



## Legal protection of freedom of religion and beliefs in the Pancasila state of law

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### Abstract

The legal protection of freedom of religion and belief in the Pancasila legal state has a religious, humanist and social justice character as reflected in the values of Pancasila...The form of legal protection of freedom of religion and belief in Indonesia is urgently the Indonesian criminal law with humanistic characteristics considering that the reform of criminal law must be in accordance with the legal politics of the Indonesian nation based on Pancasila. However, the success of criminal law enforcement is highly expected because in the field of criminal law enforcement, the meaning of 'State based on law' is at stake. The form of legal protection of freedom of religion and belief in the Pancasila legal state is preventive legal protection, repressive legal protection and progressive legal protection where the reform of criminal law has a humanistic character which is the result of the application of progressive legal principles in criminal law. Progressive law that relies on regulations, has the consequence that every regulation that will be made and enforced must be in accordance with the values, desires, situations and conditions of the community. These legal breakthroughs are expected to realize humanitarian goals through the operation of law.

**Keywords:** Legal protection, freedom of religion, religious beliefs

### Introduction

Indonesia is a state of law as affirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a state of law, Indonesia has a constitution and legal sovereignty. Pancasila as the philosophical foundation of the state and the source of all sources of national basic law in the legal system in Indonesia. Pancasila is a basic norm whose validity cannot be obtained from other higher norms and is the norm on which the legal norms below depend. Hans Kelsen in his theory of Stufenbau or hierarchy of norms places Pancasila as the highest norm <sup>[1]</sup>. The highest legal order according to Kelsen culminates in the basic norm or Grundnorm (basic norm) <sup>[2]</sup>.

This protection is intended to prevent intolerance and injustice based on religion. The principle of legal protection for the people is based on and sourced from the concept of recognition and protection of human rights recognized in the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). The birth of legal protection of the people does not result in the violation of human rights. For this reason, the Government's actions must be placed on the rights and obligations of the community and the Government so that each legal subject can exercise these rights and obligations without going against the law.

State recognition of freedom of religion as stipulated in the provisions of Article 28E paragraph (1) and paragraph (2), Article 28I paragraph (1), Article 29 Paragraph (2) of the 1945 Constitution which respectively states that:

Article 28E verse (1) and verse (2) states that:

1. Every person is free to embrace a religion and worship according to his religion, choose education and teaching, choose a job, choose citizenship, choose a place to live in the territory of the state and leave it, and has the right to return.

2. Every person shall have the freedom of belief, expression of thought and attitude, in accordance with his/her conscience.

### Article 28I paragraph (1) states that:

"The right to life, the right to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law and the right not to be prosecuted on the basis of retroactive laws are human rights that cannot be reduced under any circumstances".

### Article 29 paragraph (2) states that

"The State guarantees the freedom of each citizen to embrace his/her own religion and to worship according to his/her religion and belief."

This article illustrates the freedom for citizens to worship according to their religion and beliefs. In addition to the 1945 Constitution, it is also regulated in the provisions of Article 22 paragraphs (1) and (2) of Law Number 39 of 1999 concerning Human Rights (hereinafter referred to as Human Rights), State Gazette of the Republic of Indonesia of 1999 Number 165 Supplement to the State Gazette of the Republic of Indonesia Number 3886, which states that:

- a. Every person is free to embrace his own religion and to worship according to his religion and belief.
- b. The State guarantees the freedom of every person to embrace his religion and belief.

Based on the provisions above, if the state does not carry out its obligations to protect the freedom of every person to embrace religion and belief, then it can be said that the state has committed a violation of human rights. Human rights violations are defined as any act of a person or group of people including state officials, whether intentional or negligent, which unlawfully reduces, hinders, limits and/or revokes the human rights of a person or group of people

guaranteed by this law, and does not receive, or is feared will not receive, a fair and correct legal settlement, based on the applicable legal mechanism<sup>[3]</sup>.

Constitutionally, what has been stated in the provisions of Article 1 paragraph (3) of the 1945 Constitution provides an important contribution for the state to be subject to applicable law. As a consequence of the establishment of the State of Indonesia as a state of law, there is a guarantee and protection from the state against human rights. This is because human rights are basically a gift from God Almighty and are always attached to the life and existence of human beings themselves.

Based on the background described, the problems to be studied in this paper are:

“how is the form of legal protection of freedom of religion and belief in the legal state of Pancasila.”

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### Research methods

This research is a normative juridical research, which is a research in the field of law that aims to examine legal principles, legal methods and legal systematics. The legal materials used are primary legal materials, namely legal materials that are binding and secondary legal materials, namely legal materials that provide an explanation of primary legal materials. The problem approach used in this research is the statutory approach, conceptual approach.

### Result and discussion

#### Legal Protection of Freedom of Religion and Belief in Pancasila Legal State

The concept of the right to protection of the principle of freedom of religion and belief upholds Pancasila as the basic norm. The First Precept of Pancasila which is the basic state philosophy (filosofische grondslag), Soekarno stated that: “Filosofische grondslag is the foundation, the philosophy, the deepest thought, the soul, the deepest desire for the building of an Independent Indonesia that will last forever<sup>[4]</sup>.”

The protection of the right to freedom of religion and worship in the State of Law of Indonesia still has differences between the Preamble of the Constitution which is the result of BPUPK and the results of PPKI (Indonesian Independence Preparatory Committee). PPKI members made fundamental changes to the Preamble of the Constitution (which almost entirely came from the Jakarta Charter), namely changing the First Precept, “divinity with the obligation to implement Islamic sharia for its adherents”, by reducing 7 words and adding 3 words, namely Yang Maha Esa, so that in the Preamble of the 1945 Constitution, The First Precept changed to “the Godhead”. This of course also affects the regulation of the right to religion and worship, where in the Draft Constitution approved by BPUPK (in the Second Meeting of the Session on July 16, 1945) on Article 28 paragraph (1), namely: “The state is

based on divinity with the obligation to implement Islamic law for its adherents”.

However, in the Draft Constitution approved by PPKI, the right to religion is regulated in Article 29, and Article 29 paragraph (1) stipulates that:

“The state is based on God Almighty.”

After the Constitution of the Republic of Indonesia, the Provisional Constitution of the Republic of Indonesia was applied, but based on the Presidential Decree on July 5, 1959, the 1945 Constitution was re-applied in all parts of the Republic of Indonesia. In the Presidential Decree on the Decree of the President of the Republic of Indonesia/Supreme Commander of the Armed Forces on the Return to the 1945 Constitution, it is stated that the Jakarta Charter animates the 1945 Constitution and is a unitary series with the 1945 Constitution.

The Presidential Decree on the Decree of the President of the Republic of Indonesia in the discussion on July 14, 1945 in BPUPKI, the word “for those who adhere to it” was asked to be eliminated by the First Precept of Pancasila is of course the main element as the First Precept in Pancasila. The First Precept of “God Almighty” is not only the spiritual basis and moral basis of the nation's life, but implicitly also contains teachings of religious tolerance. In line with that, there are also those who state: “Pancasila as the basic philosophy of the State (filosofische grondslag) has also established the fifth principle, namely: “social justice for all Indonesian people”. The country of Indonesia which adheres to theism also has a fair view of its religious teachings<sup>[5]</sup>.

Article 29 of the 1945 Constitution seen from the point of view of religious theology, the freedom to embrace religion is transcendent (sourced from God) which gives freedom to humans to embrace religions freely without coercion from anyone, besides that Article 29 strictly regulates the freedom to embrace religion, not the freedom not to embrace religion.

Ismail Suny suggests the relationship between 2 (two) paragraphs in Article 29, namely that:

“...The religions and beliefs that may be given the right to live in the Republic of Indonesia are religions and beliefs that do not contradict or endanger the state's foundation of Belief in One God. Atheism, on the other hand, explicitly jeopardizes the principle of Belief in One God, because it aims to abolish belief in God<sup>[6]</sup>.”

The concept of the right to freedom of religion and worship in Indonesia is based on the First Precept of Pancasila “the One True God”, which then animates and Article 28E paragraph (1) There is no separation between state and religion because Pancasila is the basis of state philosophy, with “the One True God” as the first precept, which means that the One True God becomes the soul and basis in the administration of the life of the nation and state.

Indonesia is a state of law that is imbued with Pancasila in the administration of the life of the nation and state, so that although it is not a religious state, it is also not a secular state, let alone an atheist state, but is an Indonesian Legal State, where there is a close relationship between the state and religion, so that in the case of religious teachings that require state intervention, it must be regulated in legislation, and followed up with various government policies. The concept is in accordance with current developments, where political and civil rights are also negative rights, namely rights that require the role of the state to realize them<sup>[7]</sup>.

### Legal Protection of Freedom of Religion and Belief in Indonesia in the Future

In principle, what should be done in freedom of religion with the improvement of regulation is that in the event of blasphemy, it must be dealt with immediately, and in the event of a violation or crime, it must be given the appropriate punishment.

Restrictions on the freedom to practice and determine one's religion or belief can only be limited by provisions based on the law, and which are necessary to protect security, order, health, or public morals, or the rights and fundamental freedoms of others.

Law itself in reality cannot be understood properly, if it only sees law as something that is isolated from political and social processes, which is actually an inseparable part of these processes<sup>[8]</sup>.

The criteria for the enactment of restrictions on the freedom to practice and determine one's religion or belief, where what is restricted is in the implementation of the teachings not in the beliefs, based on the law (even based on the Fundamental Norms of the State of RI), as well as to protect the security and public order in order to avoid riots in society.

The protection of the right to freedom of religion and worship is in accordance with the right to protection of the principle of Freedom of Religion and Belief to uphold Pancasila as the fundamental norm.

Pancasila as the source of all sources of law based on MPR Decree No. III/MPR/2000 on Sources of Law and Order of Legislation, is a view of life, legal awareness and ideals, as well as moral ideals that encompass the psychological atmosphere and character of the Indonesian nation, namely ideals regarding individual independence, national independence, humanity, social justice, national and international peace, moral ideals about social and religious life as an embodiment of human conscience<sup>[9]</sup>. Without legal ideals, the resulting legal products will lose their meaning<sup>[10]</sup>.

For this reason, it is necessary to immediately restore the position of Pancasila as a margin of appreciation in legal reform (development) including criminal law in Indonesia<sup>[11]</sup>. In connection with the above, when there is a dilemma in law enforcement, especially for criminal law which has negative sanctions related to aspects of legal substance, legal structure, and legal culture, then everyone in this case the community and law enforcement officials must return to the sense of legal justice of the community.

According to the 1945 Constitution of the Republic of Indonesia in the legal system applicable to the Indonesian nation, Pancasila is in two positions, namely as the Idea of Law (*rechtsidee*), Pancasila is in the Indonesian legal system but is located outside the legal norm system; and in such a position Pancasila functions constitutively and regulatively against the norms that exist in the legal norm system<sup>[12]</sup>.

Furthermore, as the highest norm in the Indonesian legal norm system derived from the main ideas contained in the Preamble of the 1945 Constitution, Pancasila is the basic norm (*groundnorm*) creating all lower norms in the legal norm system, as well as determining whether or not the norms are valid.

In connection with this, conventional criminal law enforcement is considered no longer adequate in dealing with the *modus operandi* of current criminal acts which are

systemic and widespread and tend to be extra ordinary crimes. Therefore, a new approach is needed in criminal law enforcement that places the interests of the nation and state or the economic and social rights of the people above the interests and individual rights of the suspect or defendant, namely the progressive law enforcement approach.

The progressive law approach was chosen, considering that the idea of progressive law enforcement is not just implementing laws and regulations, but capturing the legal will of the community<sup>[13]</sup>. Therefore, when a regulation is considered to be shackling law enforcement, it requires creativity from law enforcers themselves to be able to create legal products that accommodate the will of the community based on the values that live in society<sup>[14]</sup>.

The success of this approach is not solely measured by the success of legislation products but must also be accompanied by consistent law enforcement measures, both preventive moralistic and repressive proactive.

The idea of progressive law in principle stems from two basic components in law, namely rules and behavior<sup>[15]</sup>. Progressive law, which relies on rules and behavior, places humans not to be shackled by absolute rules. That is why, when changes occur in society, when legal texts experience delays in the values that develop in society, then law enforcers must not only allow themselves to be shackled by the irrelevant rules, but must look out-ward.

These legal breakthroughs are expected to realize humanitarian goals through the operation of law, which according to Satjipto Rahardjo is termed a happy law. Progressive law also departs from two basic assumptions, namely:

- a. Law is for humans, not the other way around. Departing from this basic assumption, the presence of law is not for itself but for something broader and greater. That is why when problems occur in the law, it is the law that must be reviewed and corrected, not humans who are forced to be included in the legal scheme.
- b. Law is not an absolute and final institution, because law is always in the process of becoming (law as a process, law in the making).

Then according to Satjipto Rahardjo, progressive law sees the law as a text is only the beginning and the end will depend on how the human factor runs it. Progressive law offers liberation from the dominance of absolute legislation. Legislation or text is seen as a starting point in carrying out the law because then it depends on the creativity and courage of the humans who run it.

The Indonesian nation with a religious, humanist and social justice character as reflected in the values of Pancasila certainly requires a legal model that must also have a religious, humanist and social justice character both at the level of legal substance, as well as at the level of structure in the sense of organizers and legal culture of Indonesian society.

If the law is placed in the right corridor, it can certainly minimize and eliminate primordial characters, which honestly this character can be a very dangerous enemy and a very serious threat to the integrity and fellowship of this nation.

According to the author, religion is the main entrance that is very strategic in destroying and tearing the integrity of this nation if as citizens we are not serious and have the self-awareness to protect it. It is very necessary to re-direct the

views of every citizen to the history of the founding of this nation. As citizens, we must learn from the lives of our ancestors in the glory days of ancient kingdoms such as Majapahit, Sriwijaya, Mataram who were able to organize a harmonious life despite the diversity until this nation became an independent and sovereign unitary state. Fatherfounding has created unifying elements, namely:

- a. The Youth Pledge, where with the spirit of the youth pledge all Indonesian youth recognize the unity that cannot be destroyed, one nation, one homeland, and one language, namely Indonesia.
- b. Bhineka Tunggal Ika, the word bhineka means diverse or different, the word tunggal means one, the word ika means that, the word Bhineka Tunggal Ika is translated as diverse one, which means different but in essence Indonesia is one.
- c. Basic State Pancasila, which is the nation's view of life, is also called the philosophy of life of the nation where the five precepts in Pancasila contain the crystallization of the value of national values that unite.
- d. The 1945 Constitution of the Republic of Indonesia, which is the Constitution of this nation which is the legal umbrella for all laws and regulations made throughout Indonesia, both central and regional governments, and other legal institutions.
- e. The red and white flag is a national flag that is used throughout the country as a symbol that unites this nation.

This element is what unites the entire nation, uniting various differences. Then the ancestors formed social institutions that accommodate various racial and religious differences by the presence, reviving cultures that contain unifying elements.

This philosophy is intended to remind citizens to change their mindset about cultural customs that are considered by the youth to be old-fashioned. to strengthen the spirit of unity and integrity formed from the entire exposure of the description above, according to the author, the State of Indonesia already has various laws and regulations that are organized in a legal framework to regulate the order of religious life and beliefs, has a legal model that has a humanist pancasilais character, but in reality there are still conflicts in various forms where one group feels superior and better than other groups.

### Conclusions

The form of legal protection is carried out preventively and repressively and there is progressive protection where the law is made for the benefit and welfare of humans. in the freedom to practice religion and belief. The First Precept of Pancasila recognizes God Almighty which means the obligation of every human being in Indonesia to recognize, respect and appreciate the religions and beliefs of others, but in practice it has not been realized by the state. To get a form of legal protection of freedom of religion and belief in Indonesia, the application of law must be realized properly. The application of law as an effort to realize social justice by placing the interests of society above the legislation. Thus, the form of protection through preventive and repressive as well as progressive in freedom of religion and belief in Indonesia can be realized well in building a conscientious legal state. Legal protection of freedom of

religion and belief in the Pancasila legal state requires the existence of a national legal system that is oriented towards human rights in order to prosper the Indonesian people. For that, the Indonesian State must be guided by the era of the old kingdoms, where the previous institutions were always well preserved and there was no conflict in freedom of religion and belief. Thus, this kind of protection is expected for every Indonesian citizen to be able to coexist safely and respect human rights.

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