

Pancasila as the Guidelines in the Legislation in Indonesia

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ABSTRACT

Indonesia is a vast archipelago and has approximately 1340 tribes. This condition indicates that Indonesia is a pluralist country. However, behind the diversity of ethnicity, culture, race, and religion, there are basic principles that reflect the national identity, namely the Pancasila. By the founders of the nation, Pancasila was used as the guidelines in the administration of the state, by incorporating these principles into the preamble of the 1945 Constitution of the Republic of Indonesia. This makes the existence of Pancasila as the guidelines for the state officials, including the lawmakers in Indonesia (the House of Representatives and the President) in carrying out their functions. Hence, it is true that Pancasila is referred to as the source of all sources of law of the country, as stated in Article 2 of Law Number 12 of 2011 on the Legislation.

But in fact laws enacted by the House of Representatives (DPR) and the President remained contrary to Pancasila and the 1945 Constitution of the Republic of Indonesia. This is evidenced by the annulment of a number of provisions in the 159 laws by the Constitutional Court in the period of 2003 to November 2014. The problems of this law can be caused by political interests in the legislation. Therefore, the public may assume that the lawmakers are experiencing a moral degradation.

Pancasila which is regarded as the nation's way of life indicates that its position as the moral values. The use of Pancasila as the guidelines in the legislation will be able to avoid actions that prioritize the interests of the group rather than the interests of the entire people. Therefore Pancasila should serve as a guideline in the legislation in order to produce laws that guarantee, protect and fulfill the human rights of every person.

Keywords: Pancasila, Legislation, Human Rights

INTRODUCTION

Legislation is an activity that is always done by the countries that adopted the system of codification. Codification is the influence of the legal system of "civil law". Indonesia is one of the countries that is influenced by the legal system. This is because Indonesia was once a Dutch Colony. Nevertheless, it does not mean that the civil law system is fully implemented. Rather, matters relating to the Anglo-Saxon tradition are also applied. Apart from that, an important influence on civil law system makes the Indonesian government must continue to make laws.

Laws in a presidential system of government are the legal products of the executive and the legislature. In Indonesia, lawmaking is made by mutual consent of the House of Representatives (DPR) and the President. This is in accordance with the provisions of Article 20 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which specifies "any bill discussed by the House of Representatives and the President must reach mutual consent".

The process of making laws that will be proposed to be a bill, determines the quality of laws that will be enacted later. In fact, the quality of legislation in Indonesia is still not good. It can be seen from the number of laws that were appealed to the Constitutional Court of the Republic of Indonesia from 2003 until November 2014. The following table summarizes the recapitulation of the Judicial Reviews carried out by the Constitutional Court:

(<http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU>)

YEAR	DECISION			
	Approved	Rejected	Not accepted	cancelled
2003	0	0	3	1
2004	11	8	12	4
2005	10	14	4	0
2006	8	8	11	2
2007	4	11	7	5
2008	10	12	7	5
2010	17	23	16	5
2011	21	29	35	9
2012	30	31	30	6
2013	22	52	23	13
2014	26	36	41	18
Total	159	224	189	68

From 159 appeals which have been approved by the Constitutional Court, indicated that a number of provisions in the law 159 are contrary to the 1945 Constitution of the Republic of Indonesia and Pancasila. Thus, this shows that the quality of law in Indonesia is still a great concern. Article 1 paragraph 1 of Law No. 12 Year 2011 on the Legislation, determine that *the legislation includes the stages of planning, preparation, discussion, approval or legalization, and enactment.*

In Indonesia, the laws are placed at the third position of the hierarchy of legislation, after the 1945 Constitution of the Republic of Indonesia and the Decree of People's Assembly (MPR). This is based on the provisions of Article 7 (1) of Law No. 12 Year 2011 on the Legislation. Being the third position of the hierarchy, referring to the theory of Hans Kelsen's the hierarchy of norms "stufentheory", the Constitution of 1945 and the Decree of the People's Assembly (MPR) shall become the foundation in the making of laws. In other words, a law must not be contrary to the two rules.

However, besides these two rules, there are the state's basic principles as guidelines in the administration of the state. They are better known as the principles of Pancasila. Although

Pancasila is not included in the hierarchy of legislation, but Article 2 of Law No. 12 of 2011 specifies that "Pancasila is the source of all laws of the state". The phrases emphasize that Pancasila becomes the spirit (soul) of any state legislation.

The applicability of a law is very important in Indonesia. Considering the law is a rule that is binding on all the people of Indonesia and covering the entire territory of the country. It is vital therefore, if the existence of a law is accepted by all elements of society. This is the benchmark of a regulation in order to be regarded as a good law. Thus, the relevant question is whether Pancasila can serve as guidance in making a good law?

PANCASILA

The term of Pancasila is a combination of two Sanskrit words, namely *Panca* and *Sila*. *Panca* means five, while *sila* is defined as principles. Thus Pancasila means the five principles. These five principles (*sila*) are inseparable and interrelated:

Belief in the One and Only God, Just and civilized humanity, The unity of Indonesia, Democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, as well as the principle of Social justice for all of the people of Indonesia.

The position of Pancasila has become important in the legislation, since it is governed in the Article 2 of Law No. 12 of 2011 on Legislation. Moreover, the status of Pancasila is stipulated in the Preamble to the Constitution of 1945. In accordance with Article II of Additional Rules of the 1945 Constitution, it is specified that: *With the enactment of the amendment of the Constitution, the 1945 Constitution of the Republic of Indonesia consists of a Preamble and articles.*

Then, the Pancasila position is specified in paragraph 4 of the Preamble to the 1945 Constitution of the Republic of Indonesia, which specifies:

Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice, therefore the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God, just and civilised humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and achieving social justice for all the people of Indonesia.

The provisions above indicate that Pancasila as the basis of the conduct of the State of Indonesia in realizing the goals of the state. The status of Pancasila as stated in the Preamble of the Republic of Indonesia Constitution of 1945 showed its existence as the basic principles of the state, which animates all the provisions of the Constitution. Therefore, it can be assumed that Pancasila is the basis of Articles of the Constitution of 1945. This reasoning shows that Pancasila as the ideals of law (*rechtsidee*) for the legislation of the State law. The thoughts on the "ideals of law", actually have been implied in the Explanation of the Text of the Constitution of 1945 (before amendment), which was made by Prof. Supomo. The thought of Supomo are as follows:

The constitution created the main ideas contained in the "preamble" of its articles. The main ideas comprise the spiritual atmosphere of the Constitution of the State of Indonesia. The main ideas realize the ideals of law (*rechtsidee*) which control the legal basis for the State, either the written law (the legislation) or unwritten law. The Constitution created these main ideas in its articles.

The thought of Supomo shows the existence of the Preamble of the 1945 Constitution of the Republic of Indonesia which is the basic main ideas of the founders of the nation (the ideals). Thereby it supports the argument that Pancasila as a form of legal ideals. Other provisions, which indicate that Pancasila is the goal of the law is the Decree of the Provisional People's Consultative Assembly (MPRS) No. XX / MPRS / 1966 on the DPR-GR Memorandum regarding the Sources of Law Order and the Hierarchy of Legislation of the Republic of Indonesia, which specifies that:

Sources of legal order of the Republic of Indonesia is a way of life, consciousness and ideals of law and the ideals of individual liberty, freedom of the nation, humanity, social justice, national and mondial peace, political ideals concerning the nature, the form, and the goal of the country, moral ideals of social and religious life as the embodiment of the moral. The way of life, consciousness and ideals of law and the noble moral ideals which includes psychological atmosphere and the character of the Indonesian nation on August 18, 1945 had been purified and solidified by the Independence Preparatory Committee on behalf of the people of Indonesia, became the Foundation of the Republic of Indonesia, namely Pancasila : Belief in the One and Only God, Just and civilized humanity, the unity of Indonesia and democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, as well as Social justice.

Then in Article 1 of MPR Decree No. XVIII / MPR / 1998 on Revocation of the Decree of the People's Consultative Assembly of Indonesia Number II / MPR / 1978 Concerning the Implementation Guidelines of Pancasila (*Ekaprasetia Pancakarsa*) and the Decree on the Affirmation of Pancasila as the Foundation of the Nation, determines that *the Pancasila as referred to in the Preamble to the Constitution of 1945 is the foundation of the state of the Unitary Republic of Indonesia that it should be implemented consistently in civic life.*

The Decree of People's Consultative Assembly/MPR No. XVIII / MPR / 1998 shows that Pancasila serves as the foundation as well as the ideology of the nation. This is embodied in the 5 (five) principles containing the values of the divinity, humanity, unity, democracy and justice. These five values also indicate the status of Pancasila as the country's way of life. It is significantly connected with the activities of the administration of the state, especially in the legislation. The enactment of law is based on the value of the Devinity, emphasis on moral values in the process. Because before serving as the House of Representatives (DPR) and the President, they shall pledge or promise to the Almighty God to carry out their duties properly.

Similarly, the values of humanity will be the guidance in the making of laws that protect and fulfill the human rights of every person. This is in accordance with the principles of a democratic state of law, as stated in Article 28 I, paragraph (5) of the Republic of Indonesia Constitution of 1945. The provisions specify:

For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations.

The value of unity becomes the basis for the making of law in order to meet the interests of all groups in all regions of Indonesia. Moreover, the principles of Pancasila also imply the concept of *Bhinneka Tunggal Ika* (Unity in Diversity), as a means of unifying the nation.

While the correlation between legislation and the value of democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, as the fourth principle of Pancasila is on the populist (democracy). Democracy is meant to open up opportunities for public participation in the process of making such laws. Then the values of social justice for all Indonesian people, emphasizes on the legislation made shall not discriminate under no circumstances.

In some literature in Indonesia, it is noted that the good legislation must meet the philosophical, sociological, and juridical foundations. According to Joeniarto (1980:15), philosophical foundation means that any legislation should reflect fairness, truth, democracy, protection of human rights and other basic values. The existence of these values actually stated in Pancasila, as described earlier. On the other hand, Mohhammad Kosnoe, (1990:170) argued that philosophical conditions in the legislation (including the making of a law), are related to the ideals of law "*rechtsidee*".

In the Unabridged Indonesian Dictionary, *cita* or ideal is defined as an idea (<http://bahasa.kemdiknas.go.id/kbbi/index.php>). Thus the ideals of law emphasize on the idea of legislation. The arguments of the two experts reinforce the view of Pancasila as the philosophical requirements relating to the "ideals of law" of making laws in Indonesia. Therefore, it is true that "Pancasila is the source of all laws of the state".

THE LEGISLATION

Quoting the views of L.J. van Apeldoorn,(1982:22) that the the purpose of law is to create peace, justice, prosperity and happiness. It can be interpreted that the legislation in Indonesia is specifically aimed at promoting justice and the rule of law in accordance with the ideals of Indonesian law embodied in the preamble of the 1945 Constitution of the Republic of Indonesia.

Article 10 paragraph (1) of Law No. 12 of 2011 on Legislation, specifies: "The content that should be regulated by the Legislation contains:

- a. Further guidance on the provisions of the 1945 Constitution of the Republic of Indonesia;
- b. Command of a law to be regulated by law;
- c. Ratification of certain international agreements;
- d. Follow-up on the decision of the Constitutional Court; and / or
- e. Meeting the needs of law in society.

The existence of laws in countries that follow the continental European law system with codification, assumes that legislation is identical with the law. Therefore this assumption

suggests, the making of a good law is the same as the making of good laws. Antony Allot (1990:2) tries to give definition of the law, in his book entitled "The Limits of Law". In this writing he provides law definitions with different writing symbols, namely LAW, Law, law:

LAW = the general idea or concept of legal institutions abstracted from any particular occurrence of them.

Law = a coherent, total, particular legal system prevailing in a given community or country.

law = a particular normative provision of a Law; a rule or norm of given legal system

The thought of Anthony Allott which classifies three (3) law concepts, is not much different from the view that law contains philosophical, sociological, and juridical foundations. A good legislation should have 3 foundations, namely the philosophical (*Filosofische grondslag*), sociological (*Sociologische grondslag*) and juridical (*Juridische grondslag*) foundations. The use of three (3) foundations becomes an ideal form of existence of a law. In the previous page, it has been described that the philosophical basis of a law in Indonesia is Pancasila. While the sociological foundation emphasizes that laws should be enacted in accordance with the needs of the people.

The thought is conveyed by Robert Seidman and Ann Seidman (2002:30), who assume the failure of the legislators show a causal link between the laws (legal norms) with social reality and development. In other words, it does not show the existence of a law as a solution in dealing with social problems.

The thought of Robert Seidman and Ann Seidman has a correlation with the view of Philippe Nonet and Philip Selznick through the concept of responsive law. Philippe Nonet and Philip Selznick (1978:113), they suggest that:

“Responsive law presupposes a society that has the political capacity to face its problems, establish its priorities, and make the necessary commitments. For responsive law is no maker of miracles in the realm of justice. Its achievements depends on the will and resources of the political community. Its distinctive contribution is to facilitate public purpose and build a spirit of self correction into the governmental process.”

The thought of Philippe Nonet and Philip Selznick's also assume that the law as the solution of social problems. Therefore, the formation of legislation desperately needs public participation in evaluating policies that will taken by the government in the form of legislation. Philippe Nonet and Philip Selznick also want aspirational legal formation, by prioritizing the needs and the demands of the people. Therefore the views of Robert Seidman and Seidman Ann with Phillppe Nonet and Philip Selznick are the notions of the sociological foundation.

The consideration on the outcome of public participation normatively has been regulated in the Article 96 of Law No. 12 Year 2011 on the Legislation, which specifies:

- (1) The public is entitled to provide verbal and / or written inputs in the process of Legislation.
- (2) The verbal and / or written inputs referred to in paragraph (1) can be done through:

- a. public hearing;
 - b. working visitation;
 - c. dissemination; and/or
 - d. seminar, workshops, and / or discussion.
- (3) The public referred to in paragraph (1) are individuals or groups of people who have an interest in the substance of the draft of legislation.
- (4) To facilitate the public to provide verbal and/or written inputs referred to in paragraph (1), each draft of legislation should be readily accessible by the public.

Laws which are an instrument of law should also make the legal basis as the most important basis. Because of the character of legal science that is *sui generis* or it has its distinctive characteristics from other sciences. The distinctive feature is in the object of the science itself, which is binding in its nature. Therefore it is not made possible if in the process of making laws it would ignore the legal basis itself, considering it concerns the validity of a statute. Bagir Manan, suggests that the juridical principles "*juridische grondslag*",(1992:5)¹ of the legislation are:

First, there must be the authority from the lawmakers. Any legislation should be made by the body or the competent authority. If not, the legislation is annulled by law "*recht van wegeneitig*". It is considered to be never existed and all its consequences are null and void.

Second, it must conform: to the type of legislation to the material regulated, especially if it is ordered by law of a higher level or equivalent.

Third, it must follow certain procedures. If such procedures are not followed, the legislation may be null and void. For example: the necessity of the Regional Regulation to be stipulated by the the Regional Head with the approval of the Local Parliament.

Fourth, it must not conflict with the legislation of higher level.

In addition to the views of Bagir Manan above, normatively Article 5 of Law No. 12 Year 2011 on the Legislation determines the statutory basis for the formation of a good legislation, which comprises:

- a. certainty of purpose;
- b. the right institutions and legislators;
- c. correspondence between the types, hierarchies, and substance;
- d. executable;
- e. usefulness and efectiveness;
- f. certainty of formulation; and
- g. transparency.

Further, the Article 6 (1) of Law No. 12 In 2011 determines the materials of legislation should reflect the principles of:

- a. protection;
- b. humanity;

- c. nationalism;
- d. brotherhood;
- e. unity;
- f. *bhinneka tunggal ika*/ unity in diversity;
- g. justice;
- h. equality before the law and government administration;
- i. the orderlines and the legal certainty; and / or
- j. balance and harmony.

The provisions of Article 6 paragraph (1) is the actualization of the values of Pancasila. However, it cannot be separated from the command of Article 28 I, paragraph (5) of the 1945 Constitution of the Republic of Indonesia. The relevance of the first paragraph of Article 28 (5) of the 1945 Constitution of the Republic of Indonesia with the principles in Article 6 paragraph (1) of Law No. 12 of 2011 is the implementation of the protection, promotion and fulfillment of human rights by the state, in the legislation. In the presence of good law, then the implementation of the government's actions in the protection, the fulfillment, and the promotion of human rights would be better.

HUMAN RIGHTS

Human rights are constitutionally guaranteed rights (the 1945 Constitution). The relevance of human rights to the legislation is apparent on the Article 28 I, paragraph (5) of the 1945 Constitution which emphasizes on a democratic constitutional state. Marjono Reksodiputro (1994:29) said human rights as the rights inherent to human nature, so without these rights that we do not have dignity as a human being (inherent dignity), so that these rights must not be violated or revoked.

In this regard, human rights show the correlation between the roles of the state with its people. The thoughts of Thomas Hobbes, JJ Rousseau and John Locke are competent in assessing the State's relationship with its people seen from human rights perspective. Among the 3 (three) thoughts, Thomas Hobbes assumes that the people hand over all their rights to the ruler. (Jimly Asshidiqqie, 2009:345)

The thought of Thomas Hobbes has implications for the State's relationship with the people on absolute power. Obviously this is different from the view of JJ Rousseau who argued that the power possessed by members of society remain on individuals and not left to the particular person absolutely or it is subject to certain conditions (Lili Rasjidi, 1990:61-62). In other words, JJ Rousseau emphasizes that the state's power remains limited to the constitution. Similar to the opinion of Rousseau, John Locke said the provision of power to the state also include the conditions which, among other, powers are limited and may not violate human rights (Lili Rasjidi, 1990:61-62). By this view, John Locke gives the assertion that human rights are a touchstone against the state's action.

The thoughts of JJ Rousseau and John Locke are identical to the idea of human rights. For the Indonesian government, to protect the people and the country of Indonesia, and to promote the general welfare, the intellectual life of the nation, as well as to participate in the establishment of a world order based on freedom, lasting peace and social justice on the basis of Pancasila and the Constitution of the Republic of Indonesia of 1945, is a major task.

Soetandyo Wignjosoebroto (2002:415-416), said the constitution is always meant to regulate the functional relationship between "power" and "freedom". That is because human rights are rights that are naturally inherent and inalienable, inderogable, inviolable characterd. The meanings of the word "free", according to Bertens, the freedom that is closely related to ethics. Sometimes freedom means to do something as he/she pleases, so "free" is understood as, free from all the obligations and constraints.

The meaning of freedom that requires restriction is normatively regulated in Article 28 J, paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which says:

"In the exercise of rights and freedoms, everyone shall be subject to the restrictions set forth by law with the sole purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just demands based upon considerations of morality, religious values, security and public order in a democratic society. "

This provision implies that the restriction was based on the considerations of recognition and respect for the rights of freedom of others. Thus, in implementing the guarantee of human rights in law, morals and ethics play an important role so that the legislators would not concerned with the interests of their group only, but rather for the benefit of the entire people of Indonesia. Because the existence of moral values for state officials which implied in the Pancasila, is a way of life and philosophy of the Indonesian nation.

CONCLUSION

The problem of the legislation in Indonesia is the numbers of laws that are contrary to the 1945 Constitution of the Republic of Indonesia and Pancasila, eventhough Indonesia has Law No. 12 of 2011 on the Legislation that provides guidance in producing a good law. This shows that there is still "ignorance" for the protection, promotion and fulfillment of human rights of the people in the law. The actions of the legislators who prefer the interests of their own group, rather than the interests of the people, either by the House of Representatives (DPR) or the President, are indications of a lack of moral values in the performance of duties and functions of the state (especially the legislators).

The status of Pancasila as the foundation, the state ideology, the way of life as well as the ideals of law indicates that Pancasila contains moral values and serves as guidance in the formation of good legislations. Thus the state administration in realizing the objectives of the state of protecting, fulfilling, promoting and upholding human rights is guaranteed by the laws, as the essence of good legislation.

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