

Pancasila's Freedom of Speech

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Abstract

Having a massive population of over 261 million, Indonesia is the third world's largest democracy country in the world. A country with the most ethnic diversity, race, religion, and culture. These elements cannot be neglected and they become Indonesian legislation sources. The rules of law as a fundament of state mentioned on the new Constitutional of Indonesia. After the massive revision of Constitution in 2000, the protections for human rights are also guaranty and find their place as a fundamental rights. Twenty years after the Indonesian Reformation (*Reformasi*), the guaranty of protection for freedom of speech, as one part of basic rights, still inconsistency. The case of Prita is one of many cases of freedom of expression in Indonesia and it became a negative image of freedom of expression. After two decades, how is the development of the guaranty of human rights especially the freedom of speech in Indonesia? Pancasila as the fundament of all local regulations gives a different perspective and become the exceptionality of Indonesia. This research uses jurisprudences and empirical cases studies on freedom of speech. By using Indonesian legal instruments relative to the protection of speech, this article will provide answers what are the characteristic of Indonesia protection on freedom of speech. We conclude that, the protection of the right to speech is already present before the Pancasila and before the establishment of Indonesia in 1945. This freedom of speech called "*tapa-pepe*". Indonesia freedom of speech norm should be not contradicting from five principles of Pancasila: belief in the One and Only God, a just and civilized humanity, a unified Indonesia, democracy, led by the wisdom of the representatives of the People and Social justice for all Indonesians.

Key words: Human Rights, Fundamental Rights, freedom expression, freedom speech, Pancasila, Indonesia

I. Introduction

A. Background

Protection of freedom of speech will not be upright without legal guarantees. Indonesia as a legal state¹ is obliged to provide guarantees to human rights including the right to freedom of speech which is a branch of the fundamental right of freedom of expression. It is said to be fundamental because in the Indonesian state system that promotes people's aspirations, the right to speak is a pillar of a democratic state. This right must be guaranteed by law. The concept of a rule of law for Indonesia is unique. Of the many types of state of law, Indonesia is known as a legal state that has a philosophy of Pancasila.

For the first time, the concept of the state of law in Indonesia was raised by Muhammad Tahir Azhary² in his thesis defended in 1991.³ According to him, Indonesia has its own characteristic, the "rule of law Pancasila". In addition, he highlighted other perspectives with more precision on the notion. He explains that there are five models of the rule of law, including (1) the rule of law under Islamic law, which is based on two primordial sources: the Koran and the tradition of the prophet Muhamed (sunnah); 2) a rule of law from the western world practiced by the Netherlands, Germany, and France; (3) the rule of law stemming from the Anglo-Saxon system or common law practiced by Great Britain and the United States; 4) a socialist state of law⁴ practiced by communist states such as China or Russia; and, 5) the rule of law Pancasila.⁵

According to Azhary, the constitutional law professor in Indonesia, the Indonesian model has its own characteristics. Based on Indonesian culture, the term "rule of law Pancasila" is quite different from "*rechtsstaat*" and "rule of law". Two definitions of the rule of law Pancasila are envisaged: in a broad sense, the rule of law Pancasila has its roots in the "*rechtsstaat*" and the "rule of law"; but in a more precise definition, the rule of law Pancasila has particular elements

¹The status of the state of Indonesian law is contained in the 1945 Constitution in Article 1 paragraph 3.

²He did a research concerning the rule of law from the point of view of Islamic law theories. He defended his thesis on March 9, 1991, at the Faculty of Law of Universitas Indonesia. The best-known and oldest law school in Indonesia, created in 1924 by the Dutch colonizer.

³Muhammad Tahir Azhary, *Rule of Law: Study on the Theories of Islamic Law*, Jakarta, Universitas Indonesia, p. 107.

⁴This notion was also used by Alain Beitone in his article "Rule of law". Alain Beitone, "Rule of law".

⁵Pancasila is the foundation of the official ideology of the Indonesian state. It includes five principles considered to be inseparable and interdependent: 1. The belief in one God (Ketuhanan Yang Maha Esa), 2. The just and civilized humanity (Kemanusiaan yang adil dan beradab), 3. The Indonesian unity (Persatuan Indonesia), 4. Democracy Wisely Conducted, in Concertation and Representation (Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan / perwakilan), 5. Social justice for all Indonesian people (Keadilan bagi seluruh rakyat Indonesia). Pancasila is at the top of the hierarchy of standards.

that are: 1) no separation between the state and religion, there is an important relationship between the state and religion in the functioning of the Indonesian government; 2) establishment of the first Indonesian principle (Pancasila) "Almighty God"; 3) positive freedom of religion⁶; 4) prohibition of atheism or communism; 5) principle of fraternity and union.⁷

Jimly Asshidiqie⁸ believes that the concept of the rule of law has evolved considerably. According to him, it has grown in importance over time and has become more complex. He considers that today, the characteristic of the state of law Pancasila Azhary is not always relevant.

In this debate around the concept, the rule of law Pancasila is the most appropriate for Indonesia. Indeed, this one has its own model and a singular notion, "Pancasila". However, it is not known worldwide especially in the field of lawyers. That is why it is necessary to present the Pancasila in order to analyze its influence on Indonesian legislation.

Pancasila has also become a legal basis in determining all regulations and decisions that become positive law. Likewise, the right to freedom of speech is framed by the five principles of Pancasila. These five principles have a very broad interpretation and the writer tries to interpret and relate the first principle of "Believe in the One and Only God" with the Freedom of Indonesian citizens to speak. What restrictions are attached to Indonesian citizens in using the right to freedom of speech based on the first principle of Pancasila.

II. Discussion

The freedom of speech possessed by every human being is not absolute. In Indonesia, the freedom also has very clear but sometimes unmeasured boundaries. That is, even though every human being has freedom, but there are still limitations and limitations that are often debated. No, bro That is one of the characteristics of basic rights, freedom of speech. For example, if in

⁶Oemar Seno Adji finds that freedom of religion can be classified as positive and negative freedom of religion. In the United States, according to Sir Alfred Denning's conception, American religious freedom is both positive and negative, in other words, we can be believers or atheists. Positive religious freedom in Indonesia means there is no place for non-belief. The encouragement of atheism is therefore forbidden. In his introduction "the history of Indonesia" Drakeley confirmed this situation in Indonesia. According to him the religious communities in Indonesia are tolerant, there is no discrimination of the state. In spite of everything being atheist is forbidden.

⁷Muhammad Tahir Azhary, *Rule of Law: Study on the Theories of Islamic Law*, op. cit., p. 107-118.

⁸First President of the Indonesian Constitutional Court 2003-2009.

France or America can speak freely about religion, criticize a belief by issuing opinions about religion or matters relating to religion, then this does not apply in Indonesia.

A. Case Position

The case of Prita Mulyasari an overview of the state of freedom of opinion in Indonesia

To be able to know the state of freedom of expression, we can learn valuable lessons from the Prita case. Even though this case is not directly related to the first Article of Pancasila. But at least this case is a new case in the age of advanced sophistication of communication and can provide an overview to the reader about the current situation. Prita was charged with publicly defaming the honor of Omni International Hospital and two doctors, Dr. Hengky Gosal and Dr. Grace. The cause has been an unsatisfactory service from the hospital. Through the email of August 7, 2008, she sent her feelings of discontent to her friends. She complains about the quality of the hospital's service during her treatment. A month later, she is prosecuted in civil cases in court. The court of first instance issued decision No. 300 / Pdt.G / 2008 / PN. TNG, Prita was found guilty. After making an appeal on 8 September 2009, the second instance court (Pengadilan Tinggi Banten) delivered judgment no. 71 / Pdt / 2009 / PT. BTN, and again, Prita's effort failed. The appeal judges decided that she was guilty. She appealed to the Supreme Court (Mahkamah Agung). The latter delivered judgment No. 300 K / Pdt / 2010 on September 29, 2010, Prita is found not guilty.

During the civil trial, on 30 April 2009, the Prosecutor filed the criminal file to prosecute Prita. On May 13, 2009, she was taken into custody although she is the mother of two children, including a child who is breastfeeding. On December 29, 2009, the court of first instance rendered judgment No. 1269 / PID.B / 2009 / PN. TNG and acknowledged that Prita is not guilty. On 11 January 2010, the Prosecutor appealed on points of law to the Supreme Court and then on June 2010 the Court of Cassation delivered judgment no. 822 K / Pid. Sus / 2010 who sentenced Prita to six months in prison.

Against this judgment, Prita's lawyer appealed to the Court of Cassation for review. On 17 September 2012, the Indonesian Supreme Court (Mahkamah Agung) delivered its judgment no. 225 PK / Pid. Sus / 2011. The latter repeals Supreme Court Decision No. 822 K / Pid. Sus / 2010, now Prita is not guilty both in criminal and civil matters.

This case is not the only one nor the first one in the field of freedom of opinion in Indonesia, but it is particular, as it is the first case where the Law No. 11 of 2008 on information and

electronic transactions has been enacted. The Prosecutor supports its basis in relation to Article 27 (3) of the Law and Article 310 of the Criminal Code.

Article 27 (3) of Law 11 of 2008 states that "Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation".⁹ According to the provision of Article 45, the violation of Article 27 (3) will be punishable by a prison term of up to 4 years and a maximum fine of Rp 750 million (approximately 50,000 euros).¹⁰

Article 27 (3) is not sufficiently clear on the concept of contempt. It must therefore clarify it by Article 310 paragraph 1 of the Penal Code which states that:

"The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of four thousand five hundred rupiahs"¹¹

Through the decision of the Supreme Court, which was that of the civil complaint of lawyer Prita, we can analyze that the Supreme Court opted to give primacy to the freedom of opinion in relation to a good reputation of a legal person (the company Omni International Hospital). We also find that the judgment of the judges of the Prita Court of Cassation is a revolutionary step for freedom of opinion in Indonesia. Indeed, we can not know if the verdict of the judgment of the Court of Cassation against Prita, the condemnation physically and materially, will bury the freedom of opinion in Indonesia.

We must not neglect the moral and material support of the people, especially Internet users, who have rallied in favor of Prita. A fundraiser has reached more than 55,000 €. It is the most

⁹This article is translated by University of Boston and in Indonesian version "Setiap Orang dengan sengaja dan tanpa hak mendistribusikan dan / atau mentransmisikan dan / atau dapat diaktasnya informasi elektronik dan / atau dokumen elektronik yang memiliki muatan penghinaan dan / atau pencemaran nama baik "

¹⁰Article 45 was revised in 2016 and 28 October 2016 became applicable. Before the revision, the punishment is 6 years in prison and about 60 000 €. According to the regulations in Indonesia, during the investigation a person can be seized in custody for a penalty of more than 5 years in prison. The revision no longer allows an arrest of a person presumes a violation of Article 27 (3).

¹¹ The Indonesian version "Barang siapa sengaja menyerang kehormatan atau nama baik seseorang dengan menuduhkan sesuatu hal, yang maksudnya terang supaya hal itu diketahui umum, diancam karena pencemaran dengan pidana penjara paling lama sembilan bulan atau pidana denda paling banyak empat ribu lima ratus rupiah"

important support in Indonesian history. This proves to us that the majority of Indonesians are aware of the importance of freedom of expression in order to express their opinions.

If we analyze the procedure in which the case has crossed several degrees of jurisdiction, we want the judges to be more attentive to their decisions. In this case, they must also master the field of freedom of expression and opinion.

The case of Basuki Tjahya Purnama (Ahok) a description of freedom of speech in the context of the first article of Pancasila

The blasphemy case experienced by Basuki is not the first in Indonesia. However, this event became very well because this case exists when information was easily and quickly spreads. On 27 September 2016, during his working visit to the Thousand Islands (north of Jakarta) Governor Jakarta Basuki Tjahya Purnama (Ahok), gave his opinion and conveyed his dissatisfaction with the practice of some Muslims who tried to deceive regional voters in 2017 using a verse from the Koran.

Chapter five of the Qur'an called al Maidah or "the table served" mentions in verse 51, "O believers! Do not take for allies Jews and Christians; They are allies of one another. And one of you who takes them for allies becomes one of them. Allah does not guide unjust people. " There are several interpretations of the word "ally" in this verse. The interpretations of Indonesian Muslims are grouped into two main parts. The radical part interprets that "ally" is like "a leader" while other Muslims have a more liberal interpretation: an ally can be defined as "a friend or someone you can count on". In his speech, as a Christian, Ahok tried to clarify to the citizens of Jakarta that he was not deceived by the Muslims who used the verse of the Koran to ban him from voting because he was non-Muslim.

A few weeks later, Ahok's speech became prominent through the circulation of a video that the Jakarta government usually disseminated to make the public aware of the work for the purpose of public transparency. Looking at this picture, the reaction of Indonesian Muslims divides into two divergent opinions. Some of the Muslims who do not feel comfortable being attacked by this opinion and some think that Ahok has incited hatred of Muslims. On November 4, 2016, more than one million manifestos, Ahok's opinion opponents, gather to meet in the street in downtown Jakarta. Their claim is simply that the governor of Jakarta, Basuki Tjahya Purnama, be checked and judged because of his opinion that incites contempt. According to the interpretation of these Muslim groups, they believe that Ahok insulted not only their leader and their ulama as liars and spread lies, but also attacked the Qur'an, a Muslim holy book, saying

that the book is a lie. From different opinions, this circulates between the against and for the freedom of opinion of the Governor. His right to be re-elected for the next period (2017-2022) is therefore threatened. On November 16, 2016, the investigation of the National Police announces that he is the suspect of the crime of blasphemy under the section on public order Article 156a of the Criminal Code:

"By imprisonment for up to five years shall be punished anyone who deliberately in public expresses feelings or commits an act (a) who primarily have the character of being in enmity with, abusing or staining a religion, adhered to Indonesia. (b) With the intention of preventing a person from adhering to a religion based on the belief of Almighty God ".¹²

This article was added in 1965 by the provision of Presidential Decree No. 1 / PNPS / 1965 on the prevention of abuse of religion and blasphemy. University of Indonesia criminal law professor Nasrullah says that Indonesia does not have a specific piece of blasphemy law. Article 152 (a) was added to this fact in the 1960s when there was an act against the religion of Islam (the man who put his foot on the Koran). At the time, this act could not be condemned either by the penal code or other because there was no legal basis that could penalize him.

On May 9, 2017, the judge rendered his decision. Ahok is sentenced to two years in prison. The Ahok case shows us that all acts against a religion or anti-religion whether in the name of freedom of expression or otherwise may be classified as blasphemy. To determine an expression against or against religion this act must be determined as hatred against religion. There are two ways to find this evidence during the investigative process: the actor confesses that he has an intention; otherwise it is based on different opinions of specialists, legal doctrines and religions.

Freedom of expression in Indonesia is thus a right in itself, as well as an element of other rights protected by the Constitution such as freedom of religion in Article 28E, paragraph 1, "Every person is free to embrace religion and worship according to his religion...".

There are ten cases of blasphemy since the creation of Presidential Decree No. 1 / PNPS / 1965. In Indonesia, all protest actions related to blasphemy cases can influence the judges' decision and eventually put the defendants in jail.

¹²The Indonesian version "Dipidana dengan pidana penjara selama-lamanya lima tahun barang siapa dengan sengaja di muka umum mengeluarkan perasaan atau melakukan perbuatan: a. yang pada pokoknya bersifat permusuhan, penyalahgunaan atau penodaan terhadap suatu agama yang dianut di Indonesia; b. dengan maksud agar supaya orang tidak menganut agama apa pun juga, yang bersendikan Ketuhanan Yang Maha Esa."

B. The Indonesian Constitutional System and the Protection of Liberties

Pancasila: a concept based on five Indonesian principles

The word "Pancasila" comes from Sanskrit, *panca* "five" and *sila* "principle". This linguistic origin comes from Buddhism, present on the archipelago since the 9th century.¹³ The five fundamental points of Pancasila are: the belief in a unique god, humanity, unity, democracy, justice as mentioned by Alexandre Messanger in his book¹⁴:

The Pancasila which consists of five principles based on faith in one God - monotheism without privileging Islam - on the right and civilized humanity, on the unity of the country, on democracy guided by the spirit of consultation and of consensus and on the sovereignty of the people. The five principles of Pancasila are similar to the five principles¹⁵ of Buddhism¹⁶.

The five Pancasila norms are the five moral principles and ethical codes that should govern political life. They are also the sources of the creation of Indonesian constitutions, laws and other norms. The values of Pancasila, as set out in the Preamble to the 1945 Constitution, are a fundamental agreement and the establishment of the nation-state. This constitutes the "common thread" that leads to the realization of the ideals of society, the nation, and the state.¹⁷ It is for this reason that these values are written into the preamble of the Constitution¹⁸. Although Indonesia has undergone three changes in its constitution, Pancasila remains a sacred symbol, landmark, and pillar for the nation.¹⁹

¹³Steven Drakeley, *The History of Indonesia*, ABC-CLIO, 2005, p. 6.

¹⁴Alexandre Messager, *Indonesia*, Editions L'Harmattan, 1999. p. 17.

¹⁵The five principles of the Buddhist are (1) Panatipata veramani sikkhapadam samadiyami (we swear not to kill), (2) Adinnadana veramani sikkhapadam samadiyami (we swear not to steal), (3) Kamesu miccharaca veramni sikkhapadam samadiyami (we swear to do not commit adultery), (4) Musavada veramani sikkhapadam samadiyami (we swear not to lie), and (5) Sura meraya pamadatthana veramani sikkhapadam samadiyami (we swear not to drink until drunkenness).

¹⁶Faisal Ismail, *Islam, Politics and Ideology in Indonesia: A Study of the Process of Muslim Acceptance of the Pancasila*, 1995, p. 3.

¹⁷Mahkamah Konstitusi Republik Indonesia, *Comprehensive Document of the 1945 Constitution Review Book I*, Jakarta, Jenderal Sekretariat in Kepaniteraan Mahkamah Konstitusi, 2010, p. 4.

¹⁸The last paragraph of the preamble of the Constitution is "In accordance with which, with the aim of forming a state government of Indonesia which must protect all the people of Indonesia and the entire country of origin of Indonesia, with the aim of advancing general prosperity, developing the intellectual life of the nation, and contributing to the implementation of a world order based on freedom, peace and lasting social justice, Indonesia's national independence is laid down in a State Constitution of Indonesia, which must be established as the State of the Republic of Indonesia with the sovereignty of the people and based on the belief in 'One God, on the just and civilized humanity, on the unity of Indonesia and on democracy which is guided by the force of wisdom resulting from deliberation / representation, so as to achieve social justice for all people from Indonesia » .

¹⁹CONSTITUTIONAL COURT IN INDONESIA, *Complete Document of the 1945 Constitutional Review Book I*, p. 1

A difference of opinion regarding the choice of Pancasila as the foundation of the state appeared in May 1945, just a few months before the proclamation of independence of the republic, read by Soekarno and Hatta before the Indonesian citizens gathered in Jakarta. This brings to the question about the origin of the creation of the concept of Pancasila and the identity of its founding fathers.

Pancasila: an ideology formulated by founding fathers

An interesting question arises about the creator of the idea of Pancasila. It is the foundation of the law, a legal source placed at the top of the hierarchy of standards. It has also become an ideology of the Indonesian nation, possible thanks to great men of that time: Soekarno, Mohammad Yamin, Muhammad Hatta, and Soepomo. These are the four founding fathers whose role in this section. On June 1, 1945, Soekarno was the third and last man to speak to the assembly in charge of the preparation of independence. He talks about the foundation of the state that constitutes Indonesian nationalism, humanity, social justice and faith in God by always promoting culture. It was he who proposed the name Panca Dharma before Pancasila was finally chosen by the assembly. Soekarno has finalized its position for these principles to be named Pancasila.²⁰

Mohammad Yamin, for his part, gave his opinion on the four principles of nationalism, humanity, certainty in one God, the sovereignty of the people and social justice. For its part, Soepomo having followed a training course at a higher level than the others proposed the elements of unification and fraternity inspired by Japan. He also stressed the importance of being a believer and a practitioner. Regarding the question of the sovereignty of the people, he insists that the head of state must, in the future, integrate the citizen. Therefore, it is necessary to create a national assembly whose objective is the consultation of the people. The orientation towards an Eastern culture has, moreover, been raised. The Asian identity has been stated so that the archipelago becomes unified and becomes a unitary state called Indonesia.²¹

Hatta will be the man who will summarize the ideas proposed by the founders. Among the 33 members who posed the question of Indonesia's ideology, Soekarno once again insists that

²⁰CONSTITUTIONAL COURT IN INDONESIA, Complete Document of the 1945 Constitutional Review Book I, p. 23

²¹The spirit of a unitary state is mentioned in Article 1, first point of the Indonesian Constitution. This point remains without revision.

Pancasila is the "*philosophischegrondslag*"²² or the philosophical basis of the state of Indonesia.²³ Since then, Pancasila has become a sacred symbol and ideology of the country.

Based on the First Precept of Pancasila, it can be warned that. First, Religion in Indonesia is a book that has a high meaning of high life. The Indonesian nation is a nation that holds entertainment values above all else. Religious values in Indonesia are different from those in Islamic countries which are very strong and of course with the Qur'an and Hadith. In Indonesia, all religions get equal rights and portions without perspective or not.

Religious divisions, can destroy the nation. Therefore respect for religion in Indonesia is not negotiable anymore. Actions can be done through a transparent process as a form of humiliation. Then there lies the Resilience of free speech.

Freedom of speech before Pancasila "Tapa pepe"

In Indonesia freedom of speech was available before the birth of Indonesia and the existence of Pancasila which was known as *tapa pepe* which meant sunbathing in the sun. *Tapa pepe* itself is a form of local wisdom of Yogyakarta residents, the way of the small people to convey their aspirations to both the Surakarta Sunanate and the Yogyakarta Sultanate. *Tapa Pepe* used to be done until the time of the Sultan of Hamengkubuwono VIII or the mid-1900s. Tapa pepe with the intention to seek justice, complaining to get the attention of the Sultan. The method of *tapa pepe* is done by sitting cross-legged between two twin banyan trees in the North Square. They face south or towards Pagelaran and SitiHinggil using white clothes.²⁴ This *tapa pepe* can arrive before days. Things that relate directly to the level that you want to complain about, and are also related to the courage and bravery of those who want to face the sultan.²⁵

²²This term comes from Dutch. As a child of the aristocracy, he has a privilege of European education in Indonesia. He is fluent in English and Dutch.

²³Mahkamah Konstitusi Republik Indonesia, Comprehensive Document of the 1945 Constitution Review Book I, Jakarta, Jenderal Sekretariat in Kepaniteraan Mahkamah Konstitusi, 2010, p. 24.

²⁴Bagus Kurniawan. *Tapa Pepe, Cara Mengadu Kawula Yogyakarta kepada Raja*. Quoted from <https://news.detik.com/berita-jawa-tengah/d-3562354/tapa-pepe-cara-mengadu-kawula-yogyakarta-kepada-raja>, Detik, (accessed August 27, 2018)

²⁵ Ki Herman Sinung Janutama, 2012, *Pisowanan Alit 1 Nuswantara Negeri Keramat*, p. 1 LKIS Yogyakarta: Yogyakarta

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