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Implication Inconsistencies Patient Rights Legislation On Online-Based Health Care Systems In Indonesia

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Abstract

This study aims to examine and analyze the implications of the inconsistency between the Health Service Insurance of BPJS Director Regulation Number 4/2018 concerning on the online-based health system against the constitution Number 36/2009 concerning on Health. The method used in this research is literature research which is normative juridical in nature. This research is a normative law research. This research is a normative study in form of product legal behavior by examining constitution. The results of this study indicate that there are implications for inconsistency of BPJS Director Regulation Number 4/2018 concerning on the online-based health system against the constitution Number 36/2009 concerning on Health. The implication of inconsistencies in the constitution and government regulations regarding the rights of patient health care services affect the balance of Indonesia's existing system. Therefore, it can be concluded that the inconsistent meaning in the regulation of the rights of each person (patient) involved in health services has led to different multiple interpretations. Within the scope of inconsistent regulations, the judicial review requirements of the judges of the judicial department require that health service regulations be made for each unclear patient condition.

Keywords: Implication, Inconsistency, Law, Health Facilities.

1. Introduction

Everyone has the right to enjoy a healthy life which can be implemented by obtain a good services and feasible rights through extensive access of health resources and high-quality health facilities. In Indonesia, the government guarantees everyone's healthy life. This is the provisions of Article 28H and Article 34 of the government responsible for the construction of the health sector (Winarno & Retnowati, 2019). Then, in accordance with the Indonesian Constitution No. 23/1992 on Health, since it did not meet the development, requirements and community legal needs, it was changed related to the Indonesian Law Number 36/2009 on Health. It emphasizes that everyone has the same rights in access to the resources of the health sector, access to safe, high-quality health services, and social health insurance (Tim Penerbit Buku Biru, 2012).

For bankrupt and disservices groups, the administration cares insurance round public health insurance (*Jamkesmas*) and regional health insurance (*Jamkesda*) plan. Although, these programs are still incomplete. Medical expenses and service quality are still difficult to control. To overcome the involved problem, in 2004, Indonesian constitution Number 40/2004 concerning on the National Social Security System (SJSN) was issued, it mandates that social security is compulsory for every residents including National Health Insurance (JKN) through the Social Security Administrator for Health (BPJS) (Indonesia, 2004). The implementation of BPJS Health service program, seems quite slow, it was promulgated on November 25, 2011. It should have been set for a year period since it being promulgated (Indonesia, 2011). Apart from being slow, there are other problems that occur, such as bad services (different from the advertisements on media), Inadequate claims of unpaid operating costs of health care providers and the constraints range of fees for general practitioners (As a pioneer in primary medical institutions). Moreover, there is a statement by one of the committee leaders that it is likely to be the facilities of corruption criminal acts.

To this time, the research discussion that is often discussed is only about BPJS regulations and their legal basis. However, there has been no further discussion regarding the content and impact on society as well as online-based systems that have begun to be implemented along with the times. For almost four years, BPJS

(Security Social Administration for Health) has been established and serves the people; it continues to experience the improvements both in terms of services and the scope of the area. BPJS conducts innovations in digital field to make it easier for participants to obtain a good quality of health services. The director Regulation of BPJS Health Care Insurance Number 4/2018 concerning on the health care online-based system, health care online-based system is the digital version of health system process that has an aim for the ease and certainty of patients in obtaining services at the hospital according to the competence, distance and capacity of the hospital based on the patient's medical needs.

Patient has a right to obtain a good system of healthcare. Patient rights are crucial aspect to Provide good health care and promote the basic aspect of Medical practice ethics. Therefore, it is important to provide the patient with an effective health system (Mohammed, Eman Sameh, Amany Edward Seedhom, 2018). Through the online referral system, BPJS Patients did not need to worry if they lose or forget to bring a BPJS card information, because it has been recorded in online system, both FKTP and hospitals (Mohammed, Eman Sameh, Amany Edward Seedhom, 2018). Besides, participant data has also been recorded in inter-health facility data base, thus the services can be faster because the data does not need to be re-entered during registration, including the diagnosis data of the patient's disease. Another advantage is that patients also receive certainty of health facilities which competencies are related to the medical concern of the patients. During the transition period manual references in paper (hardcopy) are still valid.

In modern democracies, administrative policy means that it is adopted for the interests and benefits of the people of sovereign holders (state actors) (Zagrebina, 2020). Therefore, in modern democratic state, welfare is always a problem if there is a person, several people or a group of people who are damaged by administrative policies.

Legal problems in form of inconsistency norms that reflect health regulations occurs in article 5, paragraph 1, paragraph 2, and paragraph 3 of Law Number 36/2009 concerning on Health. However, in the Regulation of BPJS Director Number 4/2018 concerning on the online-based health system. According to the required medical needs, the patients will be transferred from the first-level medical institution (feline) to the advanced low-level medical institution, from the first type to the higher type, that is, from the D type to the C type hospital to the B type, and finally It is type A, it is related to the patient needs and it causes legal problems in health regulations.

Based on the various legal problems that exist, researchers raised their existence of Inconsistency Standart which occurs in the health service regulation of people. Where in the regulation of Director of BPJS Health Service Insurance No. 4/2018 in the constitutions No. 36 /2009 concerning health, right and obligation of every people in the health service in the Article 5 paragraph 1,2 and 3. This is causing the researcher asks what exactly the legal system in Indonesia is, because where there is no legal certainty there is no law (*Ubiusincertum, ibiუსnullum*). Therefore, the researcher used the Hierarchy theory which stated that the legal system which introduced by Hans Kelsen which stated that court of law is a step with tiered rules. The connection between norm which stipulated the other acts and other norms can be called as the relationship super and subordinate in the spatial context (Asshiddiqie, Jimly, 2006).

This research aimed to assess and analyze whether there are implications for inconsistencies between Regulation of the Director of BPJS Health Care Insurance No. 4/2018 concerning on online-based health system to Law Number 36 of 2009 concerning Health.

2. Methodology

In this research, the type of research that used by researcher is juridical normative literature research methods means this research implements with examine the legal norm and articles in constitutions which every material collected by library materials. This research is normative law research in form of product of legal behavior by reviewing the current legal system. Focus on positive law, legal principles and doctrines, legal identification in specific cases, systematic law, synchronization level, list of comparative law and historical law (Muhammad, 2004). this research used statute approach and conceptual approach (Marzuki, 2005). The statute approach used to identify inconsistency norm in the patient service regulations (BPJS Health participants) based on the constitution's regulation in Indonesia as law material which used in the assessing formulation of the problem, in form of legislation (Soerjono Soekanto and Sri Mamudji, 2001).

2.1 Legal Materials

There are several materials that was used primary, secondary and tertiary law which can be described as primary legal material is legal material which consist of: The Constitutions No. 29/2004 concerning medical practice, The constitutions No.40/2004, The constitutions No. 36/2009, The Constitutions No.24/2011, The Presidential Decree No.19/2016, The Minister of Health RegulationNo.71/2013, The Minister of Health Regulation No. 1/2012. And Minister of Health Regulation No.28/2014. Secondary law material consists of books, Journals, scientific article, internet news related with BPJS Health online system referral. Secondary law material consists of: Practical guide to the system, State Administrative Law, Fundamentals of State Administrative Law, Introduction to Indonesian State Administrative Law, Principles of Legal Philosophy, Legal Philosophy, and legal materials.

Tertiary law material is legal material which explains the primary and secondary law material. The main method to collect legal material by documentation and document review (Arikunto, 2013). Legal materials implement data analysis in qualitative research consists of three lines, such as, the distillation, presentation, and drawing of legal inferences from the law. The analysis that used on legal material that researcher used is qualitative descriptive analysis. After the correct material was selected, it connected to the theory, principles, and legal principles in order to get the correct answers regarding to the research problems (Arikunto, 2013). The main problems of this research that occurs is inconsistency norm between the Regulation of Health Care Security Director No. 4/2018 concerning on the Online-based health system within the legal constitution number 36/2009 article 5.

3. Result and Discussion

3.1 Every People has the Right to obtain the Health Services under the constitution Number 36/2009.

The constitutions Number 36/2009 Article 5 concerning on Health stated that everyone has the right to achieve an accessibility materials of safety part, everyone has the right to safety, access to high-quality healthcare at an affordable price, and the autonomy and responsibility to choose the medical care that individuals need. Every people have the right, it is written in the constitution No.36/2009 which already fulfills and related to the content of Indonesian 1945 Constitutions. This is in line with Stufen theory from Hans Kelsen, hierarchy theory is the theory that related to the legal system which introduced by Hans Kelsen it is stated that legal system is the system of tiers regulations. The relations among the norms which the norm stipulated by other norms, it can be called as super-relationship and subordination of spatial context (Asshiddiqie, Jimly, 2006).

This is related to the opinion of Hans Nawiaski. Theory of Hans Kelsen has received a lot of attention as the hierarchy of norms and chain of validity that build the legal pyramid (Stufen theory). One of the figures which develop the theory is the trusted pupils of Hans Kelsen, Hans Nawiasky. Theory of Nawiasky called as the theory *von stufenaufbau der rechtsordnung*. The arrangement of norms theory is (Attamimi, A, 1990). Fundamental norms of the State (*Staats* fundamental norm); Basic State Rules (*Staatsgrundgezets*); Formal legislation (*FormellGezets*); and Implementing regulations and autonomous regulations (*Verordnung EnAutonome Satzung*). According to Nawiasky, the highest norm by Kelsen called as the basic norm or state fundamental norm. Legal protection related to the right and obligation. in this case, what humans have as legal subjects in their interactions with fellow humans and environment.

Customer protection defines as every effort that can guarantee all certainty in fulfillment of consumer rights as protection form of consumers. Therefore, consumer protection law is the legal norm which arranged as the efforts to guarantee and ensure the realization of legal protection to the consumer. The Consumer Protection Act was realized through the Constitution Number 8/1999. Article 1 paragraph (1) in the Constitutions No. 8/1999 concerning on the consumer protection which means that consumer protection is every effort that ensure legal certainty to provide consumers protection. consumer protection has wide range, include the consumer protection regarding the goods and services, it is started from the activity to obtain a better quality of goods and services (Zulham, 2013). Nasution defined the consumer protection as the part of law which contains of legal rules principle which stipulated to the relation and problem among several parties that related to the goods and consumer service in social life (Nasution, 1995).

According to Sadar in his book entitled the Consumer Protection Legal in Indonesia stated that consumer protection was held as the effort based on five relevant national development principles such as: the principles of asset, justice, balance, and security and consumer safety, with the certainty law (Sadar, M., Taufik Makarao, 2012). It is found in the Article 2 concerning on the Consumer Protection, and Article 3

Constitutions No. 8/1999 concerning on the Consumer Protection. Every BPJS Health participant has the right to obtain the health service which includes the service of curative, and rehabilitative found in the Article 1 Constitution No. 36/2009 concerning Health which is: Article 1 paragraph 12, 13, 14, 15 Constitutions No. 36/2009 concerning Health.

Health service is the absolute rights for every BPJS patients. The health service include ²⁵ first level health facilities and advanced level health facilities, the other health facility which stipulated by Ministry which cooperate with BPJS Health including the supporting health facilities (Tim Visi Yustisia, 2014). Health service is the important factors to maintain the medical state for patients, thus medical crew that provide the health service related to the standard of health service quality (Tim Visi Yustisia, 2014). The quality of health services is complicated because of the economic considerations. Health policies require as measurement to improve patient satisfaction as the strategic focus of the hospital (Jeen-Su Lima , Kee-Sook Limb, John H. Heinrichsc , Khulud Al-Aalid, 2018). There are no clear boundaries concerning to how far the degree of quality needs to be achieved when adjusted to existing budget considerations (Aditama, 2002).

Institute of Medicine Committee in United States argued that the health service quality assessed from how is that service, both for personal or population can increase the degree of health and be carried out in accordance with the development of science that existed at that time. Whereas, for 500 years ago, experts named *Bombastus von Hohenheim* known as *Paracelcus*, has stated that "Good medicine without good care is as useless as good care without good medicine" (Aditama, 2002). To maintain the legal certainty, the role of government and justice is very important. The government may not issue implementing rules that are not measured by law or contrary to law. If this happen, justice should be state such regulation is nonvalid and empty, it means that it is calculated to have never lived, thus the consequences that occur due to the existence of the regulation should be repaired. Moreover, if administration still does not need to annul the rules that have been declared null and void, this will change become the political problem between government and as constitutions maker.

Roscoe Pound pointed out that there is the law certainty might be predictable. The Pound considered in line with Oliver Wendell Holmes' statements in this realism sight. Holmes stated "The prophecies of what the Courts will do in fact and nothing more pretentious is what I mean by law." By *Van Apeldoorn* stated that the sight is not right because in the fact Judge also can gives the other decision from of what the legal seeker suspected (Pound, 1975). In common law or civil law countries, if law if referred to the law certainty, it means increasingly stricter and sharper in law regulations, the justice is more pressing. In the end, it might not happen *summumius summa iniura* it means the highest justice is ultimate injustice. Thus, there is an antinomy between demands for justice and demands for legal certainty.

3.2 BPJS Health Care Insurance Regulation Number 4/2018

Related to opinion of Stufen theory from Hans Kelsen, hierarchy theory is the theory related with the system of law introduced by Hans Kelsen which stated that the system of law is a step of system with tiered rules (Travessoni Gomes Trivisonno, 2021). The relations between norms that regulate other actions and other norms can be called as super connection and subordinate in the spatial context (Asshiddiqie, Jimly, 2006). The norm determines the other superior norms. The making which determined by the highest norms becomes the reason for the validity of the entire legal system that forms a unity.

¹⁷ Based on the Regulation of the Director of BPJS Health Care Insurance No. 4/2018 concerning the online based referral, the rights of people or patient in BPJS Health, the consumer as subject in the consumer protection. Consumer has rights which called as consumer rights, according to the Constitutions Article 4 Number 8/1999 regarding the consumer rights. It can be concluded that patient is the consumer consumers of health service users. As health service users, patient also called as consumer for the applied regulation of Consumer Protection Act (Nomani et al., 2019). If the patient of hospital is consumer, generally patient is protected with the constitutions, the consumer rights must fulfill by BPJS with the cooperated Hospital with BPJS. There are the consumer law means as entire principles and legal principles governing the relationship and problems between various parties with each other relating to consumer goods and/or services in social life (Nasution, 1995).

Not every principal of justice can be realized together because it can happen that one principle collides with another principle, for that Rawls gives priority. The main priority set that the same principal freedom the biggest lexical applied previously than the principal of second and third. Only after exalted complete freedom, we can also freely direct our efforts to pursue the demands contained in the next principle. Next, the second priority is the relation between two part of the second principal of justice (there are the principle

of difference and the principle of equality of opportunity). According to Rawls, the equality principle on lexical chance applies first than the principle of difference (Darmodiharjo & Shidarta, 2006). The regulation Director of BPJS Health Service Insurance Number 4/2018 concerning online based referral. The right of every people (patient) not in line with the mandates by The Constitution of Republic Indonesia 1945 stated that, in line with the mandates in the Article 28H paragraph (1) 1945 Republic's Constitution of Indonesia and Constitutions Number 36/2009 concerning Health in the Article 5. Therefore, the regulation Director of BPJS Health Service Insurance Number 4/2009 concerning online based referral, is not giving the law certainty.

The authority in making the regulation Director of BPJS Health Service Insurance Number 4/2018 concerning online based referral is the type of delegation authority namely authority based on delegation. Within the rule of law as known as the legality principle which become the main pillar and one of main principle which become the base of every administration of government and statehood in each law country especially for the country of law and continental system (Nitibaskara, 2002). Philipus M Hadjon stated that the authority obtained through three sources namely attribution, delegation, and mandates. The Constitution, the authority of delegation and mandate are the authority comes from that comes from overflow (Hadjon, 2015). Every authority is limited by context or material of area and time. Defects in these aspects can cause defects in authority.

In the political science literature above, there can be powers that are not related to the law. Power is often equated simply with authority, and power is often exchanged with the term authority, and vice versa. Even the authority is often likened to power. Power is commonly creating the relation in the meaning of "There is one party who rules and another party who is governed"(the rule)(Budiardjo, 1998). Based on the explanation above, can be happen the power which not related with law. Power is not related with law by Henc van Maarseven is called as "blote mach"(Mulyosudarmo, 1990). While power is related with law by Max Weber called as power of rational and legal, namely power which based on a law system can be understood as a rule that has been recognized and obeyed by the community and even strengthened by the State (Setiardja, 1990).

The power is the main from state administration so that the state is in a state of motion (*de staat in beweging*) so the country can take part, work, capacity, achievers, and performs to serve its citizens. Moreover, the country must give the power. Power according to Miriam Budiardjo is the ability of someone or group of people affect the behavior of a person or other group in such a way that that behavior is in accordance with the wishes and goals of the person or State (Budiardjo, 1998). In order to exercise the power, a ruler or organ is needed so that the state is conceptualized as an association of positions (*eenambten complex*) where the position is filled by officials who support certain rights and obligations based on the construction of subject-obligation. Thus, the power has two aspects which is politic and law, while authority only has law aspect. It means the power is sources from the constitutions, it also from the outside source of constitution (unconstitutional).

3.3. Inconsistencies between the Director of Health Service Guarantee Regulation Number 4/2018 concerning on Online-Based Health System and Law Number 36/2009 concerning on Health

Indonesia was built as the country with a legal-based system and not based on power. It is emphasizing that legal system in Indonesia located the law supremacy in the administration of State power, which means that every implemented act and occurs should be based on the applied law. Where the applied regulation and the enforceability in the territory of a State so it called as positive law. The Positive law is declared to be binding and regulatory because its content is material law; it is applied to the entire State. Indonesian citizens are citizens that can be recognized by active laws, regardless their existence due to their place of birth (*iussolli*) or their ancestors (*iussanguinis*). Moreover, because Indonesia is a country under the rule of law, it is better to keep the country in order, because a country that is not well organized will make a chaotic country.

The rights and obligations of BPJS Health patients are no different from the rights and obligations of general patients. Declaration of Human Rights launched by United Nations, the Declaration of Human Rights launched by United Nations on 10 December 1948, the consumer basic right as the first stated by president of United States J.F.Kennedy in front of congress on 15 March 1962, which consist of (Miru, Ahmadi, 2004): right to obtain safety; right to choose; right to get the information; right to hear (Schaufelbuehl, 2020).

3.4. Implications of Inconsistency Between the Regulation of the Director of Health Care Insurance Number 4 of 2018 concerning Online-Based Health System and Law Number 36 of 2009 concerning Health

The regulation of law is arranged and forced the society members to obey it, causes a balance in every relation of society. Every violators of existing laws, it will be penalized on the law violator acts. Thus, Law must be built on justice to ensure the law's certainty in society. Moreover, the important role of written constitutions as one of the sources from the national law for all citizens of the State, undeniably influenced by law system which embraced by Indonesia. Indonesia is country which embraced the European Continental legal traditions or often called as civil laws, one of the characteristics of common law is the important role of written constitutions or statute law or statutory legislation. The position "statute law" takes precedence over rather than judge decision or Jurisprudence (Isrok, 2017).

From the explanation above which are the result research, then it will analyze with using the theory of law system which stated by Lawrence M. Friedman. In the theory of Friedman divided the law system in 3 components as it explains below (Friedman, 2009):

1. The term "substance of law" refers to all applicable regulations, both formal and informal, written and unwritten.
2. Law structure covers law organizations, arrangement of law and legal application system. Structure of law is related with the justice system which implemented by law enforcement officers, in the criminal justice system, law enforcement application implemented by investigator, prosecutor, Judge and advocate.
3. *Legal culture* is emphasizing from the cultural side in general, habit, opinions, how to act and think which steer the power of social and society.

Three components from law system according to Lawrence Friedman above are soul or spirit which steer the law as a social system which have the character and special technique in the study. Friedman dissecting the law system as a process which begins with input which in the form of raw material is in the form of sheets of paper in the raw material to produce output in the form of decision (Friedman, 2009). Input in the form of the concept of suit and indictment in the system is the element of behavior and social value on the demands of society that drive the legal system. If society is not implementing the demands on value and their behavior which is considered contradict with their expectation both individual and group, so there is no suit concept or the charges that go to court. If there is no suit or charges as input in the system so the court is not work or never exist (Friedman, 2009). Moreover, every component in the law system cannot be separated if one of the components not stir so there will be no feedback driving the system.

In the law system is not a machine works with mechanism and the certain process. The law experts with ideal idea wants the certain law, can be predicted, and free from the subjective things with other words must programmed, so every input that is entered and processed will be produced the certainty output and can be predicted. Therefore, everything from the other outputs rather than it will be seen as unfair (Friedman, 2009). The ideal ideas above are ideas that are impossible to manifest in the system of common law or law system of civil law. This cannot be separated from the unique and special character from the law system as specific social science, as it explained by Friedman which plays the important roles in the justice process by the judge and lawyer. The judges in deciding cases that holds is cannot be separated from various factors, background, behavior, value and intuitions. One of the studies showed that the democrats in the Supreme Court of Michigan more sensitive than Republic on the unemployment demands (Friedman, 2009). Stuart Negel calculates the lawyer role in every process of justice based on the background, expertise and experience from the older lawyer and richest tend to win the cases (Heavin, 2017).

From the cases above, it can be known that the law system which started from input proceed and output in the form of decision is the mechanism which cannot be ascertained and predicted. The complexity which influenced the system makes the application of law in the context of justice become very subjective and depends on the perspective of law and also cannot be separated from the influence of lawyers which made the argumentation of law in order to convince the judge to making the decision. Indonesian law which combines several existing law systems, including adopted some theory of law from *system of common law*. Logic consequences or the complexity that every decision in the Indonesian justice system depending on the school of thought of the judges including attitude, value and intuitions with background. Because the court is never exist if there is no charge on values and expecting in the form of input, such as sheets of paper suit and indictment, so the role of lawyer in building the citizen law cultural outlined in the concept of a lawsuit and

argumentation of law in the court is mutually reinforcing. Legal structure components in law system of Indonesian within the scopes of law enforcement, although, the rules are made as good as possible, but without citizen's support and the law enforcement agencies. The good country is full with the justice only sheer nonsense.

In practicing the submission of *judicial review* where related the structure in understanding of legal institutions in matters of justice so it related with Supreme Court as the highest level of justice for the applicant at the cassation level, then the Supreme Court oversees the High court as the appeal and the lowest is the State Administrative Court. The last component is culture, culture of the society which is outlined in the concept of lawsuit/applicant and law argumentation in the court is mutually reinforcing, because there is no lawsuit or applicant form society so the law enforcement and the regulation the law of death does not work.

4. Conclusion

The occurrence of inconsistency law because based on the regulation of Director of BPJS Health Service Insurance Number 4 of 2018. In the regulation of the highest constitution, the health service for every patient is stipulated as below: (1). the right of every people in the Constitutions of Republic Indonesia 1945 stated that in line with the mandates Article 28H paragraph (1) the Constitutions of Republic Indonesia of 1945 than in the Article 34 paragraph (3); (2). The Constitution Number 36 of 2009 related Health in the article 5; (3). In the Regulations of Indonesian Ministry of Health No. 71/2013.

It can be seen from the position of hierarchy of the law and regulation between the regulations of Director of BPJS Health Service Insurance Number 4 of 2018 related about online-based tiered referrals and the Constitutions No. 36 of 2009 related with Health which have the highest position. Then, the principle that used to solve the law problem is *Lex superior derogat lex inferiori*.

The implication occurs the inconsistency in the law and regulation which stipulated the right of patient on the health service which affection the balance of the existing system in Indonesia. System is a unity complex where every part is connected. The connectedness of the parts, those parts actively works to reaches the main purpose of the unit. The implication of inconsistency in the regulation is the right of every patient on the health service resulting in multiple interpretations. With the inconsistency regulation of judge in the court to the material test, demand that gives the contributions in the regulation of health service to every patient is not clear. This unclear regulation resulted in the legal system in Indonesia not running well.

4.1. Suggestions

This study can give the consideration for government which authorized to make the law and regulation to revise again the regulation of Director of BPJS Health Service Insurance Number 4 of 2018 related the online-based tiered referral. Because the right to health services on every people is not accordance with the mandates of constitutions Number 36 of 2009 in the article 5 so it needed to implements the Juridical Review to Supreme Court.

In order not to have multiple interpretations of the right to health services for everyone in the regulation of Director of BPJS Health Service Insurance Number 4 of 2018 related the online-based tiered referral, with the right to health services on every people in the Constitutions Number 36 of 2009 related to Health in the Article 5. The regulation is clear related to the right of patient on the health service is needed, in order not to grow any more multiple interpretations so that legal certainty will be realized and also the law system in Indonesia will work effectively. So, it needed the implementation the analysis of the law system with using the law system by Lawrence M. Friedman.

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Declaration of Interest Statement

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