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**ENHANCING CREDITOR PROTECTION RULES  
UNDER NIGERIAN CORPORATE LAWS**

**KABIRU ADAMU\***

***Abstract***

*Credit is the heart of business. Businesses thrive on loans and credit provided by creditors. However, where business fails creditors are at the receiving end and at the mercy of debtors. This leads to loss of capital and the need to protect creditors. Under Nigerian corporate laws the principles of separate legal personality and the concept of limited liability are two legal concepts that form the foundation of modern company law and play a role in creditor protection. These principles transfer risks to creditors which if not protected or regulated may lead to not only harm to the investors but shortage of capital to run the economy. If creditors are left exposed to the vagaries of company law concepts of limited liability and separate legal personality doctrines they stand at a disadvantage position because if the company cannot pay the money it borrows from its creditors, the creditors will lose their money as the shareholders of a company can only be liable to the extent of their shareholdings and the capital they contributed to form the company. This article examines this from the perspective of contractual rights and legislative enactments under the Nigerian Companies and Allied Matters Act (CAMA). The article finds out that the legal regimes on creditor protection in Nigeria are very weak especially when viewed from the provision of the Companies & Allied Matters Act of Nigeria (CAMA). The article concludes by pointing out that there exist gaps in our legislations which need to be enhanced so as to remove the clog in the wheel of corporate law and practice in Nigeria dealing with protection of creditors.*

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## **1. Introduction**

Credit is at the heart and sustenance business. Companies cannot do without capital to carry out their activities as a going concern. A company needs capital to carry on its business activity, to purchase raw materials, to pay its staff and workers and to pay its other financial obligations and liabilities. In doing this, companies resort to borrowing from lenders and other creditors with a view to take care of their finances. However, because of the doctrines of legal personality and limited liability principle there is the fear that members of the company would only be liable to creditors to the extent of their interest or shares of the company because a company is separate and distinct from the members who formed it. This may leave creditors exposed to the risk of not getting back the money they lend to the company and therefore necessitates the need for protection.

There are rules under the Nigerian corporate laws that are tailored to protect creditors. Some of these rules are derived from law of contract while some are made through legislative enactment specifically meant for companies under company law. It is on this premise that this article seeks to discuss and explore the concept of creditor protection under Nigerian corporate laws.

The article begins by highlighting the meaning and import of creditors and the types of creditors under Nigerian corporate laws. The basis of creditor protection is hinged on the doctrines of separate legal personality and the limited liability principle which rationale was to protect creditors especially because of the economic development of the financial market, the need for capital accumulation and allocation of resources, good corporate governance and the prevention of fraud and other wrongful trading activities and directors' duties to creditors shall also be examine. Similarly, the article highlights the various methods by which creditors are protected through the use of self-help strategies when drawing up credit contracts or under legislative enactments in our corporate laws.

The way and manner in which the legislation under our company laws protect creditors through requirement of minimum capital, share capital reduction, capital maintenance doctrine, directors duties and creditor disclosure obligations will be stated and examine. Finally, the article concludes by comparing the laws and rules on creditor protection in other common law countries with a view to enhancing the laws and rules on creditor protection in Nigeria.

## 2. Creditor and Creditor Protection under Nigerian Corporate Laws

A creditor of a company is a person or company that is owed money (or some kind of other debt by a company).<sup>1</sup> On the other hand, creditor protection is all about giving protection to lenders both individual and corporate who loan out capital to companies. Creditors of Company are divided into two namely:

- (1) *Secured Creditor: A secured Creditor is a creditor whose debt is secured by one or more of the company's assets and property. Example of this is where a company borrows money from a bank, the bank will ask for security like title deed to a building or property or other collateral to serve as a security and guarantee that the company will pay the loan back on agreed basis.*
- (2) *Unsecured Creditors: These are creditors whose debts are not secured by any assets of the company. Therefore if the company cannot pay all its debt then unsecured creditor will only receive payment if there are funds remaining after the secured creditors have been paid off.*<sup>2</sup>

### a. The Legal Basis for the Creditor Protection Doctrine under Nigerian Corporate Laws

The basis for the protection of creditors is anchored on two principles of company law which are the legal personality principle and the limited liability doctrine.

#### 1) Separate Legal Personality Principle

This is a fundamental feature of company law that says a company is a separate legal entity distinct from its members and shareholders.<sup>3</sup> This doctrine dates back to more than hundred years ago when the House of Lords of the United Kingdom decided in *Salomon v. Salomon & Co Ltd*<sup>4</sup> that a company is a legal entity separate from its shareholders. Those shareholders will not be liable for the company's debt. In Nigeria section 37 of the Companies & Allied Matters Act (CAMA) it was provided that

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<sup>1</sup>Creditors: Their Duties and Powers. A Quick Guide. p.1. Available at <http://www.odce.ie>. Last visited 15<sup>th</sup> January, 2014.

<sup>2</sup>*Ibid.* p.2

<sup>3</sup>Mohammed R. Corporate Insolvency: The Protection of Creditors Interest. Available at <http://www.ssrn.com>. Last visited 13<sup>th</sup> January, 2014.

<sup>4</sup>(1897) AC. p. 221.

from the date of incorporation a company becomes a body corporate and capable of exercising legal powers and separate from its members who formed it. This principle was upheld in the case of Union Bank of Nigeria Ltd V Penny Mart.<sup>5</sup> Consequent upon this, the cause of action of company's creditors are limited only to the company itself and not the shareholders or even its directors.<sup>6</sup> Therefore, this principle necessitates the having in place a regime for the protection for company's creditors.

2) Limited Liability Doctrine and its Relevance to Creditor Protection

Limited Liability principle connote that the liability of shareholders is limited to the amount of unpaid on their shares. This has the tendency of shifting risk of entrepreneurship from shareholders to creditors.<sup>7</sup>

If the company do well the gains will go to the shareholders but where the company fail or becomes insolvent the creditors will suffer.<sup>8</sup> This necessitates protection of creditors.

b. The Rationale behind the Doctrine of Creditor Protection

The protection of creditor has a number of rationales which benefit not only the company itself but the economy in general. In the opinion of Atilano and Alejandro<sup>9</sup> creditor protection is a crucial thing to do in order to develop the performance of the credit market. They argued that the primary function of lending in the credit market is to provide cheap funds which function can only be accomplished when creditors are protected and sanctions are imposed on nonperforming debtors. Other rationales or reasons behind creditor protection are:

- 1) Development of the Financial Market: Protecting creditors and investors lead to the development of the financial market and by extension companies; If creditors are protected they will be willing to lend more capital which in turn will encourage the development of lending. This is

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<sup>5</sup>(1992) 5 NWLR Pt. 240 p. 228 at 237.

<sup>6</sup>Supra note 3 at p. 9.

<sup>7</sup>*Ibid.*

<sup>8</sup>Supra note 3 at p. 9.

<sup>9</sup>Atilano J.P & Alejandro R. The Cost and Benefits of the Strict Protection of Creditor Rights: Theory and Practice. Available at <http://www.iadb.org/res.32.htm>. Last visited 12<sup>th</sup> January, 2014.

because countries that protect creditors have better larger markets as can be seen in the case of Europe.<sup>10</sup>

- 2) Capital Accumulation and Allocation of Resources: Lending also has an impact on economic development. With creditors protected they are ready to put forward more funds to finance companies thereby fastening capital accumulation.<sup>11</sup>
- 3) Stability of market: Creditor protection stabilizes financial markets and the business environment.
- 4) Improvement of Corporate Governance in Companies  
When creditor's rights are protected they have the possibility of accessing company information and decisions. This can help in detecting managers and director's fraudulent behavior easier thereby ensuring corporate governance.
- 5) To prevent fraud and financial rascality by company directors because most at times borrowers have the incentive to engage in opportunist behavior at their creditors expense.<sup>12</sup>
- 6) Strict protection also leads to cheaper credit because protection confers lenders or creditors and force entrepreneurs to risk their own wealth and provide them with the right incentive to perform.<sup>13</sup>

c. Creditor Protecting Rules in Nigeria

There are two methods by which creditors are protected which are;

- 1) Through Self help strategies or Contracts
- 2) Through legislative enactment.<sup>14</sup>

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<sup>10</sup>Elis J. Protection of Creditors in Public limited Companies, Second Council Directive and Albanian Company Law Compared: Is there a need for Reform? Available at <http://ssrn.com/abstract=1130311>. p. 9.

<sup>11</sup>*Ibid.*

<sup>12</sup>Supra note 3 at p. 15.

<sup>13</sup>*Ibid.*

<sup>14</sup>Andrew K. Directors Duties to Creditors: Contractual Concerns Relating to Efficiency and Overprotection of Creditors. Available at <http://jstor.org/page/info/stable/3699083>. Last visited 10<sup>th</sup> January, 2014.

Protection by self help strategies involves the insistence on the inclusion of certain terms in the credit contract between a creditor and a company by requiring the provision of security or guarantee. While on the other hand legislative enactment protect creditors through regulations and laws which are primarily founded on the Companies Act and laws and Insolvency Act.<sup>15</sup>

### 3. **Creditor Protection Rules Under the Nigerian Companies and Allied Matters Act (CAMA)**

There are several ways in which Creditors are protected in company law. In the opinion of Mathias<sup>16</sup> the following are the methods through which creditors are protected.

#### a. The Minimum Capital Requirement

Company laws set out minimum share capital for companies. This is done with view to improve minimum share capital and decide whether the consideration for share should be in cash or for consideration other than cash. An obvious strategy to fight the first pattern of abuse seems to be a rule which requires a company to raise a minimum amount of capital. The legal capital doctrine as such precludes the loss of share capital by trading only requires a public company to convene an extraordinary share-holder meeting if the assets fall below one half of its legal capital but does not require any particular action to be taken.

#### b. Reduction in Share Capital

This is a very important way of protecting creditors in company law. A company cannot reduce its issued share capital unless as authorized by the provision of Companies and Allied Matters Act (CAMA). Section 105 of CAMA provides that:

*“Except as authorized by this Act, a company having a share capital shall not reduce its share capital.”*

The procedure for the reduction of share capital follows very rigorous processes which are:

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<sup>15</sup>*Ibid.*

<sup>16</sup>Mathias M.S., et al “The Protection of Creditor of a European Private Company”, Available at <http://ssrn.com/abstract=1885230>. Last visited 9<sup>th</sup> January, 2014.

- 1) The calling of Meeting of Directors to resolve that the share capital be reduced.
- 2) Preparation of scheme of reduction.
- 3) Convening a general meeting of the company. The notice of meeting should be accompanied by explanatory circular and the scheme of reduction.
- 4) At the meeting a special resolution would be passed reducing the capital and approving the scheme.
- 5) A copy of the special resolution would be delivered to the commission.
- 6) Applying to the court to confirm the reduction and approve the scheme or reduction.
- 7) Obtain from the commission a certificate of registration of the order and minutes on production to it of order confirming reduction and delivery of a copy of the order and of the minutes.
- 8) Annex the approved minutes and order of reduction to the memorandum.

Section 107 of CAMA provides that:

1. *Where a company has passed a resolution for reducing share capital., it may apply to the court for an order confirming the reduction*
2. *If the proposed reduction of share capital involves either*
  - (a) *diminution of liability in respect of unpaid capital*
3. *Every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction of capital.*<sup>17</sup>

See also section 108 of CAMA on the procedure to be adopted by the court before confirming the reduction. The application for the reduction and the procedure for doing so at the Federal High Court are stated under section 4 and 650 (1) of CAMA.

The essence of the above provisions is to protect creditors. *In the case of Exparte West burn Sugar Refinery Ltd*<sup>18</sup> the court held that:

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<sup>17</sup>The Companies and Allied Matters Act (CAMA), Cap C14 LFN 2004.

<sup>18</sup>(1951) AC p. 625.



How much of the paid up share capital can be dispensed with is a domestic matter for the shareholders of a company to decide amongst themselves. If the amount which they had decided on worked no injustice to creditors or shareholders the court should not be concerned to know the precise figure which the company's capital is surplus to its requirement.

Similarly, in the case of *Re Lawson Store Service Co: In Re National Reversionary Investment Co.*,<sup>19</sup> the court held that: No court has power to dispense with the settling of the consent of creditors in the reduction of capital.<sup>20</sup>

c. Director's Duty to Protect Creditors

There is a duty on directors to protect creditor of their company. This arises out of the fallout of fiduciary duty relationship between them that require them not to undervalue transaction or engage in loss making venture.<sup>21</sup> Under English law, directors owe the company fiduciary duties and duties of skill, care and diligence. Although the company is a commercial entity distinct from its members, the interests of the company as a *going concern* are traditionally equated with the long-term interests of the shareholders as a whole. Since they stand last in line to receive the economic benefits of the company's activities, creditors are considered as the company's 'residual claimants'.

In the corporate group context, it follows from the separate legal entity principle that the directors of each company within the group are required to act in the interest of the company to which they are appointed rather than in the interest of the group as a whole legal entity doctrine. In recent English case of *Re Pantone 485 Ltd.*<sup>22</sup> the court held that as part of the director's duties to their companies, directors must in their decision making take account the interest of the creditors of their companies.

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<sup>19</sup>(1898) 2 Ch p. 726.

<sup>20</sup>See also Section 108 of CAMA which requires the consent of creditors.

<sup>21</sup>Davies P. Directors Creditor Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency. EBOR p. 301.

<sup>22</sup>(2002) 1 BCLC 206.

d. Capital Maintenance Doctrine and the Distributions of Assets to Shareholders

The capital maintenance doctrine is another good example of protecting the interest of creditors in a company. The doctrine is aimed at protecting the share capital of a company from being returned to its shareholder. The rules were intended to protect creditor against the extra risks associated with limited shareholder liability. It is aimed principally for the protection of creditor's interest.<sup>23</sup> Rules on capital maintenance act as a constraint against the distribution of assets to shareholders. Its main idea is to ensure that a company maintains its share capital as equity in favor of creditor. This rule restricts the powers of companies to dispose of their assets in order to reduce their risk of default on debt obligation. The doctrine places restriction on dividends or other distribution, share repurchases, financial assistance or capital reduction.<sup>24</sup> The law set out the maximum amount that can be distributed by way of dividend.

Jessel M.R observed in *Re-Exchange Banking Company, Flit Croft's Case*<sup>25</sup> that:

*The creditor therefore, I may say...gives credit to the company on the faith of the representation of the capital shall be applied only to for the purpose of the business, and therefore has a right to say that the corporation shall keep its capital and not return it to shareholders.*

Similarly, in the case of *Trevor V. Whitworth*<sup>26</sup> Lord Watson observed that: Paid up capital may be diminished or lost in the course of the company's trading: that is a result which n legislation can prevent, but persons who deal with, and give credit to a limited company entitled to assume that part of the capital which has been paid up into the coffers of the company has been subsequently paid out, except In the legitimate course of business.

The non-distribution of share capital of a company as a profit is a capital maintenance doctrine which is concern with the restoration and sufficiency of the company's capital. Distribution of company's capital can be made in two ways: either by paying of dividends to the shareholders or by acquiring own shares.

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<sup>23</sup>The Capital Maintenance Regime. Available at [www.cr.gov.hk/en](http://www.cr.gov.hk/en). Last visited 10<sup>th</sup> January, 2014.

<sup>24</sup>*Ibid.* p. 7

<sup>25</sup>(1879) 21 Ch D p. 518 at 533-534.

<sup>26</sup>(1887) 12 Ch 409 pp. 423-424.

The prohibition of company from purchasing its shares is another way of protecting creditor. Under these rules a company cannot purchase its own shares and dividend can only be paid out of distributable profits.<sup>27</sup> This was the reason why common law prohibits a company from acquiring its shares. Section 55 of the old Nigerian Companies Act of 1968 has a provision relating to the prohibition of a company acquiring its shares. But there is no equivalent provision under the CAMA.<sup>28</sup> Other rules under the capital maintenance doctrine aimed at creditor protection are: First, shares must not be issued at a discount to their normal par value (no-discount rule). Second, a company cannot, in principle, purchase its own shares since this would result in a reduction of capital. Thirdly, the company, or any of its subsidiaries, is not allowed to give financial assistance to any person wanting to buy its shares. Fourth, the company is not allowed to make a loan to a director of the company or its holding company. Again, the prohibition is more restrictive on public companies than on private ones.

e. Disclosure Obligations Imposed on Companies

Disclosure helps creditors to determine the credit worthiness of a company before they engage in any transaction with it. This is done through mandatory disclosure rules. The most important public information is the company's annual report and accounts, which contains the financial statements and the auditors' and directors' report. This is required in order to give creditors the opportunity to look at the accounts of the company through analysis of its financial statement before embarking on any loan transaction. The law imposes on the directors the duty to prepare a balance sheet and a profit and loss account for each financial year.

f. Piercing the Corporate Veil of a Company

Lifting and piercing the veil of incorporation is another method by which creditors are protected. The phrase lifting the veil means the erosion of the legal personality principle by going behind corporate personality to know who are behind

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<sup>27</sup>Supra note 24.

<sup>28</sup>Nwamara T.A., *The Encyclopedia of Laws of the Federal Republic of Nigeria* (1<sup>st</sup> Edi) (Lagos: Law & Educational Publishers Ltd,1992). p. 100.

the actions of a company in terms of its officers and members and shareholdings.<sup>29</sup> The law will thus go behind the corporate personality to the individual members or ignore the separate personality of the company in favor of economic entity constituted by a group of associated concerns.<sup>30</sup>

Lifting the veil is classified into those provided by statute, those under judicial interpretation and cases of fraud.<sup>31</sup> Protection of Creditors falls under statutory piercing. Accordingly, section 631(4) of CAMA provides that anyone who misdirects a company may be personally liable in respect of any liability arising under the transaction in which the company has been misdescribed. The clear import of this provision is to protect any innocent creditor who may have entered into any transaction with such a person or company. Similarly, under section 336 of CAMA notwithstanding the concept of corporate personality companies belonging to a group or have group structure are required to have a single financial statement of account with a view to let the investing public have an accurate idea of the financial position of the group. Section 506 of CAMA also renders personally liable, for the purpose of company's debt and liabilities, any person who were knowingly to the carrying on the business of the company in a reckless manner.

Therefore one obvious strategy to enhance *legal* protection of creditors is to render a company liable for its debts. The first way to this is by piercing the corporate veil; the second is embodied in the fraudulent and especially wrongful trading provisions of company law.

#### 4. **Creditor Protection Rules in other Common Law Countries**

##### a. **England**

In England section 263 of the old Companies Act of 1985 prohibits any form of distribution of corporate assets to shareholders except where the value of the distributions is less than that of the profits available for distribution. This section is saying that only profits may be distributed by a company to its shareholders while

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<sup>29</sup>Paul L.D., Gower's Principles of Modern Company Law (London: Sweet & Maxwell, Sixth Edition, 1997). p. 148.

<sup>30</sup>Ola C.S., Company Law in Nigeria (Ibadan: Heinemann Educational Books (Nigeria) Plc, 2002). p. 35.

<sup>31</sup>*Ibid.* p. 35.

it is solvent.<sup>32</sup> Similarly, section 135 of the same Act provides that no company may reduce the amount of its capital stated within its account without the express consent of the court. This is also aimed at protecting the creditor interest in the capital.<sup>33</sup> Section 423 of the Insolvency Act of England provides that creditors are entitled to apply to court to have certain transaction at a undervalue entered into by a company with the aim putting its assets out of the search of the creditor avoided.

Moreover, section 212 of the same Act is of the same effect. This provision was interpreted in the case of *Kinsela V Russell Kinsela Pty Ltd (In Liquidation)*<sup>34</sup> that:

“Where a director or a person having management of an insolvent company acts in breach of his duty to the company by causing assets of the company to be transferred in disregard to the interest of its its creditors or creditor, under English Law he is answerable through the scheme of the parliament (section 212 of the Insolvency Act of 1986).”

Other measures provided by the law in England with a view of protecting Creditors are mandatory disclosure rule under section 363 and 364 of the Companies Act which h requires the company to publish its financial statement and must contain auditors and directors reports .Section 226 of the t also imposes a duty on directors of a company to prepare a balance sheet and a profit and loss account.

b. Australia

In Australia there are three ways by which Creditors are protected. They are:

- 1) Through restriction on credit activities
- 2) Through Creditor contract rights
- 3) Through Creditors Right in Insolvency<sup>35</sup>

In the first instance, restriction deter debtor companies from entering into any transaction that might harm creditor’s interest whole the company is a going concern. The process is done through the minimum capital requirement, dividend

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<sup>32</sup>Armora J. Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law. Michigan Law Review. p. 355.

<sup>33</sup>Supra note 8 at p. 15.

<sup>34</sup>(1986) 10 ACLC. p. 395

<sup>35</sup>Helen A. The Evolution of Shareholder Protection in Australia: An International Comparison. Available at <http://www.ssrn.com/abstract=1782412>. Last visited 12<sup>th</sup> January, 2014

restrictions, equitable subordination, piercing the corporate veil and public enforcement.<sup>36</sup> Other measures are the directors duties to creditors as can be seen in the case of *Walker V. Winborne*,<sup>37</sup> where the Australian High Court recognized that as part of directors duties to act in the interest of the company they have an obligation to consider the interest of creditors when the company is nearing insolvency. Creditor's contract rights involve measure used by creditors under contract rules. These rules are the right of set off, enforcement of contract and retention of title<sup>38</sup> while creditors right to insolvency are rights protected by the insolvency laws.<sup>39</sup>

c. Canada

In Canada, apart from the rules of company law dealing with creditor protection there is the Canadian Companies Creditors Arrangement Act of 1933 which contain provision on better return for creditors of companies.

d. Malaysia

The Malaysian the Companies Act of 1965 regulates the law and practice of Company Law. The law has provisions for creditor protection which protect creditors in several ways among which are:

- 1) Directors and Officers statutory duties to creditors and the company as enshrined in section 304(1) of the Act that says where a company has been carried on with the intent to defraud creditors then any person who was knowingly a party to the act of that business in that manner shall be personally liable for the debt or other liabilities of the company.
- 2) Wrongful trading; any wrongly trading by a company's directors or officers is criminalized. Therefore any trading doe with intent to defraud creditor is an offence.

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<sup>36</sup>*Ibid.* p. 21.

<sup>37</sup>(1976) 137 CLR p. 1.

<sup>38</sup>Supra note 29 at p. 23.

<sup>39</sup>*Ibid.*

- 3) Other measure are provided under section 305 and 176 which deals with misfeasance scheme of arrangement or mergers, section 130 which deals with special administrator under *the Pengurusan Danaharta Nasional Berhad Act of 1998* called (*the Danaharta Act*)<sup>40</sup> which is aimed at forming an asset management company responsible for acquiring, managing, financing and disposing assets and liabilities of companies which is similar to the Nigerian Asset Management Company (AMCON).

e. The United States of America (the USA)

In the USA I was able to lay my hands on the laws on creditor protection with respect to trading of shares and securities. However, most of the basic principles of creditor protection in company law apply *mutatis mutandis*. The first legislation I consulted that has to do with creditor protection is Securities Act of 1933 which deals with transaction involving companies at the stock exchange. The law requires full disclosure when new securities of companies are introduced to the market. Similarly the Securities and Exchange Act of 1934 has the same provision. The Trust Indenture Act of 1939 has rules concerning the placement of bonds while the Company Act of 1940 and the Investment Advise Act of 1940 are all aimed at protecting creditor's interests.<sup>41</sup>

## 5. Conclusion and Recommendation

This article examined the laws and rules dealing with creditor protection in Nigeria, The article highlighted the meaning of creditors under Nigerian corporate laws and a creditor is understood to include persons who give out loans and credits to legal entities that carry out business for profit. A creditor is central to business activity because of the role he plays in giving capital to companies for business. A creditor includes both secured and unsecured creditors who are indebted by company.

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<sup>40</sup>See: fuller discussion in Mohammed R. Comparative Insolvency and the Protection of Creditors. Available at <http://www.ssrn.com/abstract=1462902>. Last visited 13<sup>th</sup> January, 2014.

<sup>41</sup>See: Klaus J.H. Comparative Company Law. Available at <http://www.ssrn.com/abstract=980959> p. 21. Last visited 10<sup>th</sup> January, 2014.

The basis of the creditor protection rules in Nigerian corporate law has been stated especially its relevance in understanding the twin concepts of the separate legal personality principle and the limited liability doctrine. The wisdom behind the principle of creditor protection borders on the need to develop companies and the financial market, and to ensure stability, fraud prevention and prevention of financial recklessness in the economy.

The method of protecting creditors in Nigeria takes the form of contract rules and legislative enactments under the Companies and Allied Matters Act (CAMA) of 1990. Under CAMA creditor protection rules include provisions on share capital reduction, capital maintenance doctrine, director's duties to creditors as well as lifting the corporate veil to ascertain whether fraud has been committed and minimum share capital requirement.

Finally this article recommends the need to amend CAMA provisions in order to insert strong provisions that will adequately protect creditors in view of the gaps in the laws and the need to draw lessons from other common law jurisdictions that have strong laws on creditor protection, This will go a long way in encouraging foreign investors to come an invest in Nigeria.

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**IMPACT OF GLOBALIZATION, INTERNATIONAL AGREEMENT AND  
TECHNOLOGY CONVERGENCE ON TELECOMMUNICATIONS LAW REFORM  
(The Case of Indonesia)**

**Asril Sitompul\***

***Abstract***

*In the era of globalization telecommunications market is dominated by economic powerful countries. The concept is global capitalism where international entities operated and entered into developing countries, intervened domestic policies and facilitated the entrance of MNC supported by World Bank, IMF and WTO. The GATS Annex required Indonesia to open telecommunications sector. Indonesian telecommunications sector entered the global business competition by leaving the monopoly and control of the government through ownership. The new multilateral agreement related to telecommunications is the TPP Agreement, if Indonesia decided to join the TPP Agreement, it is necessary to consider all matters related to the benefit and loss of joining the agreement, so it will not only to open Indonesia as a big market of goods and services supplied by dominant member states. Development of technology in telecommunications, computer, and Internet. Convergence of telecommunications and information technology, computer and communications technology in the Internet, and of media (conduit) and content in cable television, resulted business convergence in regional boundaries and ownership aspect. It all should be concerned by the government in the reform the telecommunications law and regulation.*

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## 1. Globalization, GATS and WTO

Globalization is something undeniable. However, there is something to be concerned: we have to ensure that globalization is not running toward the unexpected direction. If in original form globalization is directed to abolish poverty, so we have to be careful that it is not run to be the tool of structured impoverishment.

Meanwhile, globalization is running toward the openness of global market, where telecommunications market is dominated by economic powerful countries, so the formed concept is the global capitalism concept. Along with the global capitalism, international entities operated and entered into developing countries jurisdiction, they intervened to domestic policies and facilitated the entrance Multi National Corporation - MNC to developing countries supported by World Bank, International Monetary Fund (IMF) and the World Trade Organization (WTO).

The entrance of MNCs to developing countries like Indonesia may be a blessing, but the government have to be aware because even though the entrance of MNCs may support the acceleration of development in telecommunications sector, but it may also make the stronger monopoly followed by capital concentration to some domestic businesses as partner of the MNC by using the hand of the government apparatus. As stated by Milton Friedman that the final source of monopoly is private collusion,<sup>1</sup> it is the collusion between big domestic businesses and foreign companies.

One of global factor influenced telecommunications sector is the participation of Indonesia in the World Trade Organization as the international body that regulated the world trading matters. Indonesia is the member of the WTO and has already ratified the Agreement on the Establishment of WTO by the Law Number 7 Year 1994. The agreement that entered into the Agreement on the Establishment of WTO consists of basic agreement and the annex.

Basic Agreement consists of:

- a. Goods (*General Agreement on Tariff and Trade/ GATT*)
- b. Services (*General Agreement on Trade in Services/ GATS*)
- c. Intellectual Property Right (*Trade-Related Aspects of Intellectual Properties/ TRIPS*)
- d. Dispute Settlements.

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<sup>1</sup>Milton Friedman. *Capitalism and Freedom. The 40th Anniversary Edition*. (Chicago and London: The University of Chicago Press, 2002), 131.

In the services GATS Annex includes:

- a. Movement of Labor Forces
- b. Air Transportation
- c. Financial Services
- d. Shipping
- e. Telecommunications.

From the *annex* we can see that the WTO Agreement contained all services including telecommunications, so it is difficult not to say that the Indonesia Telecommunications Law enacted in 1999, that is Law Number 36 Year 1999 along with implementation regulations are full with interest and pressure if the WTO Agreement, which among other is the liberalization of good and services trading, and it is undeniable that economic liberalization will take the victims.<sup>2</sup>

The GATS Annex in telecommunications required Indonesia to open telecommunications sector, and along with ratification by the Law Number Year 1994, Indonesian telecommunications sector entered into global business competition by leaving the monopoly structure of provision and control of the government through ownership. Competition in telecommunications brought broad impact to providers and also to the consumers of telecommunications services.

The commitment signed in the GATS and WTO may not be neglected even though it is already passed a long time. Violation or incompliance with the commitment may raise attention of other countries, for example: Regulation about data center in Indonesia that included in the Government Regulation Number 82 Year 2012 Regarding the Provision of Electronic System and Transaction, in Article 17:

- (1) *The provision of Electronic System for public services is required to place the data and disaster recovery center in the jurisdiction of Indonesia for the interest of law enforcement, protection, and the implementation of authority of the state to the citizen data.*

It raised the concern of the United States of America, it was the Office of the United States Trade Representative (USTR), which included in their Annual Report of

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<sup>2</sup>Bonnie Setiawan. *At the End of Globalisation, We Are All Dead*. [www.globaljust.org](http://www.globaljust.org). Accessed 14 December 2005, 1.

2015 (2015 Section 1377 Review On Compliance with Telecommunications Trade Agreements) related to Cross-Border Data Flows, where USTR suggested that the US Government to pay attention to their finding related to the US trading partner as Indonesia, USTR among other stated that:

*“Indonesia has adopted an Electronic Transactions Law and Presidential Regulation that requires providers of a “public service” to establish local data centers and disaster recovery centers in Indonesia (Article 17). Indonesian officials have that stated for purposes of the Electronic Transactions Law and Presidential Regulation; they will use the definition of a “public service” in the 2009 Public Service Law implementing regulations, which define a public service as any activity that provides a service by a public service provider. ... A local data center requirement could prevent providers from fully leveraging the economies of scale from existing data centers and discourage future investment in Indonesia. ... This measure raises questions in connection with Indonesia’s commitments to permit the cross-border supply of data processing and value-added telecommunications services (e.g., email services).”<sup>3</sup>*

Development of Over The Top (OTT) services regulation in other country is also become concern of the USTR, in its report included the special concern about the action had taken by other country regarding the OTT services, for example regulation enacted by the Vietnam government on the OTT services, stipulated in the USTR report:

*“In October 2014, Vietnam’s Ministry of Information and Communications (MIC) released a draft “Circular on Managing the Provision and Use of Internet-based Voice and Text Services” (the Circular) for public comment.*

*Article 6 of the Circular requires that foreign providers of certain chargeable (i.e., not offered for free) OTT services, in particular voice and messaging services, enter into an undefined commercial relationship with a licensed telecommunications supplier as a condition of supplying the OTT services in Vietnam. ... Such a requirement might make sense with respect to interconnection arrangements for traditional, circuit-switched networks and services, which require physical interconnection arrangements, negotiated under contract or set by tariff; however, the nature of OTT services is that they can be provided over the Internet completely independent of any underlying transmission provider. ... Articles 10 and 15 of the Circular also raise concerns. Article 10 would limit competition*

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<sup>3</sup>Office of the United States Trade Representative (USTR). 2015 Section 1377 Review On Compliance with Telecommunications Trade Agreements.

*in the provision of voice services, by preventing non-chargeable (i.e., free) services from connecting to a consumer in Vietnam through that consumer's phone number. ... This would eliminate a whole new set of potential competitors in the voice service market. Article 15 conditions the provision of both chargeable and non-chargeable OTT services on suppliers maintaining a server system in Vietnam.”<sup>4</sup>*

USTR encourage the MIC to pay attention on the Circular and focused to the policy that may support the continued development of ICT services. USTR paid attention that the proposal included in the Circular may influence the trade commitment of Vietnam and disturbing development of ICT sector in Vietnam, where competition may bring more advantage.

Even though in Indonesia there is no regulation regarding the OTT services, but there is the important thing to be considered in the USTR report, that in enactment of a new law or regulation related to telecommunications services including OTT services regulation, the law and regulation maker cannot be free from the binding of international agreement which had already entered into, the law and regulation maker need to consider all commitment that has given in international agreement such as GATS and WTO.

## **2. Trans Pacific Partnership Agreement**

Trans-Pacific Partnership (TPP) Agreement is an agreement regarding trade and investment that newly signed on February 4<sup>th</sup>, 2016 among twelve countries in the Pacific Rim, that are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the USA.

The purpose of the TPP Agreement is to create *free trade area* which consistent with Article XXIV of GATT 1994 and Article V of GATS as stipulated in Article 1.1 TPP Agreement:

*Article 1.1: Establishment of a Free Trade Area*  
*The Parties, consistent with Article XXIV of GATT 1994 and Article V of GATS, hereby establish a free trade area in accordance with the provisions of this Agreement.*

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<sup>4</sup>*Ibid.*

In the TPP Agreement it is admitted that there is intention of all parties to be consistent to apply international agreement that has already signed before by the parties including the WTO Agreement and all rights and obligations stipulated in the agreement, as stipulated in Article 1.2 TPP Agreement:

*Article 1.2: Relation to Other Agreements*

1. *Recognizing the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms:*
  - (a) *in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to the other Parties; and*
  - (b) *in relation to existing international agreements to which that Party and at least one other Party are party, its existing rights and obligations with respect to that other Party or Parties, as the case may be.*
2. *If a Party considers that a provision of this Agreement is inconsistent with a provision of another agreement to which it and at least one other Party are party, on request, the relevant Parties to the other agreement shall consult with a view to reaching a mutually satisfactory solution. This paragraph is without prejudice to a Party's rights and obligations under Chapter 28 (Dispute Settlement).*

Provision in the TPP Agreement stated that in implementation of the Agreement, the member countries agreed that if in fact any other agreement give better treatment in goods, services, investment and individual than given by the TPP Agreement it is not mean that there is any inconsistency as stated in Paragraph above.

According to its supporters, the TPP will bring economic improvement in entire region of member states by eliminating of tariffs and other barriers in international trade and investment. But it is also analysts, according to their study, stated that the estimate improvement will not completely fulfill, even for the US, there will be only an insignificant increase of economy development.<sup>5</sup>

In the US, the main problem face by the Congress in its role related to the TPP are: (1) how strong the weight of implication of geo-politics of the TPP; (2) potential

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<sup>5</sup>Jeronim Capaldo and Alex Izurieta with Jomo Kwame Sundaram. Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement. Global Development And Environment Institute Working Paper No. 16-01. Tufts University, Medford, MA, USA, January 2016.

impact of TPP to multilateral trading system and other trade and economic institution; and (3) probability of expansion of the TPP Agreement to include additional members.<sup>6</sup>

Agreement related to telecommunications stated in Chapter 13 which include, some activities as stipulated in Article 13.2:

*Article 13.2: Scope*

1. *This Chapter shall apply to:*
  - (a) *any measure relating to access to and use of public telecommunications services;*
  - (b) *any measure relating to obligations regarding suppliers of public telecommunications services; and*
  - (c) *any other measure relating to telecommunications services.*

One thing that may be raise question mark in the TPP Agreement, considering that the Agreement is signed not long ago which is on February 4<sup>th</sup>, 2016, but the Agreement do not cited the potential of fast change in information and communication in day to day life such as development of the Internet generally and development of OTT services and the Internet of Things (IoT) specifically. Is it because the telecommunications services provided through the Internet has already included in Article 13.2, or in Paragraph 2? As follows:

1. *This Chapter shall not apply to any measure relating to broadcast or cable distribution of radio or television programming, except that:*
  - (a) *Article 13.4.1 (Access to and Use of Public Telecommunications Services) shall apply with respect to a cable or broadcast service supplier's access to and use of public telecommunications services; and*
  - (b) *Article 13.22 (Transparency) shall apply to any technical measure to the extent that the measure also affects public telecommunications services.*

In Article 13.4 stipulated the agreement of access to public telecommunications services, that is:

*Article 13.4: Access to and Use of Public Telecommunications Services*

1. *Each Party shall ensure that any enterprise of another Party has access to and use of any public telecommunications service,*

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<sup>6</sup>Congressional Research Service. Brock R. Williams, Coordinator. *The Trans-Pacific Partnership: Strategic Implications*. CRS Report, Prepared for Members and Committees of Congress. February 3, 2016.



*including leased circuits, offered in its territory or across its borders, on reasonable and non-discriminatory terms and conditions.*

2. *Each Party shall ensure that any service supplier of another Party is permitted to:*
  - (a) *purchase or lease, and attach terminal or other equipment that interfaces with a public telecommunications network;*
  - (b) *provide services to individual or multiple end-users over leased or owned circuits;*
  - (c) *connect leased or owned circuits with public telecommunications networks and services or with circuits leased or owned by another enterprise*
  - (d) *perform switching, signaling, processing and conversion functions; and*
  - (e) *use operating protocols of their choice.*

If we look carefully it will be seen that Article 13 TPP Agreement regarding telecommunications is almost similar with the GATS Annex on Telecommunications, so there is no new matter included and there is no consideration about technical improvement and development in telecommunications sector.

The matters related to trading via the Internet (*E-Commerce*) stipulated in Chapter 14 TPP Agreement, however, the matters included to the Agreement is only matters of the Internet related to trading, not include the use of the Internet for telecommunications provisions as rapidly developed in the form of OTT services and the concept of IoT.

Nevertheless, if Indonesia decided to join the TPP Agreement, it is necessary to carefully consider all matter related to the benefit and loss of joining the agreement, so it will not only to open Indonesia as a big market of goods and services supplied by other dominant member states such as Australia, Canada, Japan, and the US, and furthermore in the making of new law and regulation related to telecommunications, the TPP Agreement has to be considered.

### **3. Liberalization of Telecommunications Sector**

On February 15<sup>th</sup>, 1997, there were sixty nine countries signed the agreement to liberalize world telecommunications market. Telecommunications market is a market which according to Renato Ruggiero, Director General of World Trade Organization (WTO), has a value more than half trillion dollars annually. According to Ruggiero, the



sixty-nine country made commitment that raised more than 90% of world telecommunications sector revenue. In his statement on February 17<sup>th</sup>, 1997, Ruggiero congratulated the government of the countries for the “decision and view in bring about the negotiation to the successful agreement.”<sup>7</sup>

Even though it is admitted that there were delays to reach the agreement, Ruggiero stated that not all decision was an easy thing, but at the end the member states had already put their confident in the multilateral process in the WTO and WTO has implemented it.<sup>8</sup>

The signed of the WTO Agreement show that member states agreed to open their telecommunications market and allowed the entrance of outsider into telecommunications sector in their country. Many of the view that the signed was a sign that the global war of competition is begin in the world telecommunications market. Many put hope and optimism and many view of pessimism.

Indonesia as a country that undeveloped in economy, but quite developed in telecommunications technology, have no choice in the process of negotiation. Indonesia had tried to protect its telecommunications sector with the reason that it already given the exclusive rights to voice based telecommunications services operators (*voice telephone*) for public services and already given commitment to review the grant of license to other operators to enter into domestic and international telecommunications after the end of the exclusive rights no longer than 2006, but in fact Indonesia have opened its telecommunications sector in 2004, by giving compensation to operators that have exclusive rights for domestic and international telecommunications services. For Indonesia the WTO Agreement is a challenge and, at the same time, an opportunity. The WTO Agreement may become opportunity for Indonesian telecommunications businesses to broaden their business to other countries, even though according to some parties it yet necessary because domestic market in Indonesia is still very attractive and not be controlled by Indonesian domestic players.

The challenge is that if foreign telecommunications business come with their big capital and sophisticated technology, it will be no choice for Indonesian telecommunications players that they have to be well prepared to face the challenge or they may be loss in a very tough competition. Although it will not happen

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<sup>7</sup>Eric Senunas. The 1997 GATS Agreement on Basic Telecommunications: A Triumph For Multilateralism, or the Market? *B.C. Intell. Prop. & Tech. F.* 111401, 1997.

<sup>8</sup>*Ibid.*

automatically, because there are many things to be considered by foreign business to enter Indonesian market, among others, unsoundness of investment climate, lower level of law enforcement, procedural inflexibility and license costs, and other unpredictable costs, and many other considerations, nevertheless, Indonesia is still an attractive market for telecommunications services providers.

#### 4. Privatization and Competition in Telecommunications Sector

To the question about when the privatization in telecommunications sector in Indonesia began, there are so many answers may be submitted. Some parties said that the privatization in this sector began when PT Indosat conducted an *Initial Public Offering* (IPO) in 1994, by selling part of the government shares to private parties inside and outside the country, and other said that it was began when PT Indosat was established in 1967, because PT Indosat was a joint venture company established by the Government of Indonesia to operate the Satellite Earth Station owned by *International Telecommunications Satellite Organization* (Intelsat), located in Indonesia in order to access Intelsat satellite located in Indian Ocean region by the concept of *Built, Transfer and Operate* (BTO) for 20 years for the provision of international telecommunications services.<sup>9</sup>

Before the establishment of PT Indosat, international telecommunications services were provided by Perumtel as the only provider of telecommunications in Indonesia. Then the government (through Perumtel) established a *joint venture* to provide international telecommunications services.<sup>10</sup>

Practically, competition in telecommunications in Indonesia has already started since the grant of license to fixed cellular operator in some region to other company than PT Telekomunikasi Indonesia, for example to PT Ratelindo for the region of West Java and DKI Jakarta and since the grant of license to PT Indosat and PT Satelindo as providers of international telecommunications.

Privatization in telecommunications sector is not ended by the sold of shares of PT Indosat in the domestic and foreign stock exchanges, but it is followed by the IPO conducted by PT Telkom in 1995 by offered the shares in the US, England, Japan and

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<sup>9</sup>PT Indosat. Annual Report 2005, 23.

<sup>10</sup>Directorate General of Post and Telecommunications, Department of Transport, Communications and Tourism. *History of Post and Telecommunications in Indonesia, Volume V New Order Era*, Jakarta, 151.

Indonesian stock exchanges. Meanwhile, competition has already entered all part of telecommunications sector.<sup>11</sup>

Privatization is the government action to give opportunity to the private sector to enter into a field of business that formerly held and controlled by the government, whether it was provided by the state owned corporation or by other companies which was given an exclusive right by the government to control certain field of business. There are some important things to be considered in the matter of privatization:

a. Privatization must be with a clear reason

Before privatization, the government should have a clear reason, so there would no suspicion by people about the purpose and intention of the government in privatizing a state owned company. All reason should be organized in accordance with the goal that will be achieved by government by the privatization.

b. Privatization must be with a clear goal

There are many goals of privatization, among others:

1) To fill government need of cash

The simplest goal of privatization is to fill the need of cash of the government. This will be done for some purposes, i.e. to fill a deficit of government budget, seeking money for development or to continue development of related sector and it may also to pay government debt.

2) To improve the government performance and services

By the entrance of private party especially foreigner brought their new capital and management, it can be expected that related sector will be more efficient and may improve their performance and services.

3) To accelerate development of related sector

By privatization, it may be expected that foreign capital and technology will come and may accelerate development in the related sector.

c. Privatization should be followed by deregulation

Privatization that not followed by deregulation may resulted the transfer of government monopoly to be a private monopoly. It is better that privatization is followed by the policy that will stop monopoly and open the competition. By

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<sup>11</sup>Rajat Kathuria. *Measuring the Impact of Decline in Leased Line Prices for the Indonesian Economy*. 2009, 5.

competition it may be expected that performance of businesses will be improved and services may become better.

## 5. Impact of Technology in Telecommunications Regulation

Telecommunications is generally a *technology driven industry* therefore the impact that caused by technology development will influence telecommunications sector heavily. The development of telecommunications technology in ten years period (1989-1999)<sup>12</sup> was very rapid and it make the Telecommunications Law of 1989 became obsolete only in relatively short period of time. Now, at the time of the Telecommunications Law of 1999 applicable for almost eighteen, and the development of telecommunications technology is more rapid than the period of the Telecommunications Law of 1989 (1989—1999).

Development of the Internet, GSM cellular technology which is now entered the fourth generation (4G) and computer and internet technology increased rapidly, therefore so many things that not be covered by the Telecommunications Law of 1999, among others the usage of Voice over Internet Protocol (VoIP), convergence of voice and data technology, convergence of telecommunications services and cable television, and telecommunications and Internet.

The presence of services provided by Over the Top (OTT) providers, and it is also cannot be denied the use of Internet for every need that meanwhile known as the IoT (*Internet of Things*), which not covered in the applicable law and regulations regime. So it can be said that technology may make laws and regulations become obsolete faster.

Even though regulator may exist and function in accordance with law and regulation and the government of the state, however, the border where telecommunications services is provided has already changed to become something more relative and artificial. Regional and international cooperation in many fields became a challenge along with the development of developed and consolidated businesses.<sup>13</sup>

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<sup>12</sup>It is referred to the old Telecommunications Law of Indonesia (Law Number 3 Year 1989) and the New Telecommunications Law (Law Number 36 Year 1999).

<sup>13</sup>Colin Blackman and Lara Srivastava (Ed.) Telecommunications Regulation Handbook. Tenth Anniversary Edition. (Washington, DC: The International Bank for Reconstruction and Development/The World Bank, InfoDev, and The International Telecommunication Union, 2011), 220.

One of the same themes existed in almost all regulatory trends and continues changing as the result of convergence and digital technology development is the globalization of ICT. The ICT may be a central of support of market globalization and integration of economy in the world, and as the result the policy issues become a global issues,<sup>14</sup> therefore regulation that followed should be global in nature.

The increase of information traffics beyond the states border everyday through the link and landing point, which in principle connected the network of one country to the network of other country, actually cannot be seen by users. Mobile service particularly is not possible to cross artificial border of the states, and the users commonly *roaming* by using the network owned by neighboring country.

Many providers that have and invest in the telecommunications network commonly have *multiple licenses* within one region, and there are providers that tried to integrate the services in the markets in some different countries. Technology has moved beyond the national border and regulation has to follow.<sup>15</sup> The government and regulator may not neglect the development of technology in the amendment of existing law or proposing the new regulation.

## 6. Convergence in Telecommunications Sector

Previously, voice based and data based telecommunications transmitted by network that planned by varied system and purposes. For example, traditional voice network is planned with available technology at the time that may be optimally used only to transmit voice signal. Convergence of telecommunications and information technology, for example convergence of computer technology and communications technology in the Internet, and convergence of media (conduit) and content in cable television, brought impact to business convergence in the aspect of regional boundaries and in the aspect of ownership.<sup>16</sup>

When data communications industry began around the end of 1950's, telephone companies charged a very expensive fees for the services. It was because functionally, the companies provided voice services not data services. Even operators said that they controlled communications data technology, however, they faced difficulties, among

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<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*

<sup>16</sup>David N. Townsend. *Briefing Report on Regulatory Implications of Telecommunications Convergence*. ITU Regulatory Colloquium No.6, March 1997. ITU, Geneva, 1997, 6.

others: there were not so many experts in data telecommunications in telephone companies at the time, and many companies have difficulties when there were not change when the demand for data services started to increase.<sup>17</sup>

But now various services that separated last time may not be separated anymore and must be discussed simultaneously, because technologically services such as radio, television, telephone and Internet may be provided through the same network.

The regulator should be aware of this matter, whether in the enactment of technical regulation or in proposing business regulation, for with the convergence, the former relatively uncoordinated regulations, should be totally reconsidered as soon as possible in order to be able to be mutually implemented and not be overlapped each other.

There are some reasons why radio, television, cable, satellite, telephone, wire network, cellular telephone and Internet should be discussed in integrated manner like in services market as stated above, but the main concern of regulator is a doubt that competition may not be continued and also is not demanded by operators.

Since last time, the policy maker concern about the economic value of local telephone service is: there is only one operator will survive in the long term: in this case “competition will not evolved,” or there is only one operator that can provide a quality telephone service with lower tariff than its competitor: in this case “competition is not demanded.”

Therefore, regulator of telecommunications sector has to continue to ensure that regulation may not eliminate competition as a main framework in providing good quality services. The same argument that regulation may bring advantage than competition will rise in every telecommunication market, this is another reason that all field as stated above should be discussed at the same time.<sup>18</sup>

Every effort to separate types of telecommunications services may be hampered by technological convergence phenomena. Not only radio, cable, telephone and Internet that may be substituted and interconnected each other, but also the border between one service and another became more and more vanish. Not only substitution each other,

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<sup>17</sup>Regis J. Bates. *Broadband Telecommunications Handbook, Second Edition*. (Phoenix, Az.: The McGraw-Hill Companies, Inc., 2002), 15.

<sup>18</sup>Stuart Minor Benyamin, et.al. *Telecommunications Law and Policy. Second Edition*. (Durham, North Carolina: Carolina Academic Press, 2006), xxii.

television, telephone and computer also more increased in the usage, this is also supported that the services have to be discussed together.<sup>19</sup>

Technological convergence is different with regulation regime that since last time existed in different region and separated where radio, television, telephone and Internet regulate by different and separate laws and regulations. In this case, even though technology has already convergent, but the law matters that bind them still separate significantly.

One reason is given to the discussion of telecommunications law at the moment is the statement that the people presently live in the middle of transformation process that will ended later on not only in the technological convergence but also in the convergence of law matters. However, nobody knows until when the convergence will last and how is the nature of the convergence of law and of technology at the end of time. But this time, it is not only convergence of technology that will be faced, but also the law that will regulate telecommunications sector, and certainly the participation of operators and regulator is demanded.

The increase of demand on data communications encourages the development of network for data services. Data network is planned to transmit data traffic with certain characteristic efficiently and to ensure the accuracy of data received by the receiver.

The decrease of digital technology price encourages the use of the technology in voice network, and this change make the voice network be more similar with data network, and this will further make possible the voice network convergent with the data network. The low price of digital technology followed by the availability of more effective *Digital Signal Processing* (DSP) technic, it make the price of digital equipment lower and make digital technology can be used to improve quality and capacity of telecommunications transmission and exchange with affordable price. Some other reasons that make digital technology is more interesting for investors in telecommunications sector are:

- a. Digital signal is more resistant to the *degrade* when transmitted in long distance compare to signal with analog technology, so the amplification can be reduced and signal quality increased;
- b. Maintenance of digital system is less than the analog system;

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<sup>19</sup>*Ibid.*

- c. Digital network is more simple and the cost is lower; and
- d. Digital exchange is easy to automatizing and centralizing and can be effectively managed and controlled.

Even though many big telecommunications operators still separate data network with voice network, but in fact meanwhile data can be transmitted through voice network and also voice can be transmitted through data network vice versa. For example, user may send data through voice network by using a modem; low quality voice may also send through *backbone* data network like the Internet. But now there is a trend toward the convergence between data network and voice network. In practice, there has been invented an *integrated network* that may carry many kind of information such as voice, text, data and video.

To build and to develop the integrated network it is required to use a complete digital system where no part of the network is still using analog system. Moreover, it is needed the sufficient exchange and transmission capacity to transmit voice and picture, and it is necessary to develop a proper exchange system protocol and transmission. A standard protocol system is necessary to ensure that kinds of communications may be carried properly and efficiently.

Actually, there was convergence in the last time even only partly, for example was the use of equipment with the standard *Integrated Services Digital Network* (ISDN) on access network. ISDN was used by business subscribers as the tool to send data and voice through separated main network. Another example was the *frame relay protocol* that may carry voice, text and data communications through integrated data network.

In Australia, since 1998 telecommunications provider Telstra stated that to interconnect *Local Area Network* (LAN), they moved to the more integrated network.<sup>20</sup> The main benefit from integrated network is that the network make may possible to the operators to become more competitive in data transmission business and will have higher position when the *broadband multimedia* market increased, whether in the level of business subscriber or household subscriber.

Wireless technology is also developed significantly. At present the capacity of digital cellular network is more developed and many investors invest in *small low earth*

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<sup>20</sup>Industry Commission. *Telecommunications Equipment, Systems and Services. Report No. 61*, 9 April 1998. Commonwealth of Australia, 1998, 70.



*orbiting satellites*, which arranged to transmit voice and data communications to the whole world.

However, the development is not without obstruction. The main factor that hampers the development of interactive multimedia at present is the limited capacity of local network, and the less alternative available. But there are some new technologies that developed meanwhile that make possible to improve the network capacity with efficient cost without using expensive cable. The technology, among others, is compressing technology such as the sophisticated *Digital Signal Processing* (DSP) and mobile telecommunications system.

The development of technological convergence between telecommunications and information technology, such as the convergence between computer and communications technology in the Internet, and convergence of media (conduit) and content on cable television, bring the impact on business convergence in the aspect of regional border and ownership, should be concerned by the government and regulator, whether in proposing technical regulation or in business regulation. In this paper there is the hope that technical and business convergence will be followed by regulatory convergence.

## **7. Conclusion**

The impact of international and regional agreement such GATS, WTO and TPP to telecommunications sector, particularly in the laws and regulations regime is undeniable. Beside the important of international and regional agreement, there is also happened the development of technology.

The development of technology in telecommunications sector supported the convergence of technology, business and services offered to the customers. Meanwhile there are so many kind of services entered telecommunications market. The new services such as OTT and IoT services have become day to day consumption. Unfortunately, the development and the convergence of technology, business and services do not followed by law and regulation.

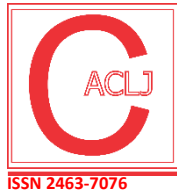
Indonesia needs the reform in its telecommunications law and regulations. In the progress of the reform, the government and regulator have pay attention and aware and of all existing agreement which entered into by Indonesia. The government and

regulator also have to consider the development of technology and services following the technology so the new regulatory regime will not obsolete faster.

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**THE DIRECTION OF INDONESIA'S BANKING POLICY  
IN FACING ASEAN ECONOMIC COMMUNITY<sup>1</sup>**

**Lidzikri Caesar Dustira<sup>2</sup>**

***Abstract***

*Indonesia, together with the other member states, has agreed to establish 2020 ASEAN Community on October 2003. One of its fundamental components includes the enactment of ASEAN Economic Community. Specifically for the banking sectors, on April 2011 the member states have adopted ASEAN Banking Integration Framework, which is mainly designed so as to develop regulatory and policy harmonization as well as to accelerate banking business integration throughout the region. Needless to say, this paper primarily aims to address what efforts should be taken by Indonesia vis-à-vis the banking policy and regulatory regime in the interest of preparing them to enter into the era of effective enforcement of the ASEAN Economic Community. Case in point, Indonesia is required (i) to strengthen their national banking performance in facing the regional integration, (ii) to review and adjust their banking regulations to resolve national interest in facing ASEAN Economic Community, and (iii) to harmonize their banking regulations to be in line with the provisions of ASEAN Banking Integration Framework. As for Indonesian state-owned banks in particular, they also must fortify themselves against the coming tough competition from other member states' banks. It is also significant for the regulators to set out a clear distinction of the foreign banks' business in Indonesia. The key ideas are that the foreign banks must also contribute to the development of national financial services industry and be prevented in causing systemic financial risks in the event financial catastrophes occurs.*

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## 1. ASEAN Economic Community Initiative

Integration could be articulated as an action of incorporating several different groups into one. And this happens in ASEAN region. As a result of the Declaration of ASEAN Concord II in Bali in October 2003, the Heads of State of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Laos People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam have agreed to establish 2020 ASEAN Community, including the ASEAN Economic Community ("AEC").<sup>3</sup> Further, the ASEAN member countries have agreed to adopt the AEC Blueprint, which was executed on November 20, 2007, stipulating that each of them shall abide by the AEC by 2015.<sup>4</sup> Pursuant to AEC Blueprint, the objectives and purposes of AEC are as follows:<sup>5</sup>

- 1) to establish economic integration at 2020 in accordance with the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based system for effective compliance and implementation of economic commitments;
- 2) to create a more dynamic and competitive ASEAN's single market and production base with new mechanisms and measures; to accelerate regional integration in the priority sectors; to facilitate movement of business persons; to create skilled labor and talents; to strengthen ASEAN's institutional mechanism;
- 3) to address the development divide and accelerate integration of Cambodia, Lao PDR, Myanmar, and Vietnam; and
- 4) to incorporate cooperation in the sector of human resources development and capacity building, recognition of professional qualifications, closer consultation on macroeconomic and financial policies, trade financing measures, enhanced infrastructure and communications connectivity, development of electronic transaction through e-ASEAN, integrating industries across the region to

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<sup>3</sup> ASEAN, *ASEAN Economic Community Blueprint*, (Jakarta: ASEAN Secretariat, January 2008), page 2.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., page 5-6.

promote regional sourcing, and enhancing private sector involvement for the building of the AEC.

In short, the key characteristics of AEC, among others, are intended to create: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable development, and (d) a region fully integrated into the global economy.<sup>6</sup>

The creators of AEC Blueprint have conducted consultations with relevant bodies/stakeholders in collecting inputs and coordinated joint conference in reviewing the Blueprint in order to ensure consistency of the measures, programs and milestones across sectors and to promote greater sense of belonging of the Blueprint among the member countries.<sup>7</sup> Further, on the one hand, the relevant ASEAN divisional bodies will coordinate the implementation of the programs and measures, while on the other hand, relevant government agencies will responsibly oversee the implementation and preparation the action plans in more detail at national level.<sup>8</sup> Participation by all stakeholders for integration process must be assured by actively involving private sector, industry associations and community at regional and national levels.<sup>9</sup>

## **2. Integration Framework on Banking Industry**

So as to provide a general framework for the liberalization and integration initiatives under AEC in the banking sector, ASEAN Central Bank Governors in April 2011 adopted the ASEAN Banking Integration Framework (“ABIF”), in which the target was to achieve significant progress by 2020.<sup>10</sup> ABIF is designed for the following objectives: to enable ASEAN banks to enter and operate in the banking sector of other ASEAN member states, to eliminate discrimination against foreign banks, and to create a more consistent banking environment throughout the region.<sup>11</sup> To achieve the target in

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<sup>6</sup> Ibid., page 6.

<sup>7</sup> Ibid., page 26.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Almekinders, Geert et al, *IMF Working Paper, ASEAN Financial Integration* (February 2015), page 7.

<sup>11</sup> Asian Development Bank, *The Road to ASEAN Financial Integration: A Combined Study on Assessing the Financial Landscape and Formulating Milestones for Monetary and Financial Integration in ASEAN*, (Philippines: Asian Development Bank, 2013), page 10.

2020, several actions needed to be made, such as that only a small number of high quality banks that meet specific qualifications may gain access to all member states (which is further described as Qualified ASEAN Banks or “QAB”).<sup>12</sup> To obtain a status as QAB, a bank must meet the minimum capital adequacy requirements, consolidation requirements and authority for consolidated supervision, restrictions on large exposure, and minimum accounting and transparency requirements.<sup>13</sup> The member states must agree to facilitate QAB access to their respective domestic banking markets. Such qualifications would serve as benchmark for regulatory harmonization in the banking industry to accelerate the integration throughout the region and also as operating targets for financial strength and operating efficiency, and thus accelerate capacity building of each region’s banking markets.<sup>14</sup>

Note that the integration includes liberalization of market access, which should be implemented for market entry and cross-border bank activities.<sup>15</sup> This means QABs must be allowed to provide cross-border banking activities, which will subject to the relevant types of banking licensing category granted by the host country.<sup>16</sup> Also, the regulators must take into consideration that the process of granting equal treatment to all banks, especially in the matter of regulatory supervision, should be based on their risk profile.<sup>17</sup>

In addition to QAB, the regional integration also demands a consistent environment of regulatory, which initially can be originated from the QAB qualifications with key areas of concerns: bank accounting standards and disclosure requirements, minimum capital requirements, risk management, Prompt Corrective Action (“PGA”) and resolution methods for failed banks, restrictions on large exposure, and anti-money-laundering and consumer protection regulations.<sup>18</sup> Moreover, to prevent potential conflict among national supervisors the prudential requirements for banks must also be harmonized using the following requirements, including but not limited to, minimum PGA triggers, accounting practices and disclosure requirements to ensure adequate transparency, asset and liability

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<sup>12</sup> *Ibid.* page 11.

<sup>13</sup> Almekinders, Geert et al, *IMF Working Paper, ASEAN Financial Integration* (February 2015), page 15.

<sup>14</sup> Asian Development Bank, *Opcit*, page 11.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, page 12

management restrictions to prevent regulatory arbitrage, and risk management regulations.<sup>19</sup>

In a few member countries that have less developed banking markets, priority should be given for capacity building by way of, among others, establishing national credit rating agencies, credit guarantee facilities, and interbank lending and borrowing market before a country can begin to entry barriers.<sup>20</sup> ADB highlights the importance of joint effort among the member countries as to create a consistent banking environment within the region.<sup>21</sup> Such less developed member states may find it difficult to establish critical infrastructure in time for the prompt integration of the regional banking market.<sup>22</sup> Therefore, assistance and cooperation from other member states would significantly affect the improvement for timely integration.<sup>23</sup>

### 3. Indonesia's Banking Industry at a Glance

To view from a bigger picture, Asia-Pacific became one of the largest sources of global banking profits and will likely to continue expanding.<sup>24</sup> Between 2005-2015, the share of global after-tax profits increased significantly from 28% to 46%.<sup>25</sup> The global profit for Asia-Pacific regions reached pool above \$ 1 trillion.<sup>26</sup> However, in 2015 the profits went lower fell from \$ 548 billion to \$ 538 billion from 2014 to 2015, the first decline since 2009 aftermath of global economic crisis.<sup>27</sup> A closer look points out China as the powerhouse in the region while Australia shows its market is more mature than other region, and its competition is more intense.<sup>28</sup> Japan had its unique domestic plagued during the period while in other developed markets such as Hong Kong, New Zealand, Singapore,

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> HV, Vinayak, et.al., *Weathering the storm Asia-Pacific Banking Review 2016*. McKinsey & Company, Global Banking June 2016. page 7.

<sup>25</sup> Calculations of profit pools were based on a propriety methodology used by McKinsey Panorama team. The analysis excludes a bank's treasury and non-banking activities to account for in-country banking pools, which results in differences with reported financial figures from the banking industry. See *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

South Korea and Taiwan, the profits grew 4 percent a year on average.<sup>29</sup> For other emerging countries, including Indonesia, Malaysia, Thailand and Vietnam, they averagely grew by 15 percent a year.<sup>30</sup>

Speaking of Indonesia in particular, the Indonesian banking sector in 2016 is expected to bounce back because of the lower primary reserve requirement ratio for rupiah deposits (6.5 percent), lower cost of funds as well as operational costs, rising credit volume (due to lower interest rate environment) and improving purchasing power.<sup>31</sup> The banking sector is also expected to taste the stimulus given by the government in order to strengthen domestic business and improve investment climate.<sup>32</sup> The banks also will benefit from infrastructure development, one of the cores of government's program.<sup>33</sup> Below is the overall performance of Indonesian banks:<sup>34</sup>

Variables	2012	2013	2014	2015
Net Profits (in IDR trillion)	92.8	106.7	112.2	104.6
Net Interest Income (in IDR trillion)	391.3	458.2	568.0	646.6
Total Assets (in IDR trillion)	4,262.6	4,954.5	5,615.2	6,132.6
Credit (in IDR trillion)	2,707.9	3,292.9	3,674.3	4,057.9
Third-Party Funds (in IDR trillion)	3,225.2	3,664.0	4,114.4	4,413.1
Loan-Deposit Ratio (LDR) (%)	83.6	89.7	89.4	92.1
Capital Adequacy Ratio (CAR) (%)	17.4	18.1	19.6	21.4
Net Interest Margin (NIM) (%)	5.5	4.9	4.2	5.4
Return on Assets (ROA) (%)	3.1	3.1	2.9	2.3

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Bank Indonesia Positive about Banking Sector in 2016, Fitch Doubts. <http://www.indonesia-investments.com/news/todays-headlines/bank-indonesia-positive-about-banking-sector-in-2016-fitch-doubts/item6628>.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*



#### 4. What To Do

Descriptions and rationales have been described above. Indonesia would likely be facing some consequences that might arise towards its commitment to AEC and ABIF. A few points that promptly need to be taken into account:

- 1) Indonesia would need to strengthen their national banking sector in facing the regional integration;
- 2) Indonesia needs to review and revise their banking regulations to empower national interest in facing AEC; and
- 3) Indonesia needs to harmonize their banking regulations to be in line with the provisions under AEC and ABIF.

To show Indonesia's commitment towards AEC and ABIF results, among other things, the Indonesian state-owned banks must strengthen its capability and competitiveness in order to become and compete with QAB. One of the effective solutions is to increase a bank's capital. Such capital increase may instantly be realized by consolidating several strong banks into one to meet QAB's requirements. In line with the aforementioned, Indonesian Financial Services Authority (*Otoritas Jasa Keuangan*) has agenda in implementing the Indonesian Banking Architecture by way of creating a strong and efficient banking system as well as consolidating banks through M&A.<sup>35</sup> Approximately there are 118 commercial banks in Indonesia and OJK intends to consolidate those 60-70 banks within the next 10 to 15 years, that will comprise of the following categories: international, national and specialized or rural banks.<sup>36</sup> This approach also can be seen conducted by Malaysia in light of the AEC in the 2010-2020 period. Case in point, the Central Bank of Malaysia has agreed to the merger between three major Malaysian banks, namely, the CIMB Group, RHB Capital and Malaysia Building Society.

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<sup>35</sup> Ernst & Young, *Indonesian banking industry: challenging yet promising*. September 2015. page 3.

<sup>36</sup> *Ibid*.

<sup>37</sup> However, such may not readily result in significant capital increase if compared to, for instance, a Singaporean bank's capital.<sup>38</sup> Hence, a strategic intervention from the Indonesian government to inject capital to local banks may be necessary. The government, on the other hand, should also take into account other required actions in preparing the Indonesian banks to meet QAB's criteria.

Concurrent with the aforesaid, it is also important to strictly regulate the business of foreign banks in Indonesia so as to provide latitude for local banks to prepare for QAB. In addition, foreign banks must be regulated for the specific reason of financial inclusion since it must participate in developing national financial services' access and banking products. Foreign banks must also maintain its risk management so as to prevent the Indonesian government from bearing the systematic financial risks caused by foreign banks. Such an arrangement is moreover important to implement reciprocal principles<sup>39</sup> and to adjust the existing banking law to the current conditions of the Indonesian economy.<sup>40</sup> Such plans can be accordingly implemented by reforming the substance of the banking law. With respect to that, the House of Representative of the Republic of Indonesia apparently has formed a task force to prepare the new banking law and as such is listed in number 34 priority of 2016 legislation for the bill to be passed.<sup>41</sup>

The new banking law should firstly be adjusted with terms as set out in ABIF. Moreover, the law must differentiate between the definitions of national and foreign banks. The existing banking law does not stipulate the definition of a foreign bank. The proposed

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<sup>37</sup> See more at <http://www.republika.co.id/berita/koran/pareto/14/10/08/nd40kh35-konsolidasi-menuju-mea-2020>

<sup>38</sup> If national bank's capital of IDR 800 trillion consolidated with a local bank with capital of IDR 400 trillion will resulting IDR 1,200 trillion. If compared with DBS that already has IDR 3,500 trillion, then such consolidation will not be significantly impactful. See more details at <http://www.gresnews.com/berita/ekonomi/10202-merger-antar-bank-bukan-solusi-tepat-hadapi-mea/0/>

<sup>39</sup> The implementation of reciprocal commitment means the treatment towards foreign banks in Indonesia must be adjusted with the treatment towards Indonesian banks in the originated countries of such foreign banks. The implementation should cover, including but not limited, to the opening of branch office's policy, the opening of ATM network, capital and ownership, and deposit taking limitations.

<sup>40</sup> The existing banking law was enacted in 1998 with the spirit as to adjust the banking regulations with the economic crises 1998's treatment program. At that time, the banking law was deemed necessary to adopt the liberalization concept as to reduce the state's role and release the financial institutions from "financial repression". Further, the law was also focused on restructuring the bank and its system. The focus of the law must be increased as the Indonesian economic goes to stability, not only focus in restructuring but also in increasing competitiveness of national banks.

<sup>41</sup> <http://www.dpr.go.id/uu/prolegnas>.

definition of a foreign bank shall be a bank incorporated under Indonesian law but which is controlled by a foreign entity/government.<sup>42</sup> Further, we may stipulate the derivative provisions:

1) The policy of opening of a branch office

Foreign banks have 7,982 branch offices, or 43% of the total of all banks' branch offices in Indonesia.<sup>43</sup> As such, the new banking law needs to stipulate restrictions on foreign banks opening new branch offices. For instance, the concept of zoning could be implemented. Zoning is created based on the density level of a branch's amount and the economic growth of certain regions. If a foreign bank intends to open a branch office in a region that has the highest level of density, then it also must open branch offices in two regions that have the lowest density level.<sup>44</sup>

2) The policy of opening Automatic Teller Machine ("ATM") networks

To increase the level of financial inclusivity and national banking competitiveness, the new law may restrict ATM locations only to the location of a foreign bank's branch offices. Also, the owners of the ATM network should be authorized to apply different tariffs. It is similar to banking regulations in Malaysia,<sup>45</sup> while in Singapore the sole discretion belongs to the Monetary Authority of Singapore.<sup>46</sup>

3) Capital and ownership

The new law must regulate that a foreign bank's capital should be higher than that of a national bank to prevent the country from bearing the financial systemic risk

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<sup>42</sup> In Singapore, pursuant to Article 2 (1) Banking Act, there are two definitions of foreign banks: "bank incorporated outside Singapore" means a bank incorporated, formed or established outside Singapore; and "foreign-owned bank incorporated in Singapore" means a bank incorporated in Singapore, the parent bank of which is incorporated outside Singapore. In Malaysia, pursuant to Part 1 Financial Services Act, there is only definition of "foreign institution" which means a foreign company, not being an authorized person or a registered person, which carries on any business outside Malaysia which corresponds, or is similar, to the business of any authorized person or registered person, whether or not such person has an approved representative office.

<sup>43</sup> McKinsey and Company, Indonesian Banking Statistic 2013.

<sup>44</sup> In Malaysia, the opening of bank's branch offices is limited up to 8 branches. If more, such banks must obtain approval from Malaysian Central Bank and must comply with the ratio 1:2:1 based on the zoning system, which also relies on the density level.

<sup>45</sup> In Malaysia, the tariff on the opening of ATM network to foreign banks is four times higher than to the local banks.

<sup>46</sup> In Singapore, the access of foreign bank towards the opening of ATM network is limited compared to local banks.

caused by foreign banks. Also, because of the dynamic Indonesian economy, the new regulation may grant authority to the Indonesian Financial Services Authority (OJK) to change the bank's ownership limitations as OJK regulations are lower than the country's laws, which will insert flexibility for any future changes.

4) Deposit limits

The new law must limit deposits taken from a third party for better risk management and financial stability as well as fair competition between national and foreign banks but still putting forward national interest in banking.

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**NEGATIVE SOVEREIGNTY AND POSITIVE SOVEREIGNTY**

*(Why the Great Powers Invade Outlaw States)*

**Zezen Zaenal Mutaqin\***

***Abstract***

*This paper attempts to answer several questions: why a state invades other states? Why a state claims an authority, in the name of civilization, democracy, freedom, security or humanitarian intervention, to enter into other sovereign states? How then it is legalized? Why the doctrine of state sovereignty sometime cannot protect a particular state from the aggression of other states? In answering this question, I will utilize two terms that used to demarcate sovereignty of states: positive and negative sovereignty. It is about 'sovereign to' and sovereign 'from'. I will also use two terms that differentiate two families of nation: the Great Powers and Outlaw States. In this paper I argue that positive sovereignty which usually possessed by the Great Powers tend to make these states to be 'authoritarian states', the states which conduct and behave merely based on their interest and not pursuant to international law. Domestically this state can be very democratic and liberal. I will demonstrate that to some extent this behavior is part of the game. Civilizing mission, preemptive security act and humanitarian mission are the common reasons used by these group of states to intervene other sovereign outlaw states. But, this unilateral authoritarian behavior of the Great Powers can be the source of problems for the international order. War on terrorism and the U.S intervention in Iraq will be briefly discussed and used as an example of how the Great Powers utilized their claim in international relations. This paper will firstly discuss the basic concept of positive and negative sovereignty. I will also discuss the idea of the Great Powers and outlaw states and liberal anti pluralism as a policy that can transforms the Great States to be 'authoritarian state'. This will be followed by discussing the authoritarian behavior of the Great Powers in its relation with other sovereign states.*

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## 1. Positive and Negative Sovereignty

Regardless the variety of their sizes, powers, prosperities, capabilities, and other qualities, all nations are equal. Chapter I article 2(1) the UN Charter says that the UN is an organization which is ‘based on the principle of the sovereign equality of all its Members’<sup>1</sup>. The principle of sovereign equality also can be found clearly in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which has been adopted by the General Assembly on 24 October 1970. The Declaration says ‘All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature’<sup>2</sup>. Moreover, President Basdevant of the International Court of Justice in 1951 said that ‘before this court there are no great or small states...’<sup>3</sup>. Thus, because of its universality, sovereign equality of states is regarded as *jus cogens* in international law<sup>4</sup>.

However, what the legal document says about equal sovereignty of states is different from what the reality says about sovereignty. It is obvious to argue that some states are more powerful, capable, richer, and bigger than others. No doubt that these qualities not necessarily means that the powerful states can do anything they want in their relation with other states. The normative principle of sovereign equality protects the dignity and sovereignty of small-weak states from arbitrary action of the powerful states. But, due to the historical process and their role in maintaining world order, some states enjoy certain privileges in international law. Veto right of the five Great Power states, the US, Russia, China, French, and the UK as stated in article 27 of the UN Charter is an obvious example of this reality. The distinction between developed and less-developed countries as stated in Part IV of the General Agreement on Tariffs and Trade of GATT

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<sup>1</sup> The Charter of United Nations, 26 June 1945. Accessed from <http://www.un.org/en/documents/charter/intro.shtml> at 2 October 2009

<sup>2</sup> The UN General Assembly, 2625.Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970. Accessed from <http://www.un-documents.net/a25r2625.htm> at 2 October 2009

<sup>3</sup> Quoted from Gerry Simpson, *Great Powers and Outlaw States, Unequal Sovereigns in the International Legal Order* (2004) 26-27

<sup>4</sup> Gerry Simpson, *ibid*

of 30 October 1947, is the other example of how different states enjoys different quality of sovereignty<sup>5</sup>.

It is interesting, in relation to this issue, to discuss the concept of sovereignty as argued by Robert Jackson<sup>6</sup>. Jackson's conception of sovereignty can captures the very basic distinction of sovereignty which is enjoyed differently by different states. He argues that in discussing the concept of sovereignty, two types of sovereignty can be proposed: positive and negative sovereignty. For student of political science or Western philosophy, these two concepts are quite familiar. Indeed, Isaiah Berlin's famous essay, *Two Concepts of Liberty* was the inspiration of Jackson's conception of sovereignty<sup>7</sup>. While Berlin's conception is used to separate two type of liberty or freedom at individual level, Jackson applied it to analyze state sovereignty in international relations. Obviously, in exercising this analysis Jackson was aware that individuals are not strictly similar with state. But, by applying this analysis to international relations of states Jackson has found special problems that exist in international relations which do not exist in relation among individuals<sup>8</sup>.

I am going to begin from the question of what is the negative sovereignty. Before answering this question, let's look first briefly the idea of negative freedom as Berlin has explained<sup>9</sup>. In his essay, *Two Concept of Liberty*, Berlin says that negative liberty is 'the area within which a man can act unobstructed by others'<sup>10</sup>. Someone is said to be free if no man interferes or hinders his activities. It means that if I coerce or prevent someone to do or not to do something I have robbed his freedom. But, not all incapability is defined as coercion. If I cannot fly by myself, or cannot understand the concept of metaphysic of Martin Heidegger in *Being and Time*, it is not means that I lost my freedom<sup>11</sup>. Berlin says that 'coercion imply deliberate interference of other human beings

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<sup>5</sup> J. G. Starke, *Introduction to International Law* (9<sup>th</sup> edition, 1984) 106. This is what Gerry Simpson called as legalized hegemony. He describes legalized hegemony as 'the existence within an international society of a powerful elite of states whose superior status is recognized by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality'. Simpson, above n 5 p. 68

<sup>6</sup> Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (1990)

<sup>7</sup> Isaiah Berlin, *Four Essay on Liberty* (1969) 118-172

<sup>8</sup> To find the difference, see Jackson, above n 8, p. 28

<sup>9</sup> It is beyond the purpose of this essay to discuss in detail Berlin's idea of the concept of liberty. Thus, I will only quote his particular idea that is relevant to my essay.

<sup>10</sup> Isaiah Berlin, above n 9, p. 122

<sup>11</sup> I use Berlin's style in this sentence.

within the area in which I could otherwise act'<sup>12</sup>. This concept of liberty or freedom is famous, as Berlin calls it, as the concept of 'freedom from'.

If human beings enjoy liberty, states possess sovereignty. States in international relations are analogues with individuals in municipal law. Of course not all qualities, rights and duties of these two entities are similar. But, to some degree, they possess similarity. If individuals enjoy a space of freedom in which no other person can hinder what he or she wants to do, then the states as well. The principle of non-intervention in which no single state can invade 'the territorial integrity or political independence of any state' is stated clearly by article 2(4) the UN Charter. This is negative sovereignty. Using definition from Schwarzenberger and Brown<sup>13</sup>, Jackson says that negative sovereignty is the 'freedom from outside interference: a formal legal condition'. For Jackson, negative sovereignty or non intervention principle is a basic principle in classical international law. Jackson adds that 'negative sovereignty is the legal foundation upon which society on independent and formally equal states fundamentally rests'<sup>14</sup>.

We have to note that Jackson used the term of negative sovereignty to discuss the condition of state sovereignty in post-colonial era, especially in Africa. Even though the process had started since, let's say, 1823 with the rise of Monroe Doctrine that guaranteed the American continent to be freed from European imperialism<sup>15</sup>, colonization was formally ended in 1960. The General Assembly Resolution 1514 of 1960 on the Granting of Independence to Colonial Countries and Peoples marked this era. Thus, following this year, new independent states came into being. But, even though these new emerging states possess equal legal sovereignty, they suffered by the lack of or enjoy very limited statehood: no effective government, no citizen basic rights, lack of freedom and so forth<sup>16</sup>. They became independent not because they were capable to achieve it, but simply because someone gave it to them. It is a gift<sup>17</sup>. These states are not really state, but 'quasi-states' or semi-state<sup>18</sup>. Jackson defines quasi-state as state that 'consisting not of self-standing structures with domestic foundations – like separate buildings – but of territorial jurisdictions

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<sup>12</sup> Berlin, above n 9, p. 122

<sup>13</sup> Schwarzenberger and Brown, *A Manual of International Law* (1976) 54-55

<sup>14</sup> Jackson, above n 8, p. 27

<sup>15</sup> Gerry Simpson, above n 5, p. 132

<sup>16</sup> Jackson, above n 8, p. 21-22

<sup>17</sup> See David Raic, *Statehood and the Law of self Determination* (2002) 196

<sup>18</sup> Jackson, above n 8, p. 21. Gerard Kreijen use this term to analyze the state failure or state weakness in Africa. See, Gerard Kreijen, *State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa* (2004) 103-105



supported from above by international law and material aid – a kind of international safety net’<sup>19</sup>. This quasi-state possesses what Jackson called as negative sovereignty or ‘sovereign from’. I want to call it as sovereignty by given—in contrast to sovereignty by achievement.

In contrast to this condition, positive sovereignty is defined as ‘capability which enable government to be their own masters: it is substantive rather than formal condition’<sup>20</sup>. States with this type of sovereignty enjoy not only the right of nonintervention and immunities but also they are capable to provide political goods for their citizens. They are able to collaborate with other states in performing various activities in international relations like defense alliances, commerce and many others<sup>21</sup>. Moreover, states with positive sovereignty are capable of taking benefit from their independence to improve their condition by making good, effective and strong government. It is a type of ‘sovereign to’—in contrast to ‘sovereign from’. The real picture of this sovereignty is the sovereignty of developed states. Historically, this type of sovereignty was not the product of decolonization. States with positive sovereignty have achieved their independence and sovereignty through a natural process in which they have survived as a nation because they have demonstrated ability of self-government and they were capable of defending themselves from the invasion of other states<sup>22</sup>. They were the winner of wars in the past. In general, they possess sovereignty because they are sovereign. That is why I want to call this as sovereignty by achievement—because they have achieved this condition through a struggle.

Following Jackson argument, the trace of Berlin’s idea of positive liberty is clearly seen. Positive liberty is defined as desire in human being in which he or she wishes to be his own master. I am a subject not an object. I can do and realize whatever I want to do not because I depend on someone or something, but because I can do it<sup>23</sup>. It is ‘freedom to’: ‘being active, self-directive, choosing, pursuing, and realizing goal’<sup>24</sup>. According to Berlin, this is possible because men are rational being. This is the type of Cartesian consciousness of human being in which men are autonomous being, capable of thinking, willing, and bearing responsibility for whatever they do. For Jackson, if negative sovereignty is merely a minimum requirement for states, positive

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<sup>19</sup> Jackson, above n 8, p. 5

<sup>20</sup> *Ibid*, p. 29

<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*, p 32-40, see also Gerard Kreijen, above n 20, p. 105-108

<sup>23</sup> Berlin, above n 9, p. 131

<sup>24</sup> Jackson, above n 8, p 29

sovereignty is condition in which states can be masters for its own affairs: active, capable and responsible.

Jackson saw positive sovereignty in an optimistic point of view. That what makes his idea of positive sovereignty is different from the idea of positive freedom of Isaiah Berlin. Berlin was very suspicious in seeing positive freedom. For him, positive freedom can transform someone to be a despot or authoritarian and ‘destroy too many negative liberty’<sup>25</sup>. Jackson was aware of this difference. In his book he argues that negative sovereignty, different from negative freedom, will bring more negative effect and harm for states than positive sovereignty<sup>26</sup>. It is because negative sovereignty makes a state becomes weak, ineffective, dependant and finally unable to take advantages from their independence for their goodness. Negative sovereignty makes state become not a real state, but a quasi-state, while positive sovereignty is the other way around.

We can understand Jackson’s point of view if we see that the focus of his book is on the problems of the Third World countries like poverty, dependency, corruption, and other symptoms of state failure, that has risen since these countries gained independence—a gift from colonial powers—in 1940s. Jackson argues that the sole problem was because these states have become sovereign not because they showed their capability of self-govern but simply because the colonial powers gave independence to them. Interestingly, this situation brings a dilemma. On the one hand, these quasi-states are protected by principle of non-intervention because they have legal sovereign equality, but on the other, their backwardness is the reason for them to ask help—also intervention—from international community. ‘They have’, Jackson says, ‘contradictory expectations: the right of independence (reciprocity) but also right to development (non-reciprocity)’<sup>27</sup>.

This dilemma cannot be separated from the history of imperialism. Before 1940s, positive sovereignty was expressed clearly in colonialism and imperialism<sup>28</sup>—something that Berlin worried about. The principle rule at that moment was that the weak states would be defeated while the strong states became a winner and then possessed a right to control other territories. The real self, rational and civilized nations were acting like parent who taught, disciplined and educated

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<sup>25</sup> Berlin above n 9, p. 163

<sup>26</sup> Jackson, above n 8, 30-31

<sup>27</sup> Jackson *ibid*, p. 181

<sup>28</sup> *Ibid*, p. 1

backward, uncivilized and like-children people. However, after 1945, this practice is no longer can be legalized. But, this not necessarily means that the form of paternalism disappears from international relations<sup>29</sup>. It takes new form: right to development. I see it as neo-colonialism. Positive sovereignty claims themselves as civilizer, teacher educator. May be this is true. But, this attitude historically has transformed them to be exploiter and invader. Hard colonization in the past has taken a shape of soft colonization in the present. In this stand I depart from Jackson. I argue that both colonialism and neo-colonialism has risen because some states exercise too much positive sovereignty. Just like Berlin worried about positive freedom that can transforms someone to be a despot, I also worry about positive sovereignty that can transforms a state from ‘teacher’ to be invader and exploiter, as we seen during colonialism era—and also neo-colonialism.

## 2. The Great Powers Vs. Outlaw States

In history, states that possessed positive sovereignty, on the one hand, because their ability to govern, economics success, military power, ability to defend their territories and won various wars, can be classified as the Great Power states<sup>30</sup>. Gerry Simpson identifies the Great Powers as:

*‘the norms that place certain states in a separate normative universe and there is an identifiable connection between the propensity of the Great Powers to intervene on behalf of the international community and the labeling as outlaws some of those states subject to intervention’<sup>31</sup>*

This is a group of civilized nations. This elite group of states, no doubt, is the subject of alteration, rise and fall. Austria and Prussia, for instance, were part of this group in 18<sup>th</sup> century. Now they are not considered as part of it. In contrast, America was not a super power player in 18<sup>th</sup> century, but now they are the leader of the Great Powers. Possibly one hundred years to go the US will no longer part of this elite group while China or India will become the super powers. Paul Kennedy notes that military and economic powers are two dominant aspects that influence this alteration<sup>32</sup>.

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<sup>29</sup> *Ibid*, p. 186-187

<sup>30</sup> See John Agnew, *Globalization and Sovereignty* (2009) 85

<sup>31</sup> Gerry Simpson, above n 5, p. 6

<sup>32</sup> Paul Kennedy, *The Rise and Fall of the Great Powers, Economic Change and Military Conflict from 1500 to 2000* (1988) xv-xxv

Negative sovereign states, on the other hand, because they were the losers, weak, ‘uncivilized’, criminals, and illiberal, can be classified as Outlaw States<sup>33</sup>. This group of states were being colonized and exploited; they are the followers, minor players and supplement. However, international lawyers, as Simpson has indentified, have set the standard of outlawry differently. Some international lawyers see the outlawry is based merely on illiberal and tyrannical condition and violation of human rights<sup>34</sup>. Other Scholars argue that outlawry cannot be defined simply based on undemocratic or illiberal internal condition of a particular state. A particular state is regarded as an outlaw state if it is illiberal and aggressive in its relation with other state or if it is ferocious and violent internally<sup>35</sup>.

The Great Powers, despite their claim as the teacher of civilizations, ‘the gentle civilizer of nations’<sup>36</sup> and the maker of the world order, have transformed to be the colonizer, invader and exploiter of nations. Colonialism and imperialism were the real example. These Great Powers naturally, in the first place, came into being as the winner, survival and civilized nations. Derived by impulse to teach other nations they occupied the rest of the world in the name of civilizing mission. Indeed, economics impulse, finding new markets and getting raw materials, was much bigger than the holly mission. Probably, the civilizing mission was simply a cover to hide their real impulse to conquer the world and getting economics and political benefit from it. In this case, positive sovereignty, as worried by Berlin, could easily change the Great Powers from teacher to be exploiter. To support my argument, I will use Simpson’s terminology of liberal pluralism and liberal anti-pluralism. In general I want to say that states with positive sovereignty which have became the Great Powers, because their policies in international relations is based on liberal anti-pluralism principles, have transmuted themselves to be exploiters and invaders. Iraq war and war on terror in Afghanistan represent this reality today.

In discussing the transformation of the Great Powers from the position of the maker of world order to be exploiters and invaders, the concept of liberal anti-pluralism is essential. This perspective is based on a belief that world is composed of two contrasting positions, a bipolar

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<sup>33</sup> Gerry Simpson, above n 5, p. 4-7, 127-129

<sup>34</sup> This is the opinion of Fernando Teson. See Gerry Simpson, Two Liberalisms, *EJIL* (2001) 12(3) 537-571, p. 563-564

<sup>35</sup> This is the opinion of John Rawls, *Ibid*

<sup>36</sup> This is a title of Martti Koskenniemi’s book. See Martti Koskenniemi, *The Gentle Civilizer of the Nations, The Rise and Fall of International Law 1870-1960* (2004)

worlds. Indeed, this world view is inherent in every civilization. In the Islamic legal traditions, for instance, world can be divided into *dar al-islam* (peaceful territory) and *dar al-harb* (territory of war or chaos)<sup>37</sup>. *Dar al-islam* is a peaceful, civilized and justice territory due to its submission to a certain normative legal order, while *dar al-harb* is a chaotic, uncivilized, injustice territory due to the lack of legal foundation in this region. *Dar al-islam* claims a superiority and authority to teach and transform this chaotic territory to be part of their civilized territory. Western Christian civilization also possesses this perspective. The concept of the *civitas terrena*, the city of earth, and *civitas dei*, the city of God, as St. Augustine has defined points out this phenomenon<sup>38</sup>. In modern actualization, this perspective is clearly seen in differentiation of the world into civilized and uncivilized, lawful and outlaw and liberal and illiberal states. The civilized-liberal states, like its cousin of *dar al-islam*, claims a right to control or transform uncivilized-outlaw states to be civilized nations. Wars, conquests, subjugations and even violations have been part of the mission as St. Augustine said: ‘the enemies of the church are to be coerced even by war’<sup>39</sup>. Inherent in this world view is the belief that there is only one side of the truth: *dar al-islam*, *civitas dei*, civilized nation. The world outside my border is totally wrong and that land is an object that has to be conquered. This evangelical feature is embedded in liberal anti-pluralism of the Great Powers<sup>40</sup>.

This perspective grows together, but in contention, with what Simpson called as liberal pluralism. Both concepts begin with an assumption that individual rights and autonomy are the sole foundation in maintaining order. In international law, when states are treated like individuals in municipal law, states possess negative sovereignty in which every state has an autonomy and rights to be not being intervened by the others. Liberal pluralism regards states as an equal legal entity. The United Nations and classical international law formally adopt this perspective<sup>41</sup>. This is the feature of international order since Westphalia. Liberal anti-pluralism, however, treats states as equal only if these states meet a certain provisions: domestically they must implement certain liberal principles like rule of law, respecting human rights, adopting democracy and so forth<sup>42</sup>. Without these provisions, states will not be treated as equal and they are regarded as Outlaw states.

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<sup>37</sup> See for example James Turner Johnson, Two Worlds, *Humanities* (2000) 21 (6)

<sup>38</sup> *Ibid*

<sup>39</sup> Quoted from James Turner Johnson, *ibid*

<sup>40</sup> Simpson, above n 5, 231

<sup>41</sup> *Ibid*, 76-83

<sup>42</sup> *ibid*

Inherent in this debate are two perspectives in seeing state sovereignty. For liberal pluralism, states are legally equal sovereign entity. In contrast, liberal anti-pluralism regards states in a hierarchical quality where liberal states are in a higher position over outlaw states, a phenomenon that is called as legalized hegemony by Simpson.

History of international law has been decorated by the rise and fall of these two perspectives of liberalism (liberalism and liberal anti-pluralism) and sovereignty (equal sovereignty and legalized hegemony)<sup>43</sup>. It is interesting to note very briefly how these two perspectives of liberalisms and sovereignty were institutionalized in international law.

If the flowing of history of state sovereignty was started from the Peace of Westphalia in 1648 and, let say, stopped at the formation of the United Nation in Chicago in 1945, 'the form of a 'dialectic' between hierarchical and egalitarian models of inter-state relations' can be drawn as follow<sup>44</sup>. First stage was from 1648 of the Peace of Westphalia to the Congress of Vienna in 1815 where the general feature of this stage of history was equal sovereignty and liberal pluralism. The Peace of Westphalia is a foundation for the very basic principle of state sovereignty in modern history. Westphalian sovereignty is, according to Stephen D Krasner, 'an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures'<sup>45</sup>. This is also a foundation for negative sovereignty.

Second stage had started since the Congress of Vienna in 1815 when the Great Powers, learned from Napoleonic wars, legalized their power into formal treaty of international law to prevent Napoleon aggression<sup>46</sup>. This was a moment when the status of outlawry was formed and legalized hegemony prevailed. The UK, Prussia, Austria, Russia, initiated the formation of alliance to guarantee peace in Europe for periods. Essential in their alliance were a cultural similarity where these states were bound by Christianity. Other powers at that moment, like China (Confucian) and Ottoman (Islam) were treated as 'the other' outlaw states simply because they were not part of the Christian-European family.

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<sup>43</sup> *Ibid*, 9

<sup>44</sup> I follow Gerry Simpson in this case, partly. I do not include Kosovo simply, for a practical reason. See Simpson, above n 5, Part III (91-223)

<sup>45</sup> Stephen D Krasner, *Sovereignty, Organized Hypocrisy* (1999) 20

<sup>46</sup> Simpson, above n 5, footnotes no 3 p 91.

This situation was not change until the Second Hague Conference was held in 1907 where negative-equal sovereignty took an ‘extreme sovereignty’. This is the third stage where in this stage, Westphalian sovereignty were dominant. Included in this stage was the formation of the League of Nations. In this stage, the Great Powers enjoyed less formal legal privilege in international law.

The last stage was started in Chicago in 1945 when the United Nation Charted was formulated. The Great Powers learned from the fail of the League of Nation that took equal sovereignty in maintaining peace and order. Order in international law would not be achieved if the Great Powers ignored the reality of inequality among nations. This inequality should be recognized in international law. On the other hand, request for equal sovereignty especially from new post-colonial states was very demanding and could not totally be ignored. The structure of the UN as we find today is based on this tension. In the General Assembly and membership of the UN equal sovereignty is clearly seen, while the legalized hegemony of the Great Powers institutionalized in the veto rights of the Security Council. This last stage, I assume, represents a syntheses from the previous stage of history. However, unequal sovereignty and liberal anti-pluralism, especially with the rise of the US as single superpower, is part of the recent dominant reality.

### **3. The Great Powers Hegemony and Negative Sovereignty**

Both outlaw states and the Great Powers have a similar potentiality in making world disorders. Outlaw states like Iraq made insecure Middle East, by invading Kuwait in 1990, because of its outlawry: aggressive, illiberal and violent. The Great Power, however, made more insecure world because of their claim to maintain order. The Great Powers outlawry<sup>47</sup> probably can be more dangerous than the outlawry of outlaw states. If outlaw states invade aggressively other states, the Great Powers can easily stop them. But, who will stop the Great Powers if they invade, in the name of humanitarian intervention, preemptive self-defense or what so ever, other states? This problem is more acute since the downfall of the Soviet bloc in which America has become the single superpower.

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<sup>47</sup> I use this term with an assumption that liberal state sometime can act illiberally in its relation with other state in International relations. See Simpson, above n 5, p. 298. It is interesting also to see an article by Jose Alvarez, Do Liberal State Behaves Better, *EJIL* (2001) 12 (2) 183-246



What has made the outlaw states and the Great Powers actions are different, probably, is simply its status of legality. The Great Powers poses what Simpson calls as ‘special legal privileges’ to justify their actions which are not be possessed by outlaw states. I want to discuss briefly how the Great Powers exercise this legal privilege by seeing Iraq war 2003 as a case. This war was the real picture of how positive sovereignty of the Great Powers, because of the prevailing of the liberal anti-pluralism in these states, has transformed to be a dangerous deadly action and eroded a space of negative sovereignty of other states. However, discussing the aspect of legality of this war is beyond the purpose of this paper<sup>48</sup>. I am not interested to discuss this issue also because it seems like fruitless to discuss this aspect. For the Great Powers, everything can be included under the category of legality. They have legal privilege to extend, select and distinguish law. In international relations, law has been created, extended, innovated, interpreted and even manipulated depend on the willing of the Great Powers<sup>49</sup>. Furthermore, in relation to the Iraq war, as can be applied to every war, an international lawyer said that ‘from the purely legal standpoint, all wars are equally just or unjust; or, properly speaking, they are neither just nor unjust’<sup>50</sup>

Can we justify a war? There is no such thing called as ‘just war’ according to Buddhism<sup>51</sup>. Just war simply ‘a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre’<sup>52</sup>. However, no single invasions or wars, I think, would like to be labeled as ‘unjust’. Because of that, seeking legitimacy and justification for every war has become part of the war itself. Take America as an example. Looking into the codename of several operations can be a simple way to see how the US has grounded their interventions on a justifiable reason. When the US intervened Panama in 1989, the codename that was used was ‘Operation Just Cause. In Somalian intervention, the US used ‘Operation Restore Hope’. In fighting terrorism, the war rhetoric that has been used is ‘Operation Enduring Freedom’. In their last war in Iraq in 2003, the

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<sup>48</sup> There are a lot of books and articles about this issue. See for example, Phil Shiner and Andrew Williams, *The Iraq War and International Law* (2008), Dominic McGoldrick, *From ‘9-11’ to the ‘Iraq War 2003’ International Law in An Age of Complexity* (2004)

<sup>49</sup> See, for example Michael Byers and Georg Nolte, *United State Hegemony and the Foundation of International Law* (2003). See also Phil Shiner, *The Iraq War, International Law and the Search for Legal Accountability* in Phil shiner and Andrew Williams, *The Iraq War and International Law* (2008) 19.

<sup>50</sup> Amos Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (New York, 1906), 67, quoted from Hew Strachan, *Preemption and Prevention in Historical Perspective*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 25

<sup>51</sup> Anthony Anghie, *Imperialism, Sovereignty, International Law* (2004) 273

<sup>52</sup> *Ibid*



US used ‘Operation Iraqi Freedom’<sup>53</sup>. Almost all invasions have been grounded on the rhetoric of freedom and liberation. The US has acted, like what Europe did during colonization, as a hero who will come to help uncivilized, rough and backward states to achieve freedom. What make the US occupation of Iraq was different from, let says, the British occupation of India during colonization is something that Anghie calls as a ‘denial of imperialism’<sup>54</sup>. The US claimed that the occupation of Iraq was directed to liberate Iraq, to make sure that Iraqi people would have an ability of self-government under a democratic regime, restoring the sovereignty of Iraqi people, and it was not intended to colonize Iraq.

Anghie interestingly compared the US occupation of Iraq with the US occupation of Philippine after the Spanish was defeated by the US in 1898<sup>55</sup>. In taking control over Philippine, the US rhetoric at that time was, like in Iraq, the liberation of Filipinos from injustice heinous Spanish imperial rule. In Iraq, the image of Spanish was replaced by the ‘rouge’ regime of Saddam Husain. The US promised that in the near future, when the Filipinos were ready to self-govern, the independence would be granted<sup>56</sup>. Filipinos, who initially welcomed the coming of the US troops, took rebellions against the United States. The rebellion was the nature for every occupation. No one would like to be directed, occupied, and hindered by other. The war at that moment killed around 200.000 civilians—compare to Iraq war where about 102.624 Iraqi people have killed<sup>57</sup>. In both moments, the denial of imperialism was part of war justification.

Both wars—also other wars like Vietnam War—has generated a controversy mainly among the US citizens and scholars. The US who was born out of war of independence against British colonialism suddenly replicated the practice of imperialism, something that for centuries has been condemned. The US, by occupying Iraq and other states, is convicted by part of their citizens as doing a violation of their ‘sacrosanct principles of American identity’<sup>58</sup>. Defending this sacred American identity is something that lingers behind the denial of US imperialism.

Essential in the debate about Iraq war is the discussion of self-defense doctrine which has already extended by the US practice to be ‘preemptive self-defense’—Bush doctrine. Self-defense

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<sup>53</sup> Michel J. Buthler, U.S Military Intervention in Crisis, 1945-1994: An Empirical Enquiry of Just War Theory, *The Journal of Conflict Resolution* (2003) 47(2) 226-248, p. 227

<sup>54</sup> Anghie, above n 53, p. 279

<sup>55</sup> Anghie, *ibid*, p. 281-288

<sup>56</sup> It is similar to the Trusteeship or Mandate system of the UN. See Anghie, *Ibid*

<sup>57</sup> This is a maximum estimation. See <http://www.iraqbodycount.org/>. Accessed at 15 November 2009

<sup>58</sup> Anghie, above n 53, p 282

doctrine is a fundamental principle in which a state maintains its negative sovereignty by resisting reflectively every kind of act that can deprives their sovereignty. It is a justified reason to use of force in international law as stated by the UN Charter under chapter VII. In his advice to the British prime minister Tony Blair on Iraq war, British Attorney General also recalled this principle, said that the use of force only can be legalized under three circumstances: self-defense, overwhelming humanitarian catastrophe or if it is authorized by the Security Council acting under Chapter VII of the UN Charter<sup>59</sup>. In contrast to self-defense, preemptive self-defense is a highly controversial issue in international law. Preemptive self defense is a war against enemy ‘who has not yet attacked but whose attack is clearly imminent’<sup>60</sup>. The aspect of imminence is essential but controversial in this matter. Who has an authority to decide an imminent attack? For the US, Iraq was poised to attack American soil and because of that the US had a right to attack Iraq first on behalf of anticipatory self defense, while for the UN and other states, the aspect of imminence was not clearly seen. Because the aspect of imminence is unclear, the line that separates between preemptive and preventive self-defense is hard to be drawn<sup>61</sup>. Preventive war, little bit different with preemptive war is, as Michael Walzer says, an ‘attack that responds to a distant danger, a matter of foresight and free choice’<sup>62</sup>. This kind of war is cannot be justified and prohibited in international law<sup>63</sup>.

Because of the great possibility to be corrupted, Hugo Grotius is suspicious to accept both preventive and preemptive attack. While he agrees firmly that defensive war is justifiable in international law, Grotius is very dubious in accepting offensive war even if it is carried out to anticipate attack. Grotius, as quoted by Larry May, very interestingly says:

*Wherefore we can in no wise approve the view of those who declare that it is a just cause of war when a neighbor who is restrained by no agreement builds a fortress on his own soil, or some other fortification which may some day cause us harm. Against the fears which arise from such actions we must resort to counter fortifications on our own land and other similar remedies, but not to force of arms*<sup>64</sup>

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<sup>59</sup> British Attorney General’s Advice to Blair on Legality of Iraq War, quoted from <http://globalpolicy.org/security/issues/iraq/document/2003/0307advice.htm> accessed at 20 October 2009

<sup>60</sup> David Rodin, *The Problem with Prevention*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 144.

<sup>61</sup> See Larry May, *Aggression and Crime Against Peace* (2008) 75-85

<sup>62</sup> Quoted from David Rodin, above n 62, p. 5

<sup>63</sup> See Allen Buchanan, *Justifying Preventive War*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 126

<sup>64</sup> Quoted from Larry May, above n 63, p. 79

Relate to his statement above, Grotius formulates a very important and relevant reason why he is reluctant to accept anticipatory attack. For Grotius, in establishing reasons to make an anticipatory attack, someone commonly bases his action merely on pretexts not on the real fears of the enemy. Pretext is a reason declared intentionally to hidden the real reason for waging war. The real reason is unjustifiable if it is declared openly to public<sup>65</sup>. A clear example of confusing between pretext and fear in recent time is Iraq war in 2003. In several occasion Bush declared that Iraq was attacked because it was poised to attack America by possessing weapons of mass destructions (WMD). The linkage between Saddam Husain and Al-Qaida was another reason. These two reasons, WMD and the linkage to the terrorist group had formed a sufficient reason for the US to attack Iraq in the name of preemptive self-defense. Indeed, this was not a fear, but rather merely a pretext. Because the real reasons behind the Iraq war 2003, as stated by The UK Poet Laureate, Andrew Motion, was ‘elections, money, empire, oil and Dad’<sup>66</sup>

For this reason, in recent practice, especially after 9/11 tragedy, self-defense doctrine has become, as Anghie says, ‘the vehicle for a new form of imperialism, defensive imperialism’<sup>67</sup>. Anghie further argues that this new term operates as legitimacy for occupation just like old imperialism was justified by the law of war. Anghie cites how, for example, Spanish imperial rule in American continent was legalized by self-defense reason: the Spanish was waging war against native Indian merely because the Spanish had to defense themselves from Indian attack. Importantly, Anghie adds, American new doctrine of the preemptive self-defense sounds more convincing since it has been combined with other doctrine: human rights, humanitarian intervention, freedom and democracy. All these things have formed what Anghie called as a new management to reaffirm an old practice of imperialism that based on a classical sacred rhetoric of civilizing mission<sup>68</sup>.

Thus, negative sovereignty is in a real danger of being eroded and violated by the rise of aggressive positive sovereignty which uses the mask of self-defense rhetoric. This concern is not without a real evident. For the Great Powers, intervention to other sovereign states, implicit or

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<sup>65</sup> *Ibid* 80.

<sup>66</sup> Quoted from Dominic McGoldrick, *From ‘9-11’ to the ‘Iraq War 2003’ International Law in An Age of Complexity* (2004) 20. To see further this issu see also for example David Harvey, *The New Imperialism* (2003)

<sup>67</sup> Anghie, above n 53, p. 294

<sup>68</sup> *Ibid*, p. 292-293

explicitly, is part of their behavior. The US has used preventive war regularly since 1945, mainly as part of the management to maintain their imperial power. Between the 1950s and 1960s, for instance, America attacked other sovereign states by a military power once every eighteen month to remove government that seen as a threat for American interest<sup>69</sup>. War in Iraq and Afghanistan are the two recent example of this behavior.

This authoritarian behavior of the Great Powers is not without risks. Externally, ambition for imperialism—even if it is denied—can gradually harm the UN systems. The UN systems, as Anghie notes, now are gradually subordinated by the unilateral use of force of the Great Powers, especially under the doctrine of self-defense<sup>70</sup>. In this situation, state sovereignty is in a danger situation and it is vulnerable of being violated. Internally, this unilateral intervention to other sovereign states is really costly and can, in the long term, erode the Great Power financial and economic power. Paul Kennedy has mentioned how military and economic capacity is the foundation for the Great Powers to maintain their influence. The rise and fall of the Great Powers depend on these two aspects<sup>71</sup>. In relation to Iraq war, Joseph Stiglitz and Linda Bilmes explains how war that is predicted will exceed a trillion dollars costs has affected American economic conditions<sup>72</sup>.

## Conclusion

I have tried to answer the question of why a state invaded other states and how it was justified. I have argued that positive sovereignty has a dark side because it can transform a state to be an invader or exploiter. The motif of civilizing mission, teaching, liberating and sending freedom to other states has been the motif behind this transformation. If it happens, negative sovereignty is in a real danger of being eroded and violated. However, International law has set regulations that protect every sovereign state from the invasion of other states. But, in the reality, some outlaw states, because they were illiberal and aggressive broke down the rule by invading other states. The invasion of Iraq to Kuwait in 1990 was an example. However, a group of elite

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<sup>69</sup> Quoted from Hew Strachan, *Preemption and Prevention in Historical Perspective*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 38

<sup>70</sup> Anghie, above n 53, p. 300

<sup>71</sup> See Paul Kennedy, above n 34, p. xv-xvii

<sup>72</sup> Linda Bilmes and Joseph Stiglitz, *The Economic Cost of the Iraq War: An Appraisal Three Years after the Beginning of the Conflict*, NBER Working Paper Series, National Bureau of Economic Research, February 2006. Accessed from <http://www.nber.org/papers/w12054> at 1 November 2009.

states that called as the Great Powers also possess this behavior. For me it can be more dangerous because their outlawry is built upon the claim of ‘special legal privilege’ to behave above the law while still using legal language to justify their actions. The invasion and intervention of American government since 1945 and clearly seen recently in Iraq and Afghanistan obviously shows this reality. Liberal anti-pluralism policies, I conclude, is behind the transformation of the Great Powers from peace maker to be occupier.

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