE VALUE	
Muhammad Ansori Lubis.....	251
GOVERNMENT OFFICIAL DISCRETION POLICY IN DECIDING PUBLIC POLICY BASED ON JUSTICE VALUE	
Mhd. Taufiqurrahman	262
COMPLETION OF BAD CREDITS IN BANKING FINANCIAL INSTITUTIONS BASED ON JUSTICE VALUE	
Muhammad Yasid	268
AUTHORITY OF YUDISIAL COMMISSION IN ENHANCING JUDGE CODE OF ETHICS BASED ON JUSTICE VALUE	
Maurice Rogers	277
NON-CASH PAYMENT SYSTEM IN ECONOMIC SYSTEM IN INDONESIA BASED ON JUSTICE VALUE	
Jonner Lumban Gaol	284
LEGAL ENFORCEMENT TOWARDS THE VIOLATION OF SPATIAL LAW IN SET BACK BUILDING (GSB) BASED ON JUSTICE VALUE	
Darwin Sinabariba.....	294

RECONSTRUCTION OF SALES RIGHTS OWNERSHIP BASED ON JUSTICE IN PUBLIC MARKETS MANAGED BY REGIONAL COMPANY IN CITY MARKET, MEDAN REGIONAL	
Novi Juli Rosani zulkarnain	300
PROVISION OF SANCTIONS ON THE APPLICABILITY OF DECREASING PERMIT ESTABLISHING BUILDING BASED ON THE JUSTICE VALUES	
Paterson Hasiholan Pardomuan Sibarani	309
LEGAL POLICY ON THE DYNAMICS OF DEMOCRACY IN INDONESIA BASED ON THE VALUE OF JUSTICE AND LEGAL CERTAINTY	
Arifin Sihombing.....	320
LEGAL PROTECTION ON CHILD VICTIMS OF PEDOFILIA IN INDONESIA BASED ON JUSTICE VALUES	
Sarma Siregar	329
THE SETTLEMENT OF BUSINESS DISPUTES IN ELECTRONIC TRANSACTIONS (E-COMMERCE) BASED ON JUSTICE VALUES	
Sarman Sinaga.....	346
POLICY OF COSMETICS DISTRIBUTION IN INDONESIA BASED ON JUSTICE	
Ria Sintha Devi	365
THE PROBLEMS IN MULTIPARTY SYSTEM IN THE INDONESIAN PRESIDENTIAL GOVERNMENT SYSTEM	
Widayati and Winanto.....	381
LEGAL ENFORCEMENT OF LAND FUNCTION CONVERSION (CASE STUDY IN KUNINGAN DISTRICT)	
Haris Budiman.....	391
CONSTRUCTION WORK CONTRACT IN GOVERNMENT BASED VALUE OF BENEFIT	
Herwin Sulistyowati, Sumarwoto	399
STUDY OF LAW NO. 11 OF 2008 CONCERNING ELECTRONIC INFORMATION AND TRANSACTIONS IN PROTECTING THE TRADE MARKET THROUGH ELECTRONICS BASED ON THE DEVELOPMENT OF CYBER CRIME IN INDONESIA VIEWED FROM THE PERSPECTIVE OF FREEDOM OF CONTRACT	
Putri Maha Dewi, Setiono, M. Hudi Asrori S	415
JURIDICAL REVIEW OF THE IMPOSITION OF ADDITIONAL PENALTIES FOR PERPETRATORS OF CORRUPTION IN INDONESIA	
Sumarno	425
REFORM OF LEGAL EDUCATION AS AN EFFORT TO PREVENT CORRUPTION	
Yasmirah Mandasari Saragih, Ariansyah	433

SOCIOLOGICAL JURIDICAL REVIEW OF THE CHILD COMMITTING THEFT CRIME AT THE DEMAK STATE COURT	
Achmad Sulchan, Bambang Agus Rianto	449
FUNCTIONALIZATION THE CUSTOMARY INSTITUTION AS LAW ENFORCEMENT EFFORTS IN WEST SUMATERA	
Otong Rosadi, Fitriati Fitriati	457
THE VERIFICATION OF CLOSE CIRCUIT TELEVISION (CCTV) STANDING IN INDONESIA POSITIVE LAW PERSPECTIVE AND ISLAMIC VALUES	
Ira Alia Maerani, Nuridin Nuridin.....	464
COMPARATIVE STUDY OF GUARANTEE LAWS ACCORDING TO ISLAMIC LAW AND CIVIL LAW IN POSITIVE LAW IN INDONESIA	
Lathifah Hanim, Aryani Witasari, Peni Rinda Listyorini.....	470
EXISTENCE AND FORMULATION OF REGIONAL LAWS ON INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL COMMUNITY IN INDONESIA	
Ariy Khaerudin.....	477
RISK OF THE USE OF FOREIGN WORKER	
Rahmatsyah Rahmatsyah.....	484
OVERVIEW THEORY OF LEGAL PROTECTION AGAINST THE DRIVER RESPONSIBILITY PARTNERS (PARTNERS PT. GO-JEK INDONESIA) UNDER LAW NO. 8 OF 1999 ON CONSUMER PROTECTION	
Aryani Witasari, Wahyu Ibnu Musthofa	492
ANALYSIS OF THE INDONESIAN CRIMINAL CODE ARTICLE NO. 359 IMPLEMENTATION ON MEDICAL MALPRACTICE CASE (Case Study on the Supreme Court Verdict No.: 365-K/Pid./2012)	
Mohammad Abdul Hakam	499
RECONSTRUCTION OF THE PROVISIONS OUTSOURCING	
Muhammad Andri	507
THE ROLE OF INDIGENOUS PEOPLES AND CUSTOMARY LAW IN THE DEVELOPMENT OF NATIONAL LAW THE PARADIGM OF PANCASILA	
Lathifah Hanim, MS. Noorman.....	515
THE ANALYSIS OF LEGAL PROTECTION ASPECTS FOR WOMEN AS VIOLENCE’S PERPETRATOR BASED ON JUSTICE VALUE	
Hadjar Handokojati	522
THE WEAK OF THE REGIONAL REPRESENTATIVES IN MAKING LAWS	
Herlina Hanum Harahap.....	530

REVIEW THE PRODUCTIVITY OF THE PEOPLE'S REPRESENTATIVE IN MAKING LAWS	
Muhammad Ridwan Lubis	538
HONEST AND FAIR GENERAL ELECTIONS TO ORGANIZE THE LAW	
Kasmudin Harahap	545
REGULATION FOR THE POLITICAL PARTY FUNDING IN INDONESIA	
Sudimun Sudimun	552
REGULATION OF CORRUPTION IN INDONESIA	
Danial Syah	559
LAND REDISTRIBUTION ARRANGEMENTS AND ITS CHALLENGES	
Raja Induk Sitompul.....	567
MANAGEMENT OF POLITICAL PARTIES FOR PREVENTION OF CORRUPTION	
Muhammad Evin Barus.....	574
STRENGTHENING THE CORRUPTION ERADICATION COMMISSION TO ILIMINATE CORRUPTION CRIMINAL ACTION	
Tajuddin Noor	580
LEGAL CODIFICATION RELEVANCE WITH THE NATIONAL LEGAL SYSTEM	
Khomaini Khomaini	588
DRAFT LAW ON CRIMINAL CODE AND LEGAL DEVELOPMENT IN INDONESIA	
Syaiful Khoiri Harahap.....	595
DYNASTIC POLITICAL TRADITION IN CONSTITUTION	
Ahmad Rusly Purba.....	602
RULES FOR ERADICATION OF TERRORISM AND STATE SECURITY	
Elawijaya Alsa.....	608
REFORM OF THE IMPLEMENTATION OF PROTECTION AND RECOVERY RAPE VICTIM'S CHILD RIGHTS	
Fatin Hamamah, Teguh Prasetyo, Anis Mashdurohatun.....	614
JUSTICE REPOSITIONING IN THE LEGAL POLITICS OF HEALTH INSURANCE	
Himawan Purwo Handuto, Teguh Prasetyo, Maryanto Maryanto	621
RECONSTRUCTION OF EFFECTIVE YEAR AUTOMATIC VEHICLE TAX PAYMENT TERMS	
Sami'an Sami'an	628

MORALITY AS A BASE IN POLITICS AND LEGAL ENFORCEMENT COMES FROM THE VALUES THAT LIVING IN THE SOCIETY (Reconstruction in Thinking and Behavior) Andi Aina Ilmih.....	634
LEGAL PROTECTION OF INDUSTRIAL DESIGNS BASED ON LAW NUMBER 31 OF 2000 CONCERNING INDUSTRIAL DESIGN Ali Ashadi.....	642
STUDY ON THE LEGAL PHILOSOPHY OF MARRIAGE LAW NUMBER 1 OF 1974 Bagus Gani Setiana.....	647
THE GOVERNOR GENERAL OF THE NETHERLANDS 'POLITICS OF LAW TO APPLY EUROPEAN LAWS TO PRIVATE PEOPLE (TOEPASSELIJK VERKLARING) Bambang Rudi Hartoko.....	653
THE LEGAL POLITICS OF THE RELIGIOUS JURISDICTION IN INDONESIA Bobby A. Rachman	659
ANALYSIS OF NOTARY OBLIGATIONS IN REPORTING TAX PAYMENTS AS TAXABLE ENTREPRENEURS Fani Pratama.....	663
THE ROLE OF THE CODE OF CONDUCT TO IMPROVE THE PROFESSIONALITY OF THE NOTARY Damar Dwi Kuncoro	667
THE LEGALITY OF MAKING NOTARY ACTIONS USING ELECTRONIC MEDIA Yodha Dhia Hogantara.....	671
EXISTENCE OF NOTARY DECTS RELATED TO THE PROCEDURE OF PAILIT PROPERTY RESERVATION Fikrina Setyo Rini.....	675
COMPARISON STUDY OF THE ROLE OF NOTARY IN THE PERSPECTIVE OF ISLAMIC LAW AND POSITIVE LAW IN RELATIONSHIP WITH SERVICE TO THE COMMUNITY Ardiansyah Alrawi.....	684
ROYA MECHANISM OF LAND RIGHTS AS COLLATERAL FOR BANKING BANKS BANNED BY AUCTION OFFICERS BECAUSE THEIR CREDITS ARE PROBLEMS Ade Alfriyan Rumrijono.....	689

THE ROLE OF LAND ASSET OFFICERS ON THE INSTALLATION OF LIABILITY RIGHTS WITH THE NAME OF THE DEAD OF THE WORLD OF DECLARATION OF DECLARATION OF DECLARATION PROCEDURES TO THE HERITAGE EXPERT	
Indana Fawaizah.....	694
ROLE OF NOTARY IN PROVIDING LEGAL PROTECTION AGAINST HOME OWNERSHIP CREDIT CONSUMERS THROUGH STANDARD AGREEMENTS	
Muhammad Muamal	699
IMPLEMENTATION OF PROPORTIONALITY PRINCIPLES IN MAKING NOTARY OF COLLABORATION AGREEMENT BY NOTARY	
Ahmad Tsekhudin	704
LEGAL ASPECTS OF AUCTION CONCERNS AS ASSETS AUTHENTIC IN THE EXECUTION AUCTION OF LIABILITY RIGHTS	
Etik Kuswanti	709
GOVERNMENT REGULATION IMPLICATIONS CONCERNING PPAT OFFICES TOWARD PPAT AREAS / WORKING AREAS	
Angga Wisnu Firmansyah	714
NORMATIVE STUDY OF DISTRIBUTION LAND STATUS FOR BUSINESS RIGHTS	
Daniel Budi Hardwianto.....	721

IMPLEMENTATION OF PROPORTIONALITY PRINCIPLES IN MAKING NOTARY OF COLLABORATION AGREEMENT BY NOTARY

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Students of Master of Notarial Law, Faculty of Law, Univeristas Islam Sultan Agung

ABSTRACT

The problems formulated in this research are 1. How is the application of the principle of proportionality in the notary's deed of cooperation agreement, 2. What are the constraints and solutions in applying the principle of proportionality in the notary's deed of cooperation agreement, and 3. What are the consequences? law of application of the principle of proportionality in the deed of a cooperation agreement made by a notary. The approach used is the normative juridical approach.

The results of this study are that the role of the notary to implement the principle of proportionality in the agreement of the cooperation deed between the pharmacist managing the pharmacy and the owner of the pharmacy facilities as outlined in this deed will encounter obstacles from both the pharmacist, the pharmacy manager and the owner of the pharmacy facility itself, that this proportionality principle cannot be realized and interpreted numerically and mathematically so that it is an obstacle for the Notary Public to be able to balance the rights compared with the obligations of the parties or balance the rights on the one hand while on the other hand is an obligation. Implementation of the principle of proportionality in the Deed of Cooperation between the Pharmacist Managing the Pharmacy and the Pharmacy Facility Owner will have good legal consequences for both parties.

Keywords: Proportionality Principle, Notary, deed of Cooperation Agreement

A. INTRODUCTION

Notary as a public official creates a product called an authentic deed, which is related to the provisions of civil law, especially the law of proof.¹ Authentic deeds as the strongest and most fulfilled evidence have an important role in every legal relationship in people's lives². Deeds do not meet the requirements as state administrative decisions that are concrete, individual and final and do not cause civil legal consequences for individuals or civil legal entities, because deeds are a formulation of the wishes or wishes of the parties as stated in the deed made before or by a notary public. itself.³

The authority of a notary in the provisions of Article 15 of Law Number 2 of 2014 concerning Notary Position. That the notary is authorized to make authentic deeds regarding all actions, agreements and stipulations required by statutory regulations and / or those desired by those with an interest to be stated in the authentic deed.⁴

When the tappers come to the notary so that their actions or actions are formulated into an authentic deed in accordance with the notary's authority and then the notary makes a deed at the request or desire of the tappers, in this case it provides a basis for the notary and the tappers there has been a legal relationship. Therefore, it must ensure that the deed has been made in accordance with the established legal rules so that the interest concerned is protected by the deed. With a legal

¹Herry Susanto, 2010, *Peranan Notaris dalam Menciptakan Keputusan dalam Kontrak*, Fakultas Hukum Univesitan Islam Indonesia, Yogyakarta, p. 39

² Elucidation of Law Number 2 of 2014 concerning the Position of Notary Public

³Habib Adjie, 2008, *Sanksi Perdata dan Administratif terhadap Notaris sebagai Pejabat Publik*, Refika Aditama, Jakarta., p. 31-32

⁴ *Ibid*, p. 57

relationship like this, it is necessary to determine the position of the legal relationship which is the beginning of responsibility⁵

A notary deed as a form of agreement based on Article 1320 of the Civil Code must fulfill the validity requirements of an agreement. A covenant is an event when someone promises to another person or when that person promises to do something. In this agreement, there is a legal relationship between the two people. This agreement is concrete in nature.⁶

The principle of proportionality, which is equated with the principle of balance, which, when traced from the opinions of several scholars, generally gives the meaning of the principle of balance as the balance of the positions of the contracting parties. Therefore, in the event of an imbalance in position that causes disruption to the contents of the contract, the intervention of a certain authority (government) is required.⁷ Moreover, in a contractual relationship, the parties cannot be separated in relation to the issue of justice. A contract as a forum that brings together the interests of one party with another demands a form of fair exchange of interests. Therefore, it is very appropriate and basic if in analyzing the principle of proportionality in the contract, it starts from the philosophical aspect of fairness in the contract.⁸ However, the question about what justice is is a question that we often hear, but the correct understanding is actually complicated and even abstract, especially when it is related to various interests that are so complex.⁹

Based on the description above, this study aims to answer the following questions:

- a. How is the application of the proportionality principle in the cooperation agreement deed made by a notary?
- b. What are the obstacles and solutions in the application of the principle of proportionality in the cooperation agreement deed made by a notary?
- c. What is the legal consequence of applying the principle of proportionality in the cooperation agreement deed made by a notary?

B. DISCUSSION

1. Application of the Principle of Proportionality in the Cooperation Agreement Deed Made by a Notary

Seeing current developments, it turns out that the scope and workability of the principle of proportionality appear to be more dominant in commercial contracts such as in the Deed of Cooperation between Pharmacists Managing Pharmacy and Pharmacy Facility Owners in this study.

With the basic assumption that the characteristics of a commercial contract place the parties on equality, so that the objectives of the parties in the Cooperation Deed between the Pharmacist who Manages the Pharmacy and the Owner of the Pharmacy Facility are oriented towards business profits that will be realized if there is a fair (proportional) exchange of rights and obligations.

In its implementation, the principle of proportionality cannot be seen from the context of mathematical balance, (equilibrium) but in the process and mechanism of the fair exchange of rights and obligations, which in the Deed of Cooperation between Pharmacists Managing Pharmacy and Pharmacy Facility Owners are summarized in articles- agreed articles regarding the rights and obligations of each party

The implementation of the proportional principle in the deed of the cooperation agreement between the Pharmacist who manages the pharmacy and the owner of the pharmacy facility can be described in the articles in it as follows:

⁵Marthalena Pohan, 1985, *Tanggung Jawab Advocaat, Dokter dan Notaris*. Surabaya: Bina Ilmu, p. 11

⁶ Lukman Santoso, 2012, *Hukum Perjanjian Kontrak*, Yogyakarta: Cakrawala, pp. 8

⁷ Agus Yudha Hernoko, 2014, *Hukum Perjanjian Asa Proporsionalitas dalam Kontrak Komersil*, Jakarta: Prenada Media Kencana, p. 79

⁸ Agus Yudha Hernoko, Op Cit, p. 47

⁹ Burhanudin Salam, 1997, *Etika Sosial*, Jakarta: Rineka cipta , p. 117

In Article 3, the collaboration between the Pharmacist Managing Pharmacy and the Owner of the Pharmacy Facility describes the rights and obligations of each party which reflects the principle of proportionality in the agreement, such as the Pharmacist Managing the Pharmacy to obtain permits and other facilities related to the Pharmacy, the Pharmacist Managing the Pharmacy contributes labor, intelligence, goodwill and proficiency in the field of pharmacy in accordance with the provisions of the legislation in force. But on the other hand, owners of pharmacy facilities provide pharmacy facilities consisting of: Sufficient funds, pharmacy equipment, medical supplies in the pharmaceutical sector, buildings all of which are owned and / or under control of the Owner of the Pharmacy Facility.

Then Article 3 of the deed of cooperation between Pharmacists Managing Pharmacy and Pharmacy Facility Owners states that Pharmacists who manage pharmacies are carried out by Pharmacists who manage pharmacies in accordance with Government Regulation Number 25 of 1980, Regulation of the Minister of Health of the Republic of Indonesia Number 1332 / Menkes / SK / X / 2002 as well as regulations prevailing laws and regulations and oath of office

Regarding the rights and obligations between the parties in the deed of cooperation between the Pharmacist Managing the Pharmacy and the Owner of the Pharmacy Facility, it is also described in Article 4 that the pharmacist who manages the Pharmacy is obliged and fully responsible for managing the pharmacy which includes the field of pharmaceutical services, the field of materials, the field of administration and finance, The field of workforce and other fields related to the duties and functions of a pharmacy

The principle of proportionality is not only regarding the balance of obligations between the Pharmacist who manages the Pharmacy and the obligations of the Pharmacy Facility Owner, it also relates to the obligations that one party must carry, but as compensation for these obligations, that party also has rights that are proportional to these obligations as in Article 4 deeds of cooperation between the Pharmacist Managing Pharmacy and the Owner of this Pharmacy Facility that the Pharmacist Managing the Pharmacy as the manager of the pharmacy based on Article 4 of the Deed of Cooperation between the Pharmacist Managing the Pharmacy and the Owner of the Pharmacy Facility has the right and power to represent this cooperation inside and outside the court regarding all things and events that have the right to bind the pharmacy with other parties and other parties with the pharmacy and carry out all actions

2. Constraints and Solutions in the Application of the Principle of Proportionality in the Cooperation Agreement Deed Made by a Notary

To find obstacles in the role of the notary public to implement the principle of proportionality in the Deed of Cooperation between the Pharmacist Managing the Pharmacy and the Pharmacy Facility Owner is to use the criteria or measure of the values mentioned above, it should not be interpreted that the findings will be obtained in the form of mathematical numbers.

The principle of proportionality does not question the balance (equality) of results mathematically, but rather emphasizes the proportion of the distribution of rights and obligations among the parties that is appropriate and appropriate (fair and reasonableness). So that through this opinion, researchers need to ask to answer questions about what the meaning, criteria and form of the principle of proportionality are. It is not an easy thing, even impossible to weigh or measure the contractual relationship in accordance with the principle of proportionality in the form of a mathematically measurable final result.

Because the principle of proportionality cannot be realized and interpreted numerically and mathematically, it is an obstacle for the Notary Public to be able to balance the rights compared to the obligations of the parties or balance the rights on the one hand while on the other hand it is an obligation.

3. Legal Consequences of the Application of the Principle of Proportionality in the Cooperation Agreement Deed made by a Notary

The Cooperation Deed Agreement between the Pharmacist Managing the Pharmacy and the Pharmacy Facility Owner is not only in the form of a deed but must be implemented for several years and may be extended and there is a possibility to be repaired in the middle of this agreement so that the application of the principle of proportionality in the Deed of Cooperation between the Pharmacist Managing the Pharmacy and the Owner Pharmacy facilities with terms that have been agreed upon, can benefit both parties and the business being carried out can benefit the community at large, especially in the pharmaceutical world

The parties to the Deed of Cooperation between the Pharmacist Managing the Pharmacy and the Owner of the Pharmacy Facility have equal rights and obligations in considering whether to continue the agreement process if it is extended and have the right to obtain as much detail as possible regarding everything related to the business that is carried out through the Financial Statements.

In fact, apart from seeing the principle of proportionality, it is necessary to consider the principle of good faith because it is related to one another, this good faith also does not escape the elements of propriety and habit as well as laws. Article 1339 of the Civil Code states that agreements are not only binding on matters expressly stated in it, but also for anything which, according to the nature of the agreement, is required by propriety, custom or law.

C. CLOSING

Based on the above discussion, the following conclusions can be drawn:

- a. The application of the principle of proportionality in the cooperation agreement deed made by the Notary for the making of the cooperation deed starting from the process of forming and implementing the deed is by compiling clauses made by both parties by taking into account the rights on the one hand and on the other hand is an obligation.
- b. The constraints and solutions in the application of the proportionality principle in the cooperation agreement deed made by the Notary are: a) this proportionality principle cannot be realized and interpreted numerically and mathematically and b). ambitions for the Notary to be able to balance the rights compared to the obligations of the parties or balancing rights on the one hand while on the other is an obligation
- c. The legal consequence of the application of the principle of proportionality in the Deed of Cooperation between the Pharmacist Managing the Pharmacy and the Owner of the Pharmacy Facility is that there is an obligation to explain in detail the object of the agreement including the legal consequences that will arise from the existence of the agreement.

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