

“RULE OF LAW AND ITS DEVELOPMENT IN INDONESIA”

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Dear participant,

May God's bless upon us

Good night and regards for all of us

Firstly lets send our grateful to the one Almighty God that already bless us abundantly so that tonight we can gather in here to discuss about “Rule of Law in Indonesia” initiated by the World Justice Project.

In accordance with the topic proposed by the WJP, I would like to inform you that the substance of my remarks would be on “Negara Hukum Pancasila” (Rule of Law based on Pancasila). I need to emphasize this from the beginning of this speech because Indonesia does not wholly submit to the concept of “*rechtsstaat*”¹ which is the legal tradition of European Continental countries which based on the Civil Law System and *Legisme*; neither does to the concept of “rule of law” from the tradition of Anglo Saxon countries based on the Common Law System.

Even so, it cannot be denied that the existence of Negara Hukum Pancasila is inspired by the fundamental idea of *rule of law* and *rechtsstaat*. The concept of Negara Hukum Pancasila basically consist of element that exist in the concept of rule of law and *rechtsstaat*. In other words, Negara Hukum Pancasila put together and make *rechtsstaat* and the *rule of law* as concept that complement and integrated. This means that Negara Hukum Pancasila accept the principle of **legal certainty** as the basic principle of *rechtsstaat*'s concept and at the same time accept the notion of **sense of justice** in the rule of law.

Amendment of Indonesian Constitution, UUD 1945, confirms that “Indonesia is a rule of law country”, yet does not explicitly put Pancasila in the wording. Pancasila is the basic norm and *rechtsidee* (the idea of law) therefore, the truth of Pancasila's values shall be used as guidance by Indonesia as rule of law to the country. The values of Pancasila are later become things that distinguish the concept of *rechstaat* and rule of law from “Negara Hukum Pancasila.”

Basically, there are three principles that shall exist in a rule of law country, namely: supremacy of law, equality before the law and due process of law. In the implementation, those three elements are elaborated into: (1) human rights protection; (2) the freedom of judiciary and delivery of justice; and (3) legality of law in all aspects and forms (every state's action/government's action and citizens' action must be based on and conducted through law).

If explained further in the context of today's discussion those relate to the issues of: quality of regulatory implementation; problems that influence quality of life (welfare of labors, availability of clean water, health service); access to justice and dispute settlement system; anti-corruption and civil society roles and private sector.

Dear participants,

The legality principle in all forms serves as a basis that every government action shall be based on laws. In one aspect, legality principle is understood as limitation towards government's power, and on the other hand it is a manifestation of protection for the people against the possibility of abuse of power.

In this context, that principle is closely related to legal certainty needed in the development process. Based on National Development Plan System, development is an effort done by all components in the country which aims to obtain the state goals. Thus, development is a continuing and a never ending process which needs support from various existing elements in order to achieve the state objective as stipulated in the 4th paragraph of the Indonesian Constitution.

¹ Rechtsstaat is a doctrine in continental European legal thinking, originally borrowed from German jurisprudence, that can be translated as "legal state", "state of law", "state of justice", "state of rights", or "state based on justice and integrity".

Considering that matter, one way to achieve a legal certainty is through laws and regulations. The existence of laws and regulations is crucial in the legality principle, among other things, because: they consist of working norms; they have institution which form and examine laws; and they have hierarchical system.

The drafting of laws and regulations shall be perceived as one of the efforts of legal reform in order to guide and accommodate legal needs to be in line with the legal consciousness of the people. This should be done on the direction of modernization according to the level of development stage in every sector. Therefore, it is hoped that legal order and legal certainty can serve as a tool to gain unity as a nation as well as functioning as a way to support improvement and total reform.

It cannot be denied that most of the time the implementation and enforcement of laws and regulations do not run effectively and efficiently due to problem of optimality of the laws to resolve problems. At least there are three problems correlated with laws and regulations: **firstly**, substantial problem related to legal basis that underlying laws, 'want vs need' in drafting laws, dis-harmony between substance of one law to other laws, and the development of science which often changes very rapidly. **Secondly**, problems related to procedure or process in drafting laws related to pre-legislative process (the quality of research, academic script, priority determination, meeting between ministry and harmonization), legislative process (mechanism in the House of Representatives) and pasca legislation (disemmination/sozialisasi). **Thirdly**, problem associated with initiator of the law which currently is still based on sectorial ego.

In relation to the above mentioned problems, nowadays the Ministry of Law and Human Rights is conducting a reform process toward laws and regulations through simplification and reconceptualization of legal drafting, and empowerment of human resources who draft the laws.

Good preparation in legal drafting is crucial so that the product can meet the quality which consist of: *Fisrt*, law shall create stability by accommodating and balancing the competing needs in the society. *Secondly*, creating certainty so that everybody can predict the consequences of his/her action. And *thirdly*, law shall create fairness in the form of equality before the law, fair treatment and the applicability of certain standard.

Good laws become a starting point for a good governance. One of the parameters in a good governance is participation and responsiveness. In other words, good governance request the involmenet of all elements (including civil society and private sector) in the process of legislation making. Article 96 of Law No. 12 of 2011 and Article 188 Presidential Regulation No. 87 of 2014, stipulate opportunity for a such involvement. Nowadays, the government is still in the process in drafting Law and Human Right Ministry Regulation concerning the procedure on conducting Public Consultation.

In addition, there is an examination process and legal research to understand what to be the needs, concerns, inclination, and public aspiration. Legal research in the context of legal development is aimed to disclose the legal reality that is happening and will be happening in the society. The outcome of legal development policy will be better and trustable if the formulation of policy is based on the correct legal information which is based on research. So, it is not merely legal information that is formulated as political will or based on group interest of people in power.

In the context of criminal justice, legal certainty shall be harmonized with fairness in order to create expedience in the society. In other words, laws shall be combined with performance of law enforcers in order to create fairness, certainty, and expediency. The concept of integrated criminal justice system is the best choice. The system will support the synergy in criminal law enforcement starting from investigation to correctional stage. Besides, it is necessary to implement restorative justice concept which currently has been applied in juvenile criminal justice. The restorative justice concept is an approach which emphasizing to a condition in order to create fairness and balances for the perpetrators and the victims. This deserves special attention from the government and all elements in the society, because based on the data from the Directorate General of Correctional in the Ministry of Law and Human Rights, there is overcapacity amounting to 67,1% in Indonesian penitentiary per December 2014

I would like to emphasize that implementation and enforcement of laws shall be accompanied with the preventive effort in the form of socialization of laws. The success of preventive effort leads to the zero number or decreasing number of violation, therefore will give benefits and does not create bigger disadvantage compare to repressive action.

One of the efforts in developing and creating legal culture in the society is through legal education in general which is aimed to all components in the society in the form of dissemination and legal counseling. The education process and civilization of law is directed to all elements from the government, law enforcement institution and society as a whole. The

dissemination and legal counseling are interrelated components from the implementation of legal fiction (*recht fictie*) which stipulates that “any person deemed to know the law.” The application of legal fiction without sufficient socialization effort may leave to the people unprotected because they get trapped in legal violation without knowing it.

Dear participants,

Access to justice and dispute settlement system are closely related to human rights. Law and human rights (Hak Asasi Manusia/HAM) are a unity. The two of them are like two sides of the one coin. Should the legal development is built without taking consideration and respect toward human rights principles, the law would become the tool for the government to support their power and ends up with abuse of power. On the contrary, if HAM is built up without understanding and based upon sound legal commitment, the HAM is only like a fragile building which easy to be violated.

In order to develop laws and legal system in accordance with human rights principles, it is crucial to open up and strengthen access to justice for the people more importantly to vulnerable groups. Law No. 16 of 2011 concerning Legal Aid is now in force. This Law provides access to justice for the vulnerable groups. The right to have legal aid has been universally accepted and guaranteed in the (International Covenant on Civil and Political Rights (ICCPR)). Article 16 and Article 26 of ICCPR provide assurance that all people have the rights to get legal protection and be protected from discrimination in any forms. Article 14 point (3) of ICCPR stipulates requirements in regard to Legal Aid, namely: 1) in the interest of justice, and 2) unable to pay attorney fees.

Even though explicitly Legal Aid is not part of the state responsibility, as a **rule of law** country Indonesia has to admit and protect human rights for every citizen including the right to legal aid. The administration of legal aid to citizen is a way to fulfill and implement the notion that the state acknowledge, protect and guarantee the rights of its people on their needs of access to justice and equality before the law.

Law No. 16 of 2011 stipulates that legal aid recipients are person or vulnerable groups who cannot sufficiently fulfill their basic needs such as: food, clothing, health, education, job and opportunity, and/or housing. Currently 310 Legal Aid Organization are registered in Indonesia, among them 270 are in the form of legal entity and therefore have the capacities to act as Legal Aid Provider. In the future, this number will add up so that the access to justice will be wider for those in needs. This will enable them to be able to contribute to the development of rule of law in Indonesia.

Dear participants,

That is all my remarks, hopefully this can enrich the tomorrow’s discussion. I truly hope that this event will positively contribute for the legal development in Indonesia.

Have a meaningful discussion.

May God's bless upon us

Jakarta, January, 19, 2014

Dr. Enny Nurbaningsih