

DEVELOPMENT OF NATIONAL LEGAL DEVELOPMENT IN THE FRAMEWORK OF HEART TRANSPLANTATION IN INDONESIA

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Abstract

Responsive Pancasila law that nurtures and protects can be realized if the law is able to provide a sense of security and peace to the life of the nation and state and to the people as a whole. The law becomes a place of protection and protection for the people from actions that threaten and destroy the sense of security, peace and human rights. Just law based on Pancasila is a formulation of justice that is carried out in Indonesian society, which is justice which emphasizes the balance between rights and obligations, namely the right to enjoy the results of development with the obligations of darma and service. With this formulation of justice, the development of national law in the constitutional state of Pancasila basically aims to protect: (1) the entire Indonesian nation, (2) all Indonesian blood, (3) the ideals and goals of the Indonesian nation, (4) Indonesian society and individuals (5) soul, individual freedom, honor, and property, (6) implementation of development (law must function as a means of supporting the development of modernization and comprehensive development).

Keywords: National Law Development, Indonesian Heart Transplant, Transplantation

INTRODUCTION

Pancasila¹ has been placed as the ideal of law (*rechtsidee*) and the source and all sources of law which constitute the highest level in the theory of legal norm level. So that the legal ideals (*rechtsidee*) of Pancasila in the development of the national legal system have three values, namely:

1. Basic values, namely principles accepted as arguments that are more or less absolute. The basic values of Pancasila are divinity, humanity, unity, people's values and the value of justice.
2. Instrumental value, namely general implementation and basic values. Mainly in the form of legal norms which are then crystallized in statutory regulations.
3. Practical value, namely the value that is actually implemented in reality that comes from basic values and instrumental values. So that the real practical value becomes the touchstone for whether these basic values and instrumental values actually live in Indonesian society. For example, community compliance with law or law enforcement.

The three values are then concretized into legal norms. The concretization of these three values is very important because the law that is to be built must be able to integrate and harmonize Indonesia's national interests at national, regional and global levels. So that by based on the values of Pancasila as a guiding star to test and give direction to positive law in Indonesia, It is hoped that the national law that is formed in Indonesia, whether written or unwritten, will be imbued with and originate from Pancasila. Muladi is of the opinion that Pancasila is used as the *margin of appreciation for the doctrine* that always inspires legal development in Indonesia.² The elaboration of the values of Pancasila in the development of the national law is:

- a. Divine Value. This means that the formation of law in Indonesia must be based on divine or religious values. Apart from that, in every law formation there must be a guarantee for freedom of religion and there should be no law that privileges one particular religion and denies another. So that the law in Indonesia can create Indonesia as a religious nation and state.
- b. Human Value. This means that in any form of law, it must be able to create a civilized and legal nation that upholds respect for human rights.
- c. The Value of Unity. This means that the formation of law must pay attention to the unity or integrity of the nation and state. In the formation of the law, it should not cause division (disintegration) and divide the nation and state.
- d. Populist Value. This means that in the formation of law, it must be based on democratic values that involve all elements in the state, be it the executive, legislative, judiciary and community. So that the law in Indonesia can support the creation of democracy in Indonesia.
- e. Value of social justice. This means that in the formation of national law, it must aim to provide justice and prosperity for all Indonesian people.

Meanwhile, the elaboration of Pancasila values or principles in legal development according to Frans Magnis Suseno³ includes five things, namely:

- a. Legal development can only maintain its human quality if it is based on respect for humans, recognizes the same human position, does not treat humans as objects. planning, never sacrificing one party for the benefit of the other and never buying progress by tormenting others. The manifestation of this attitude is in accordance with the first Pancasila, namely the Supreme Lordship and the second principle, namely a just and civilized humanity.
- b. Legal development does not make humans the target object or even the means and victims for efforts to progress, so development should not be carried out paternalistically and

¹ Soediman Kartohadiprojo, *Beberapa Pikiran Sekitar Pancasila*, Bandung, Alumni, 1983, hlm. 4. Disebut pancasila adalah pancasila Indonesia, sebagai lawan dari pancasila-pancasila lainnya seperti apa yang dimaksudkan oleh Almarhum Nehru dari India, bahwa istilah pancasila ini ialah merupakan nama dan bukan sebagai bilangan lima dasar (five principle).

² Lihat Zainuddin Ali, *Filsafat Hukum*, Jakarta, Sinar Grafika, 2016, hlm. 109. Alinea keempat dalam pembukaan UUD 1945 berbunyi: "Kemudian daripada itu untuk membentuk suatu pemerintahan Negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia dan untuk memajukan kesejahteraan umum mencerdaskan kehidupan bangsa dan melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi dan keadilan sosial, maka disusunlah kemerdekaan kebangsaan Indonesia itu dalam suatu Undang-Undang Dasar Negara Indonesia, yang terbentuk dalam suatu susunan Negara Indonesia yang berkedaulatan rakyat dengan berdasar kepada Ketuhanan yang Maha Esa, kemanusiaan yang adil dan beradab, persatuan Indonesia, kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan, serta dengan mewujudkan suatu keadilan sosial bagi seluruh rakyat Indonesia".

³ Frans Magnis Suseno, *Etika Politik: Prinsip-prinsip Moral Dasar Kenegaraan Modern*, Jakarta, Gramedia, 1988, hlm. 23.

technocratically, but in a dialogical and participatory manner. The embodiment of this attitude is in accordance with the 4th precept, namely democracy led by wisdom in deliberation / representation.

- c. Legal development must respect humans in a concrete manner, which means guaranteeing human aspects / upholding human rights (HAM). The manifestation of this attitude is in accordance with the second and fourth precepts.
- d. Legal development must operate the principles of respect for human dignity into the structures and institutions of public life. This embodiment is in accordance with the 5th principle, namely social justice for all Indonesian people.
- e. Legal development must have an attitude of respect for human dignity for a development, it is necessary to put forward normative guidelines for determining development priorities.
- f. This manifestation is in accordance with the second and third precepts.⁴

Second, the law can apply effectively in society. After the law can keep up with the dynamic developments in society, it is hoped that national law will be enforced effectively in society. In the sense that the law is not alienated from society. There are at least three legal meanings alienated from society, namely:⁵

- a. Law only becomes a text that does not have a significant social meaning;
- b. Law is transformed into a burden or a factor that triggers chaos in society;
- c. There will be disobedience by society to the law itself, so that the law will lose its authority in the presence of the society it governs.

In relation to the values of Pancasila, there is legal development based on Pancasila that must be directed to accommodate and support legal needs that are in accordance with the development and progress of development that occurs in other fields. So that the Pancasila law is able to create justice, order and legal certainty which aims to improve the unity and integrity of the nation and state. Thus, it can be said that the future Indonesian national law will be responsive national law. Which in the development of a responsive national law is carried out in a transparent and open manner that involves elements of society and follows developments that occur in society itself. So far, legal development in Indonesia is a conservative legal development strategy because the greatest power in the formation of law lies with state institutions, namely the executive and legislative branches.⁶

Pancasila law⁷ Responsive that nurtures and protects can be realized if the law is able to provide a sense of security and peace to the life of the nation and state and to the people as a whole. The law becomes a place of protection and protection for the people from actions that threaten and destroy the sense of security, peace and human rights.

Just law based on Pancasila is a formulation of justice that is implemented in Indonesian society, which is justice that emphasizes the balance between rights and obligations, namely the right to enjoy the results of development with the obligations of darma and service. With this formulation of justice, the development of national law in the constitutional state of Pancasila basically aims to protect: (1) the entire Indonesian nation, (2) all Indonesian blood, (3) the ideals and goals of the Indonesian nation, (4) Indonesian society and individuals (5) soul, individual freedom, honor, and property, (6) implementation of development (law must function as a means of supporting the development of modernization and comprehensive development).⁸

Regulation of the Minister of Health of the Republic of Indonesia Number 37 of 2014 concerning Determination of Death and Utilization of Donor Organs regulates the use of donor organs in Article 3, namely: The scope of regulation includes: a. determination of brain stem death in a person whose death process is known in a health care facility; b. discontinuation of life support therapy; c. postponement of life support therapy; and D. utilization of donor organs. The provisions of this statutory regulation do not specifically address heart transplants.

⁴ M. Ali Mansyur, *Pancasila Sebagai Dasar Pengembangan Ilmu Hukum Indonesia*, Dalam Ahmad Gunawan dan Mu'amar Ramadhan (Penyunting), *Menggagas Hukum Progresif Indonesia*, Cet. Kedua, Yogyakarta, Pustaka Pelajar, 2012, hlm. 283-284.

⁵ Teguh Prasetyo dan Abdul Halim Barkatullah, *Filsafat, Teori dan Ilmu Hukum (Pemikiran Menuju Masyarakat Yang Berkeadilan Dan Bermartabat)*, Jakarta : Rajawali, 2012, hlm. 331.

⁶ Teguh Prasetyo, *Hukum dan Sistem Hukum Berdasarkan Pancasila*, Jakarta : Media Perkasa, 2013, hlm. 92.

⁷ Yopi Gunawan dan Kristian, *Perkembangan Konsep Negara Hukum & Negara Hukum Pancasila*, Bandung : Refika Aditama, 2015, hlm. 92. Hukum Pancasila merupakan konsep negara hukum yang dikembangkan dan diterapkan di Indonesia yang didasarkan pada sistem hukum Pancasila. Konsep negara hukum Pancasila memiliki ciri khas yang terdapat pada falsafah bangsa dan negara Indonesia yakni Pancasila.

⁸ Yopi Gunawan, *Op.Cit.*

RESEARCH METHOD

This research is included in the form of research of normative juridical, namely research that provides an understanding of the norm problems experienced by dogmatic jurisprudence in its activities of describing legal norms, formulating legal norms (forming laws and regulations), and enforcing legal norms (judicial practice).⁹ Normative research emphasizes the use of written legal norms which are expected to be able to answer in detail and systematically and thoroughly the development of national law development in the context of heart transplantation in Indonesia.

The type of research used in this research is descriptive analysis, in order to obtain clarity on problem solving and conclusions, namely from things that are general in nature to things that are specific in nature to describe the development of national law development in the context of heart transplantation in Indonesia.

DISCUSSION

A. The Development of National Law Development in the Context of Heart Transplantation in Indonesia

The development of national law development that began in the New Order era until now cannot be separated from the influence of Mochtar Kusumaatmadja. In the development of national law development, the idea of development law, law is not a tool, but a means for legal reform. It is difficult to separate the development of national law from Mochtar Kusumaatmadja's writing. Almost all writers who study the theory of development law cite Kusumaatmadja's opinion. Therefore in this paper some of Kusumaatmadja's comments will be quoted in his legal theory of development.

If "law" here includes international law, then the concept of law as a means of reforming society has been applied long before this concept is officially accepted as the basis of national legal policy.

Between the philosophy of law and the development of national law are like two different sides of a coin. Therefore, the philosophy of law as a scientific discipline is temporary legal development is a national policy in the form of development in the field law, but has the same common ground on the object of discussion, namely law.

According to Kusumaatmadja, the definition of law as a tool is broader than law as a tool because, in Indonesia, the role of legislation in the process of legal reform is more prominent, for example when compared to the United States which places jurisprudence (especially the decision of the *Supreme Court*) in a more important place.

The concept of law as a "tool" will produce results that are not much different from the application of "legism" as was once held in the Dutch East Indies era, and in Indonesia there is an attitude that shows the sensitivity of the community to reject the application of such a concept.

The development of a national law is a necessity that must be accepted by the Indonesian people, because of its condition as a country that has a very high level of plurality in society and a complex social plurality.

The composition of Indonesian society consists of ethnicity, religion and regional identity which are very diverse. So, according to Nurcholis Madjid, the condition of the Indonesian nation which is considered pluralist, then the universal base of truth is the one and only Godhead *ortawhid* (literally means to exalt God).

Efforts are made to make efforts to develop national laws to accommodate all the interests of a multi-ethnic society. Thus, the dimension of legal philosophy to be achieved in the theory of development law shows that there are 2 (two) dimensions as the core of the *Development Law Theory* created by Kusumaatmadja, namely:

1. Order or order in the context of renewal or development is something that is desired, even considered absolute;
2. Law in the sense of legal rules or regulations can indeed function as a regulatory tool or a means of development in the sense of channeling the desired direction of human activities towards renewal. The maintenance dimension is an effort to maintain the existing legal order, even though it is not in accordance with the times. This dimension aims to prevent a real legal vacuum as a logical consequence of Article II of the Transitional Rules of the 1945 Constitution, but in its implementation it must be adjusted to the situation and conditions while still being based on Pancasila and the 1945 Constitution.

Organ transplantation has been discussed since 1992, namely through the provisions of Article 33 of Law Number 23 Year 1992 concerning Health, states that transplantation is one of the treatments that can be done to cure disease and restore health. Legally transplants can only be done

⁹ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, Jakarta: Prenada Media Group, 2016, hlm. 84.

for humanitarian purposes and may not be done for commercial purposes, this is stated in Article 33 paragraph 2 of Law Number 23 Year 1992 concerning Health. The elucidation of the article states that organs or body tissues are a gift from God

Almighty so that they are prohibited from being used as objects for profit or commercial purposes.

B. Legal Regulations Regarding Future Heart Transplants

Health Legal regulations for organ transplants are expressly contained in Law no. 23 of 1992 which has been replaced by Law no. 36 of 2009 concerning Health, hereinafter referred to as the Health Law, namely Article 64, which reads: Healing diseases and restoration of health can be carried out through transplanting organs and / or body tissues, implants of drugs and / or medical devices, plastic and reconstructive surgery, and use of cells. punca.

Article 66 of the Health Law which reads: Cell transplantation, both from humans and from animals, can only be carried out if its safety and benefits have been proven. Article 67 of the Health Law, which reads: Taking and sending specimens or parts of body organs can only be carried out by health workers who have expertise and authority and can be carried out in certain health service facilities.

Transplants from corpses do not pose an ethical or moral problem. Article 14 PP 18/1981 states that organ harvesting from deceased victims is carried out with the consent of the immediate family. Article 16 PP 18/1981 states that donors or donor families who die are not entitled to any material compensation in return for a transplant. Organ transplants from live donors present more ethical and moral problems and must fulfill several conditions. Because in principle, committing an act on a person's body without the consent of the owner of that body is an act that violates ethics, civil law, criminal law, and even violates human rights. To be able to decide and give consent to what will be done to the patient, the doctor must first provide sufficient information followed by the consent of the patient concerned, which is then called *informed consent*, which is the relationship between doctor and patient based on belief, autonomy rights or self-determination, and there is an agreement between the doctor and the patient.

An *informed consent* is valid only given by the patient if it meets at least three elements as follows:

1. Sufficient information disclosure is provided by the doctor.
2. The patient's competence in giving consent.
3. Volunteerism, namely without coercion or pressure to give consent.

Transplantation is a matter related to actions that make sick or injured or injured (to donors and recipients) and is also related to engagement or agreement issues, so the articles in the Criminal Code such as Article 204, Article 205 and Article 206 and Article 1382 of the Civil Code can still be enforced.

Based on the 1948 Geneva Declaration, transplantation of human organs may be carried out if:

- a. Transplantation is the last resort in treatment
- b. The main objective is clinical and not experimental
- c. The implementation is procedural and proportional, which means not only considering the quality of life but also considering medical feasibility
- d. Transplantation is a risky medical action high, therefore the transplant medical procedure is carried out by a team of at least sub-specialized surgeons.

In addition, it can also be seen in PP 18/1981 that transplants can be carried out if:

- a. If the donor is alive, the prospective donor must have been informed in advance by the treating doctor about the nature, consequences and possibilities that might occur after surgery and the doctor who The person concerned is sure that the prospective donor has fully understood and is fully aware of the things that have been conveyed by the doctor concerned.
- b. If the donor dies, then with the consent that has been made by the donor himself before he dies with the approval of his closest family.

As in Article 1 of the Minister of Health Regulation No. 290 of 2008 concerning Approval of Medical Action, what is meant by the closest family is the husband, wife, father and / or biological mother, biological children or siblings. c. Donors or donor families who die are not entitled to any material compensation in return for a transplant.

CONCLUSIONS

Based on the above analysis, the conclusions are:

1. The development of national law development in the context of heart transplantation in Indonesia can be done through the development legal theory approach and progressive legal theory. In the

development of national law development, the idea of development law has always been aimed at human order and that order is created through legal means as well as progressively. The law is not a tool, but a means for legal reform, the law is for humans, not the other way around, for the law, the law must make the people prosperous and not the other way around. Related to heart transplantation is an effort to release humans from abnormalities due to damage to the function of organs, tissues or cells, basically having the goal of healing from a disease, for example blindness, damage to the heart, kidneys, etc. and restoring an organ, tissue or cell that is damaged. has been damaged or has abnormalities but absolutely no biological pain occurs, for example, a cleft lip. Organ transplants are usually performed at the terminal stage of a disease, where the organs can no longer bear the burden because their functions have almost been lost due to a disease. Law Number 36 of 2009 concerning Health states that transplantation is one of the treatments that can be done to cure disease and restore health.

2. Legal arrangements regarding future heart transplants should be regulated in more detail. Currently, the health law that regulates the legal rules for organ transplants is expressly contained in Law no. 23 of 1992 which has been replaced by Law no. 36 of 2009 concerning Health, hereinafter referred to as the Health Law, namely Article 64, which reads: Healing diseases and restoration of health can be carried out through transplanting organs and / or body tissues, implants of drugs and / or medical devices, plastic and reconstructive surgery, and use of cells. *punca*. In Indonesia, only authorized health workers perform transplants on the basis of the consent of both donors and their heirs. Organ harvesting can only be carried out if the donor has been informed about the risk of surgery and based on the correct understanding, the donor and his heir or family voluntarily express their consent.
3. As for the advice to the Government to immediately form, enact, and disseminate implementing regulations regarding organ and / or tissue transplantation human body. This is in order to explain the laws and government regulations related to heart transplants both through government regulations that specifically regulate transplants of types of organs as well as regulations from the minister of health regarding heart transplants.

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