

A ROADMAP OF THE DEVELOPMENT OF INDONESIAN LAW IN THE MIDST OF GLOBALIZATION

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ABSTRACT

Openness as a dominant feature that marks the era of Information and Technology in global public relations, has had a significant impact on the pace of development of a nation. Included in this context is the development of law. Various shades and legal thoughts classically mapped in common law and civil law mazdhab are no longer strictly adhered to by the supporting states. This phenomenon is at least seen in the dynamics of the development of Indonesian law, which is genealogically rooted in the civil law system of colonial inheritance. Indonesia is so open in adopting various legal thoughts that evolved from various circles as a reference raw material from the law itself. This paper focuses on analysing trends in the highly inclusive patterns of national legal development; And how the strategy to revitalise the values of Pancasila as a catalyst in the development of national law amid global situations and conditions with all the impact it brings.

Keywords: Pancasila, Law Development, Globalization.

Introduction

The development of Indonesian legal thought from the time of independence to the current reform era, is very dynamic. This condition was comprehensively photographed by Khudzaifah Dimiyati (2003), who divided the pattern of legal thought development in Indonesia in three periods. First, between 1945 and 1960; Second, in the decade 1960 to 1970; Third, in the decade 1970 to the 1990s. The period is based on the legal thinking that grows in accordance with the spirit of the times in each period. This condition also shows the level of legal development and way of the people of Indonesia in practicing law that continues to grow along with the progress of Science and Technology, as well as the politics of the State developed by the authorities.

According Dimiyati (2003), typology of legal thinking in the period of 1945-1960, trying to escape from the confines of Western legal thought. Implicitly, legal thinking in this period has a strong obsession with creating law based on legal thinking imbued with Indonesian legal culture. On the other hand, however, from the arguments of legal thought, it shows that it must ultimately accommodate the growing stream of modern law in the world, with Western legal idioms and terminology. The reflection of legal thought in this period, basically carries out significant efforts on legal thinking and orientation that emphasize the substantial manifestation of Indonesian cultural values. Legal thinkers recognize that the existence and articulation of customary law values unearthed from an intrinsic Indonesian cultural treasury is more important and sufficient to develop legal thought, in order to obtain equal treatment with modern law developed by other countries.

Legal thinking in the early era of Indonesian independence as described by Dimiyati, termed by David Bourchier (2008:186-87; 193), as Romanticism, is a legal thinking style unearthed from the nation's cultural treasury. According to Bouchier, the idea of Indonesian national law at that time, was extracted from the model of justice thinking in traditional Indonesian society. Furthermore, Bourchier says that the era of legal positivization in Indonesia began at the beginning of the Soeharto era-unearthed from the pattern of Dutch colonial legal thought which notabenenya derived from the German legal thinking.

Meanwhile, the typology of legal thought, in the period of 1960-1970, shows a characteristic of thinking that prioritizes affirmation on strict principles in postulative legal formats. The focus of thought on law was more oriented to the evolving reality of this day. Although the legal thinker ideas of this period were based on Western tradition, but at the same time they sought to conceptualize and transform Western frameworks into the framework of Indonesian reality, both normatively and empirically.

The condition of legal thought that calls colonial law with customary law is termed by Nobuyuki Yasuda (1993:149) as legal pluralism, as the basis of the national legal system. In the Dutch colonial era, legal practice was not uniform-in the sense that Dutch law was originally only for the West, while indigenous people used customary law.

The typology of legal thinking in the period 1970-1990s, can be viewed as a thinking that is transformative. That is, transformative thinkers not only touch on the mere normative and doctrinal aspects, but attempt to transform critically the legal phenomena of the empirical level that are constructed into the philosophical theoretical level. In addition, legal thinking in Indonesia can not be released with social origin, as the basis of the discovery of legal theories that have the value of the tradition of Indonesiaan (Dimiyati, 2003).

The realization of the "ideals" of Indonesian Law Science, can not be separated from the nation's view of Pancasila (the five principles of the Indonesian idiology). That is, that "ideals" contain anti-ideas, flavors, intention, creations and thoughts, that want to be realized. Therefore, the realization of Indonesian legal science must be based on Pancasila and the 1945 Constitution,

taking into account the plurality of prevailing legal arrangements capable of ensuring the certainty, order, enforcement and protection of justice (Seran, 1999:141; Mahfud, MD., 2009:134-137; 54-56).

The latter idea of legal thought, namely to restore the nation's development, including the law into the Pancasila framework, becomes a serious concern by all elements of the nation. In fact, the People's Consultative Assembly (MPR) establishes four pillars of nation-building, namely: Pancasila, 1945 Constitution, Unitary of the Republic of Indonesia System and *Bhinneka Tunggal Ika* (the Unity in diversity). According to Hajriyanto Y. Thohari (2011:1), the affirmation of the four pillars of the nation is intended for two things, namely: implementing Law no. 27 of 2009 on MPR, DPR, DPD and DPRD, and in the context of nation and character building or political education that is expected to play enlighten the nation's life.

The roadmap for legal development as described above, currently undergoes a much more complex transformation of the problem. According to Soetandyo Wignjosoebroto (2000:2-4), today's development is fundamentally different from the first condition of legal development. If initially, the development of the law was directed as a tool for the renewal of society in the 1970s, without further explanation of the shape or form of society how it would be directed to the law.

Different thinking on the direction of national law development, delivered by Moh. Mahfud MD (2009:106). According to him, by taking legal development theory from Lawrence Friedmen-which divides the law developmental duties involving three, namely: substance (content / legal matter); Structure (law enforcement apparatus); Culture, then, in fact, the era of reform has succeeded in establishing legal substance-by replacing all legal products that contradict the spirit of demography and human rights. Furthermore, according to Mahfud MD (2009) that has not been well tilled is the development of community culture and law enforcement officers.

Alexander Seran (1999:123), meanwhile, states that the current situation is characterized by a shift in the old world order caused by the process of globalization and the fact that nations-including Indonesia-have not yet (fully) prepared for the social, economic, legal and political changes And a new perspective. Globalization as an up-to-date phenomenon-which some consider as a characteristic relationship among the world's population that transcends conventional boundaries, such as nation and state. As a process, globalization continues to accelerate in different regions of the world. Historically, Wallerstein (cited in Dimiyato, 2003), one of the most important thinkers of globalization, argues that globalization has actually taken place since the fifteenth century. However, Wallerstein also states that globalization is a process of forming the world capitalist system.

According to Satjipto Rahardjo (2000), globalization driven by capitalist forces has an impact on the legal development of a country-including Indonesia. The golden period of the nations that could compose the law according to what they wanted several hundred years ago, is now past. The presence of the State and the nation as a separate island in the middle of the world's oceans is history. Now the islands are getting more and more connected to one and there is no more luxury to organize themselves freely.

Under these circumstances, the problem facing Indonesia in its legal development is on the question of how we will build Indonesia's legal system would need to be refined and complemented to be how we would place Indonesia in the midst of a global map or how Indonesia would play its role in a global situation. In line with this idea, the focus of this paper is on two things: to describe the trend of a highly inclusive pattern of national legal development; And how the strategy to revitalize the values of Pancasila as a catalyst in the development of national law amid global situations and conditions with all the impact it brings.

INCLUSIVENESS OF INDONESIAN PANCASILA LAW

Mahfud MD (2008) writes in his article that the choice of inclusive law is the consensus of two currents of legal thought that developed in the early phase of Indonesia's legal development-between religious groups and nationalist groups. This Mahfud's thesis is based on a historical record of the struggles of Islamic groups struggling through the democratic process-to make Islam the basis of the State and its laws, but the struggle was unsuccessful. Read more, Mahfud's thesis is as follows:

"Some Indonesian Muslims have been struggling democratically through Islamic political parties to make Islam the basis of the state and make Islamic law a formal national law. Some Muslims have championed the "formalization of Islam" through the Indonesian Agency for the Preparation of Indonesian Independence (BPUPKI) in 1945, through the Constituent Assembly from 1956-1959, and through the 1999-2002 MPR. However, the struggle that has been pursued democratically failed because not all Muslims and leaders agree. Most Muslims and Islamic leaders themselves choose an inclusive national law. Namely, a national law that unites the legal ideas of all religions and social subsystems that exist in Indonesia. By accepting such an inclusive law, Muslims should not become apostates for, for example, abandoning the teachings of Islam. Indonesian Muslims can continue to practice the religion of Islam through inclusive national laws. Moreover, what is called Islamic law is fought by some Muslims is just *fiqh* which is nothing but the result of *ijtihad fuqaha* ".

The inclusiveness of Indonesian Law based on Pancasila, actually has historical roots in the early democratic era in Indonesia, namely during the Constituent Assembly. This era is called the first democratic era, because the legislators who sit in it is the result of democratic elections in multi-party system at that time. The Constituent mindset was not only democratic at the time, but it led to liberalization, even though it eventually failed to do its job. This liberalization reflects the thoughts of the figures accumulated in the Constituent Assembly and is open and accepts [inclusiv] various legal thoughts in the developing world (Mahfud, MD., 2009:13).

The thinking is based on the results of a study conducted by Adnan Buyung Nasution (2010; Iskandar and Krisnandi, 2011:144-45), a Senior Lawyer and Founder of Legal Aid Institute (LBH) in Indonesia. The focus of Adnan Buyung's study is on the work of the Constituent Assembly as an institution authorized by Article 134 of the 1945 Constitution to "as soon as possible establish the Constitution of the Republic of Indonesia which will replace the Provisional Constitution. The extraordinary contribution of the study conducted by Adnan Buyung is the basic provision for the enforcement of the values of liberal democracy as a universal, especially for the Indonesian nation. However, unfortunately the "premature period of liberal democracy" was dissolved by Sukarno by issuing a decree of 5 July 1959. This was acknowledged by Adnan Buyung in his Inauguration Inauguration speech as Professor at his Almamater, Faculty of Law, Melbourne University. Political freedom and judicial independence did not last long, because the power of Soekarno when it was strongly supported by the military.

Entering the New Order era, actually the development of law is also progressing, especially in the field of business law. Many instruments in the field of investment are made. This is inseparable from the development paradigm carried out by the New Order regime itself is pro-economic development though by experts experiencing a significant jump from agrarian to industrialist. This situation causes the pattern of people's economic behavior also changed.

In that context, the inclusiveness of legal thought is then diverted on the interests of the ruling regime. Past conditions by Mahfud MD (2009) photographed in a map of development paradigm that ropes with the political situation and condition. The law subsequently became the subordination of politics, so the character was also influenced by the political configuration that existed then. In fact, the true character of Pancasila is the universal inclusiv, because Pancasila values are crystallisation-not social and cultural values in the Indonesian nation, but also universal values, such as human rights, humanity and religion.

PANCASILA AS A LAW DEVELOPMENT CATALYST

Pancasila is the basic norm of the state of Indonesia (*grundnorm*) and is also the legal ide of the Indonesian state (*rechtsidee*) as a normative and constitutive belief framework. Normative because it serves as the base and ideal prerequisites underlying every positive law, and constitutive because it directs the law on the goal to be achieved. In the next stage Pancasila became the fundamental principle of the state "*staatsfundamentalnorm*" with the inclusion in the Preamble of the 1945 Constitution (the 1945 Constitution). Based on these principles, Indonesia has a specific characteristic-based on Pancasila. Hidayat and Nagara explain five characters of Pancasila law (Hidayat and Nagara, 2011:7-9).

First, it is a kinship state. In a familial state there is recognition of the rights of individuals (including property rights) or human rights but with the priority of national interests (collective interests) above the individual's interests. This is on the one hand in line with the social value of Indonesian society which is *paguyuban*, but on the other hand also aligns the shift of Indonesian society toward the pathetic modern society. This is quite contrary to the concept of a western legal state that emphasizes the freedom of individuals as far as possible, as well as contrary to the concept of a state of socialism-communism law that emphasizes communal or collective interests. In the legal state of Pancasila, efforts are made to create a harmony and balance between individual interests and national interests by giving the state the possibility to intervene as long as necessary for the creation of a national and state life order in accordance with the principles of Pancasila.

Second, it is a state of law that is both inequality and justice. With the prismatic nature of the concept of Pancasila legal state in the activities of punishment both in the process of formation and implementation is done by combining the various elements that both contained in the concept of *Rechtsstaat* and the Rule of Law that is by combining the principles of legal certainty with the principle of justice, and the concept and system Other laws, such as customary law systems and religious legal systems that live in this archipelago, thus creating a prerequisite that legal certainty must be upheld to uphold justice in society in accordance with the principles of Pancasila.

Third, it is a religious nation state. By looking at the relationship between state and religion, the concept of a Pancasila legal state does not embrace secularism but it is not a religious state as in theocracy and in the Islamic Nomocracy concept. The concept of a Pancasila legal state which is a concept of a ruling state. Belief is in the sense that the life of the nation and the state of Indonesia is based on belief in the Belief in the One Supreme God, thus opening a freedom for citizens to embrace religion and belief according to their beliefs. The logical consequence of this prismatic choice is that atheism and communism are forbidden because it has ruled out belief in God Almighty.

Fourth, integrating law as a means of changing society and law as a reflection of the culture of society. By combining these two concepts. The legal state of Pancasila tries to preserve and reflect the living values of the living law as well as to positivize the living law to encourage and guide the people to developments and progress in accordance with the principles of Pancasila.

Fifth, the basis for the creation and establishment of national law must be based on a principle of law that is neutral and universal, in the sense that it must meet the main requirements of Pancasila as a glue and unifier; Based on values acceptable to all interests and does not favor a particular group or group; Giving priority to the principle of mutual cooperation and tolerance; As well as the same vision-mission, goals and orientation are accompanied by mutual trust.

Speaking of the peculiarities of Indonesian law as mentioned above, it can not be separated from Pancasila as its main source. Thus, there is a need for a common step in determining the legal system, to keep the various legal products that are born remain in the unity of the system, and simultaneously to avoid the occurrence of irregularities of the system we have mutually agreed upon. Without it our legal system will produce legal products that deviate far from the aspired, both from socio-political, socio-economic, and socio-cultural aspects (Sudiyono, 2010).

In relation to that, the Pancasila legal system installed signs and gave birth to guiding principles in Indonesian legal politics. The most common signature according to Mahfud MD (2009:38-39) is a prohibition for the emergence of laws that conflict with Pancasila. There are at least four guiding principles of Indonesia's legal development policy.

First, the national law must be able to maintain the integration (integrity) both ideology and territorial territory in accordance with the purpose of protecting the entire nation and the entire blood of Indonesia. Therefore, it should prevent the emergence of legal products that have the potential to divide the integrity of the nation and the State of Indonesia, including discriminatory laws based on primordial ties.

Second, national law must be developed democratically and nomocratically in the sense that it should contain participation and absorb the aspirations of the wider community through fair, transparent and accountable procedures and mechanisms. Therefore, it should be avoided the emergence of law products that are processed in a cunning, cat-kucingan, and transactions in the dark. Although democratically the formation of the law is true, if it is incorrectly nomocratic (the principle of law) then the law is null and voidable by the judicial institution.

Third, the national law should also be aimed at creating social justice in the sense of being able to give special protection to the weaker classes in the face of strong groups, both from within and from within their own country. Without the special protection of the law, the weaker classes will always lose if they are free to compete or fight freely with strong factions (Bloch, 2010).

Fourth, must guarantee freedom of religion with full tolerance among the adherents of biliefers. There can be no privilege of treatment of religion and its adherents only because it is based on the large number of adherents. Proportional treatment is of course permissible, but privileges are not allowed. States may regulate religious life to the extent of maintaining order in order to avoid conflicts, and facilitate for everyone to exercise their religious teachings freely without being disturbed or harassed by others.

Based on the guiding principles, it is actually sufficient as a guide in the development of national law. Therefore, if a legal product is found to be in conflict with Pancasila in the community, then to complete it is to measure every product or regulation with this guiding principle. Only in catalyzing it takes careful precision so that on the one hand it does not impress the legal exclusiveness and on the other hand can still show an inclusive legal character.

GLOBAL LAW PATH TO PANCASILA LAW SYSTEM

The view of Mahfud (2009) and Arief Hidayat (2011) on Pancasila as the main source of Indonesian law, as described earlier, shows a genuine thinking style in view of Indonesian law. Both have similarities in the idea that Indonesia is different from other systems. Indonesian law is based on the values of Pancasila, and therefore every one that grows in this country-if it is not in line with Pancasila, it must be canceled through the Judicial mechanism. However, does it mean that Indonesia is static and does not want to open up to developments in the global level ?.

Related to this question, then we need to answer it by exposing the characteristics of law in the global era. Sabino Cassese (2006:397), Vice President of the Constitutional Court, Italy and Professor of Administrative Law at the University of Rome, provided a fairly clear framework of globalization. Casese began the writing with interesting questions (motivating questions). For example, can all nations of the world be required to embrace a single human rights system [as it exists today] ?; Can the WTO be standardized in government procurement ?; Can free trade affect the legal system in China ?; And there are still some other questions.

Responding to some critical questions as Cassese himself had pointed out, he then charted clearly how these global practice patterns took place. First, for example through the process of democratic transformation as it did in Iraq [as well as some other Arab and African countries, such as: Egypt, Tunisia and Libya]. The entry of the democratic system to replace the models of the Monarchic government, certainly has great implications for the legal system in these countries. Other variants we can see in the process of development of Indonesian law in the reform era. Through the democratic system adopted by Indonesia, the changes that were only at the level of certain Act and the People's Consultative ssembly Decree which were deemed inconsistent with democracy, then the next step also demanded the amendment of the 1945 Constitution (Mahfud MD., 2009:72).

Second, the next model of globalization is that government tender systems should refer to WTO principles. In the WTO system, the entire procurement process must be conducted in a fair, transparent, non-discriminatory, competitive manner and contains objective reasons when giving a decision to the winner (Sutrisno, 2012).

Third, the application of a global human rights legal system not only to States, but also to the national legal system of each State. Factually, this condition is experienced by almost all countries in the world. The obvious exceptions are in the legal system in Arab countries which tend to impose human rights according to the Shari'a perspective. But what seems to be the most fundamental is on the issue of religious conversion-which they disagree with. They then made their own human rights declaration in London 12-15 April 1980 which was known as Universal Islamic Declaration (UID) a year later, exactly on September 19th 1981 in Paris, gave birth to Universal Islamic Declaration of Human Rights (UIDHR).

Other issues that continue to drive globalization are free trade. This regime has as rapid progress as human rights and democracy. In fact, free trade and economy is what many promote globalization - which by Satjipto Rahardjo based on the desires and interests of world capitalism. It is at this point that he disagrees with globalization solely based on the interests of capitalism.

Although then many people who think, that with such an attitude the economic progress of Indonesia is hampered by nationalism and economic nationalism. Satjipto then reminded that the development of Indonesian economic law should remain oriented towards a family economy devoted to the greatest prosperity of the people and not the interests of capitalism (Hidayati, 2008:116-17).

CONCLUSION

To culminate in this paper, the author will give a cover of the theme of this paper in a macro. First, in principle, Pancasila philosophically is a model that has an open character to the various social dynamics of society, both at the local and global levels. It is characterized by universal values of Pancasila, such as human rights, humanity, democracy and religion. Secondly, in the midst of the current globalization, development must still make Pancasila the ultimate guide. Therefore, the character of Pancasila in accordance with the character and personality of the nation. Therefore, the global variety if it will be applied into the legal system of Indonesia should be selected based on the values of Pancasila. If this is done through the process of ratification, then international law also provides space for it by reservation mechanism, ie a statement of non-attachment to the articles being reserved. While in the context of extracting material from outside, the selection of norms can be done in the legislation process as well as its enforcement through the judicial mechanism in the Constitutional Court. Third, success in integrating national interests in legal policy with globalization, ultimately returns to the capacity of governments and legislatures to carry out the process. Therefore, political reconciliation with integrity becomes a necessity.

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