

# **THE IMPACT OF *PANCASILA* AS THE STATE IDEOLOGY OF INDONESIA TOWARD THE PROVISION ON DEATH PENALTY IN THE PENAL CODE BILL**

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## **Abstract**

*Pancasila* has been the state ideology of Indonesia since the day after the independence of Indonesia that is on the 18<sup>th</sup> of August 1945. One year after the independence on the 17<sup>th</sup> of August 1945, Indonesian government promulgated Law No. 1 Year 1946 concerning The Penal Code on 26<sup>th</sup> of February 1946. Before this date Penal Code has been enacted based on transtitional provision on the Constitution. Article 10 provides death penalty as the heaviest main punishment. Netherlands as the home base of death penalty dropped it out from its penal code in 1870 because of the strong struggle of human right proponents. In Indonesia a research carried out in 1981/1982 by The Law Faculty of Undip collaborating with the The Supreme Court found out that both proponents and opponents of death penalty used *Pancasila* as “justification”. In the effort to give respect to both parties legal drafters of the Penal Code Bill provide death penalty as “specific punishment” and put it out of the main punishment in the Penal Code Bill.

**Keywords:** *Pancasila*; State Ideology; Legal Drafters; Specific Punishment; The Penal Code Bill

## **Abstrak**

*Pancasila telah menjadi ideologi negara Indonesia sejak sehari setelah kemerdekaan Indonesia yaitu pada tanggal 18 Agustus 1945. Satu tahun setelah kemerdekaan pada 17 Agustus 1945, pemerintah Indonesia mengumumkan Undang-Undang Nomor 1 Tahun 1946 tentang KUHP pada tanggal 26 Februari 1946. Sebelum tanggal tersebut KUHP telah diberlakukan berdasarkan aturan Peralihan UUD 1945. Pasal 10 KUHP mengatur pidana mati sebagai pidana pokok terberat. Belanda sebagai negara asal hukuman mati menghapus pidana mati pada tahun 1870 karena perjuangan yang gigih dari para pendukung hak asasi manusia. Di Indonesia suatu penelitian yang dilakukan pada*

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*tahun 1981/1982 oleh Fakultas Hukum Undip bekerja sama dengan Mahkamah Agung menemukan bahwa baik para pendukung dan penentang hukuman mati menggunakan Pancasila sebagai “pembenaran.” Dalam upaya untuk mengakomodasi pendapat kedua belah pihak, para perancang RUU KUHP menempatkan pidana mati sebagai “pidana khusus” dan mengeluarkannya dari pidana pokok dalam RUU KUHP.*

**Kata kunci:** Pancasila; Ideologi Negara; Perancang Undang-Undang; Pidana Khusus; RUU KUHP

## A. Introduction

The prevailing Indonesian Penal Code originated from the 1881 *Wetboek van Strafrecht* (WvS). The Dutch WvS it self originated from the French Penal Code, because in 1811 the Dutch was annexed by Emperor Napoleon Bonaparte and became a part of France. The 1801 French Penal Code was influenced by the Roman law, because at the 6<sup>th</sup> century the Roman Emperor Yustinianus enacted a law which became the basis for most European laws,<sup>3</sup> so that both the Napoleon’s Code which follows the civil law system and the English law which follows the common law system were patterned after the Roman law, although later in the development they were different. The law in France followed the regulation written in the Napoleon’s Code rather strictly, while the law in England was based on the unwritten common law or tradition, that is the common law which was developed from decisions of various courts throughout the country.<sup>4</sup> Because of the Dutch colonization, based on the concordance principle between *Ned. Indie* and *Nederland*, *WvS Ned.*

*Indie* entered Indonesia for the first time in 1918.

After the Indonesian people proclaimed their independence on the 17<sup>th</sup> of August 1945 the effort for law reform began in Indonesia, including the penal law reform. Article II of Transition Regulation of The 1945 Constitution provides: “All existing state organs and regulations still continuously prevail, as long as they have not been reformed by this Constitution.”

From the provision in Article II of Transisional Regulation of The 1945 Constitution, it can be noted that since the independence of the Republic of Indonesia, Indonesian people have kept in mind an idea to have their own law in the fields of criminal law and policy to overcome crimes which should be based on the preamble of Indonesian Constitution which become the foundation and at once the aim of legal policy in Indonesia, that is: “To protect the whole nation and advance public welfare based on Pancasila”.

But in the reality on 26<sup>th</sup> of February 1946 The Government of The Republic of Indonesia enacted Law No. 1 Year

<sup>3</sup> Arthur P. Crabtree, 1964, *You and The Law*, Rinehart and Winston Inc., New York, p. 2.

<sup>4</sup> *Ibid.*, p. 3.

1946 concerning The Regulation of The Criminal Law. Through this law, the Government of The Republic of Indonesia at that time stated that *W.v.S. Ned. Indie* (S. 1915 No. 732) as the main written criminal law, because Article VI of Law No. 1 Year 1946 provides that “*Wetboek van Strafrecht voor Nederlandsch-Indie*” is changed into “*Wetboek van Strafrecht*” and the term *Kitab Undang-undang Hukum Pidana (KUHP)*”<sup>5</sup> is formally used. It means that the formal (legal text) of our *KUHP* is in Dutch.<sup>6</sup>

The criminal law which is prevailing now in Indonesia is the codified criminal law, because most of its regulations have been arranged in one code, called *KUHP* which has 3 books according to a certain system. Available criminal regulations existing outside *KUHP*, such as the regulation on traffic (*wegverkeersordonantie* and *Wegverkeersverordening*), in *Deviezen* regulation, in the regulation on the election of the members of Consultative Assembly and Parliament (Law No. 7 Year 1952), and various other regulations, all of them obey the system used in *KUHP* provided in Article 103 of *KUHP*, stating: “Provisions in Chapter I up to Chapter VIII of the first book (general rules), are also applied for acts which are threatened with punishment by other regulations, except determined differently by law”<sup>7</sup>.

Beside having been codified, our criminal law has also been unified, that

is it prevails for all Indonesian people so that there will not be dualism as in private law, because the different law prevailed for indigenous people, and so did for European people. Dualism in the private law, now has begun to be wiped out, so that in the short term there will be unification in this field of law for all people. Unification in the criminal law field has occurred since 1918, that is at the time the *Wetboek van Strafrecht voor Nederlands Indie* prevailed, which according to Law No. 1 Year 1946 also still prevails until now, although with changes and additions.<sup>8</sup>

Moeljatno then explained that dealing with the existence of *prae-federal* regions governed by the Dutch Government, in the field of criminal law which had been codified, formerly there was no unification, because although basically we based on *Wetboek van Strafrecht van Nederlands Indie* 1918, but it was because the force of The Law No. 1 Year 1946, whereas according to the Dutch Government, such a condition was already suitable or the condition before the war automatically continued (the condition of Dutch colonial era).<sup>9</sup>

As the result of these differences, all regulations which added and changed *KUHP*, after the 8<sup>th</sup> of March 1942, and which was carried out by the Dutch Government in regions which were formerly occupied were not prevailed for us, so that from this aspect formerly there was still dualism. Then with the existence of Law No.73 Year 1958 which made Law

<sup>5</sup> Barda Nawawi Arief, 1990, *Pelengkap Hukum Pidana I*, Fakultas Hukum Undip, Semarang, p. 4.

<sup>6</sup> *Ibid.*, p. 15.

<sup>7</sup> Moeljatno, 2008, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, p. 17.

<sup>8</sup> *Ibid.*, p. 18.

<sup>9</sup> *Ibid.*, p. 20.

No. 1 Year 1946 prevailed for all regions of Indonesia, the dualism was wiped out. It was said for all regions of Indonesia because it comprised all former regions of Dutch Netherland including West Irian. Therefore now *KUHP* is prevailing for all Indonesian regions based on Law No. 1 Year 1946 jo Law No. 73 Year 1958. Thus our *KUHP* has “its own birth certificate,” so it is different from The Commercial Code (*KUHHD*) and The Civil Code (*KUHPerdata*), ect. which have no birth certificate as *KUHP*.<sup>10</sup>

At the time of its promulgation, that is on 26<sup>th</sup> of February 1946, *W.v.S/KUHP* just prevailed only for Java and Madura. For Sumatra island it prevailed starting from the 8<sup>th</sup> of August based on The Government Regulation No. 8 Year 1946. In regions out side Java and Madura which were still occupied by N.I.C.A. (Nederlands Indie Civil Administration), *W.v.S.v.N.I.* still prevailed with some changes and additions made by N.I.C.A.

The use of these 2 penal codes lasted continuously until the returning of soveignity of Indonesia in form of *R.I.S.* based on the Transition Regulation in Article 192 of *R.I.S.* Constitution which began to prevail on 27<sup>th</sup> of Desember 1949. The Republic of Indonesia having Yogyakarta as the capital city as a part of *R.I.S.* State still had its own regulations, among others was Law No. 1 Year 1946.

In its development the *R.I.* State was widened, because some states and regions combined themselves to *R.I.* (Yogyakarta) and to those regions which combined

themselves (called recovered regions Law No. 1 Year 1946 was used based on Article 1 Government Regulation as the Substitute of Law No. 1 Year 1950 jo Law No. 8 Year 1950).

Such a condition (the existence of two penal codes {*KUHP*} having their own regions of implementation) lasted continuously until the formation of The Unitary Republic of Indonesia on the 17<sup>th</sup> of Agust 1950. The Transition Regulation in Article 142 *UUDS* 1950 also defended the regulations available on the 27<sup>th</sup> of December (based on Article 192 of *RIS* Constitution) that are:

1. *KUHP* jo Law No. 1 Year 1946 the former *R.I.* (Yogyakarta) and the former recovered regions, and
2. *W.v.S.v.N.I.* for the former non recovered regions, which were governed by the Dutch.

The existence of the dualism of *KUHP* could be ended by the promulgation of Law No. 73 Year 1958 (LN. 1958 No. 127) on the 29<sup>th</sup> of September 1958, which stresses that Law UU No. 1 Year 1946 prevails for all regions in Indonesia. Thus the main function of Law UU No. 73 Year 1958 is o reunify some kinds of material criminal law (making unification) by making Law No. 1 Year 1946 prevail in all regions of Indonesia. All regions of Indonesia means all regions of the former Dutch colonization, therefore including West Irian, although at that time (the enactment of Law No. 73 Year 1958) West Irian was still governed by the Dutch colonial and then on the 1<sup>st</sup> of May 1962

<sup>10</sup> *Ibid.*, pp. 20-21.

as the result of Trikora it included into our authority.<sup>11</sup>

From the above description it is clear that *KUHP* which is still prevailing in Indonesia until today is not made by Indonesian people but because of the force of both Law No. 1 Year 1946 and Law No. 73 Year 1958. As the consequence *KUHP* is not based on *Pancasila*, including the provision of death penalty as the heaviest punishment written in Article 10 and some other articles which threaten criminal acts with death penalty such as articles 104, 111 paragraph (2), 124 paragraph (3), 140 paragraph (3), 340, 365 paragraph (4) and 444 of *KUHP*.

Therefore the problem which will be discussed in this article is: "What is the impact of *Pancasila* as the state ideology of Indonesia toward the provision on death penalty in the penal code bill?"

## B. Discussion

### 1. *Pancasila* as the state ideology of Indonesia

#### a) *Pancasila* viewed from the cultural perspective

If we discuss about *Pancasila* today, our minds will be directly focused on *Pancasila* as formulated in the 4<sup>th</sup> paragraph of the preamble of The 1945 Constitution, because that is *Pancasila* which is formally determined by The President's Instruction No. 12 Year 1968 (Inpres No. 12/1968). The formulation of *Pancasila* is as follows:

"...Ketoehanan Jang Maha Esa,  
kemanoesiaan jang adil dan

<sup>11</sup> *Ibid.*

beradab, persatuan Indonesia, dan kerakjatan jang dipimpin oleh hikmat kebijaksanaan dalam permoesjawaratan/perwakilan, serta dengan mewedjoedkan soeatoe keadilan sosial bagi seloeroeh rakyat Indonesia..." (Berita Repoeblik Tahoen II No.7).<sup>12</sup>

(...God Almighty, fair and humanized, unity of Indonesia, and people governed by wisdom in compromise/representativeness, and by realizing social justice for all Indonesian people..." (Republic News The Second Year No.7).

*Pancasila* has an important role in guiding the social life of the people. For Indonesian people. For Indonesian people, *Pancasila* is no more an alternative, but an imperative. Because it has such a determinant role, as supporting subjects we are invited to continuously elaborate it. Through continuous and indepth study on it, we hope that we can understand and find out the most valuable richnesses containing in it. Such an effort will help us to be more conscious and give us more stimulation to implement and defend it as the national belonging which its sustanaibility has been tested and proven through various historical facts.<sup>13</sup>

<sup>12</sup> P.J. Suwarno, 1993, *Pancasila Budaya Bangsa Indonesia; Penelitian Pancasila dengan Pendekatan Historis, Filosofis & Sosio-Yuridis Kenegaraan*, Kanisius, Yogyakarta, p. 11.

<sup>13</sup> Paulus Wahana, 1993. *Filsafat Pancasila*, Kanisius, Yogyakarta, p. 7.

According to Walfarianto,<sup>14</sup> *Pancasila* as written in the Preamble of The 1945 Constitution, in the history of the independence of Indonesian people experienced perception and interpretation in accordance with the interest of the authorized regime. *Pancasila* was used to compel people to obey the authorizing government by giving *Pancasila* a position as the only principle in the society, nation and state lives. It was not allowed for the society to use the other principle, although it was not against *Pancasila*. It seemed that the New Order government tried to make similarity of thoughts and ideologies in the society and state lives of the pluralistic Indonesian people. Therefore, People's Consultative Assembly held a specific meeting in 1998 and the result was the publication of *Tap. No. XVIII/MPR/1998* containing The Eradication of The Guidance for Understanding and Socializing *Pancasila* (P4) and the decision on *Pancasila* as the foundation of the state. *Pancasila* as meant in the Preamble of The 1945 Constitution is the state foundation of The Unitary State of The Republic of Indonesia must be carried out consistently in the state life.

From the cultural perspective, *Pancasila* has roots in values found out from kingdoms which used to be powerful in Nusantara areas such as Kutai, Sriwijaya and Majapahit. Indonesia entered into historical era at 400 AC. by the founding of an inscription in form of 7 *yupa* (stone poles). The Kutai

society which opened the historical era of Indonesia for the first time performed social, political and God's values in forms of kingdom, *kenduri* and God Almighty and gift to Brahmins. Form of kingdom with the religion as the binding tie of the king's power could be seen in kingdoms which appeared later in Java and Sumatra. In the ancient era (400-1500) there were two kingdoms which were successful to gain integration with areas consisting of a half of Indonesia and all areas of Indonesia nowadays that were Sriwijaya centering in Sumatra and Majapahit centering in Java.<sup>15</sup>

According to Muhammad Yamin Sriwijaya was called "The First Indonesian State" based on *kedatuan*. Values of *Pancasila* were related to each other, such as the value of unity was not separated from the value of God Almighty which could be seen in the king as the center of power with religious force made an effort to defend his authority toward the *datu* (governor). And so were values of society and economy which were integrated each other with values of internasionalism in form of commercial relationship stretching from the hinterland up to the overseas countries through harbours and Malaka Strait which were secured by the sea nomads who became a part of bureaucracy in Sriwijaya Government.<sup>16</sup>

The appearance of Madjapahit in Java was successful to widen areas of its authority to all parts of Nusantara and neighbour regions. The peak government bureaucracy of Majapahit was the king

<sup>14</sup> Walfarianto, 2014, *Pendidikan Pancasila Untuk Perguruan Tinggi*, Leutika, Yogyakarta, pp. 1-2.

<sup>15</sup> P.J. Suwarno, *Op.cit.*, pp. 17-18.

<sup>16</sup> *Ibid.*, pp. 20-21.

called Prabu Hayam Wuruk. He had power because of the tradition which was the habit of charisma owned by Raden Wijaya the founder of Majapahit, whereas the charisma of Raden Wijaya was the habit of charisma owned by Ken Angrok the founder of Singasari kingdom. Therefore the Prabu was supposed to have a function as the center of society and cosmos utilized for the people's welfare. The combination of religious and secular power caused the existence of tendency toward absolute power.<sup>17</sup>

Thus Majapahit under the king Prabu Hayam Wuruk and *Apatih Mangkubumi* Gajah Mada was successful to integrate Nusantara. Factors utilized to create Nusantara view were as follows: magic religious force which centered in the Prabu, social family tie mainly between regional kingdoms in Java with the Prabu in an institute called *Pahom Narendra*. Economic tie in form of feud given in *pisowanan agung* for regional officials in Java and tax collection by the king's officials outside Java, and the military force coordinated by Rakryan Juru Pengalasan under the command of *Apatih Mangkubumi*. Thus it can be said that political, social and religious values which became the materials of Pancasila had occurred since Nusantara society entered into the historical era.<sup>18</sup>

#### b) *Pancasila* viewed from Historical Perspective

The above description clearly indicates that *Pancasila* was taken from

values of Indonesia's own culture. The process to formulate those values to become *Pancasila* from the historical perspective at least passed 3 (three) important moments as follows:

#### 1) The 1<sup>st</sup> June 1945

When the Japanese army were pushed by the Allied Army and felt that they would soon loose the war, Japan announced the formation of *Dokuritsu Zyunbi Tyosakai* known by Indonesian people as *Badan Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI)* or Body of Efforts to Prepare the Independence of Indonesia. This body was formed to finish 3 (three) urgent problems as follows: a) The problem of independence time, now or next time?, b) The problem of state foundation which is called *philosophische gronsslag* by Sukarno, and c) The problem of the form of state government.<sup>19</sup> To answer those problems the first plenary meeting of *BPUPKI* was held from 28<sup>th</sup> of May until 1<sup>st</sup> of June 1945. In this period of time three speeches were given respectively by Muhammad Yamin, Sukarno dan Supomo to answer the problem dealing with *philosophische gronsslag*, and it was Sukarno's speech given on the 1<sup>st</sup> June 1945 that was regarded as the birth of *Pancasila*.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, pp. 23-24.

<sup>19</sup> *Ibid.*, p. 48.

2) The 22<sup>nd</sup> of June 1945

In fact among our founding fathers who were 60 persons in number and 7 additional Japanese people were divided into two groups, that are the “Religious Group” (Moslems) and the “National Group” (Nationalists). The Religious Group preferred *syariah Islam* as the state foundation whereas The National Group would like to have *Pancasila* as the state foundation. To have a compromise way between these two groups, a small committee was formed, called “The Nine Committee” which was successful to make a formulation called *Jakarta Charter*.<sup>20</sup>

The formulation of *Pancasila* in Jakarta Charter is as follows:

- a) *Ketuhanan, dengan kewajiban menjalankan syariat Islam bagi pemeluknya* (God Almighty, with the duty to carry out *syariat Islam* for its followers),
- b) *Kemanusiaan yang adil dan beradab* (Humanity which is fair and civilized),
- c) *Persatuan Indonesia* (The unity of Indonesia),
- d) *Kerakyatan yang dipimpin oleh hikmah kebijaksanaan dalam permusyawaratan/perwakilan* (People guided by wisdom in compromise/representativeness),

e) *Keadilan sosial bagi seluruh rakyat Indonesia* (Social welfare for all Indonesian people).

On the 1<sup>st</sup> of July 1945 a small committee consisting of 19 persons headed by Sukarno was formed to investigate the problems needed for the state foundation. In this discussion Latuharhary did not agree with part of the sentence “with the duty to carry out *syariat Islam* for its followers”. This idea was supported by Wongsonegoro and Husein Jayadiningrat, but moderately debated by Agus Salim and Wakhid Hasyim. In this case Sukarno as the head stressed twice that this sentence was a compromise between the religious group and the nationalist one and could be achieved very difficultly. If this sentence was not written the religious group would refuse it.<sup>21</sup>

On the 4<sup>th</sup> of July 1945 in its second period of meeting *BPUPKI* fully received the results of The Nine Committee in order to become the bill of the Preamble of the Basic Law of The Independence of Indonesian State. Then at the last meeting on the 16<sup>th</sup> of July 1945 finally *BPUPKI* could agree *Jakarta Charter* as the design of Basic Law of Indonesian State consisting of

<sup>20</sup> Walfarianto, *Op.Cit.*, p. 29.

<sup>21</sup> P.J. Suwarno, *Op.Cit.*, pp. 57-58.

three parts as follows:

- a) Statement of the independence of Indonesia,
- b) The Preamble containing *Pancasila* in a complete text,
- c) The body of The Constitution arranged in articles.<sup>22</sup>

The last day, that is the 17<sup>th</sup> of July 1945 was only the formal closing meeting of *BPUPKI*. Thus if we realized it, since 29<sup>th</sup> of May 1945 *BPUPKI* held the first meeting and from the 10<sup>th</sup> until the 17<sup>th</sup> of July 1945 the second meeting, then in a relatively short time since the 29<sup>th</sup> of May until the 17<sup>th</sup> of July 1945 (49 days) *BPUPKI* was successful to prepare the design of a text containing the State Foundation for Indonesian State which would be independent (only waiting for the time for proclaiming the independence).<sup>23</sup>

3). The 18<sup>th</sup> of August 1945

On the 9<sup>th</sup> of August 1945, *BPUPKI* was dispersed by Japan, and at the same time The Committee of Independence Preparation (*PPKI*) or *Dokuritsu Zumbi Iinkai*, was formed consisting of 25 (twentyfive) members led both by Ir. Sukarno as the Head and Drs. Moh. Hatta as Vice Head.<sup>24</sup>

After the independence of Indonesia was proclaimed

on the 17<sup>th</sup> of August 1945, the founders of Indonesian State completed the new independent state with the Constitution and the State Institutions based on the Constitution. When the independence of Indonesia was proclaimed the available institution was *PPKI*. This institution was first formed by Japan, but Japan had lost the war and stated that Indonesia was at *status quo* as commanded by the Allied Forces was not obeyed by *PPKI*<sup>25</sup>.

On the 17<sup>th</sup> of August in the afternoon before the meeting of *PPKI* on the 18<sup>th</sup> of August, Mohammad Hatta received a telephone call from Nisyijima, an assistant of Mayeda informing that a *Kaigun* (Commander of Japanese Navy operating at the eastern part of Indonesia) officer would come and meet Hatta dealing with the independence of Indonesia. Hatta permitted the officer to come to his house. He was delegated by *Kaigun* to inform that representatives of the Protestants and Catholics in regions authorized by the Japanese Navy operating at the eastern part of Indonesia did not agree with the part of the sentence (seven words added at the back of the first principle) in the Preamble of The 1945 Constitution saying that: *Ketuhanan dengan kewajiban*

<sup>22</sup> Walfariato, *Op.Cit.*, p. 30.

<sup>23</sup> *Ibid.*, p. 30.

<sup>24</sup> *Ibid.*, p. 31.

<sup>25</sup> P.J. Suwarno, *Op.Cit.*, pp. 71-72.

*menjalankan syariat Islam bagi pemeluk-pemeluknya*” (God Almighty with the duty to carry out *syariat Islam* for its followers). According to them such a part of the sentence was not binding for them, it was only binding for those who are Moslems, but the fact that those words were written in a base which became the main part of the constitution would have a tendency to make a discrimination for the minority. If such a discrimination would finally be decided, they would like to be outside of the Republic of Indonesia. Mohammad Hatta explained that Maramis who represented the Christian people at the time of the discussion agreed with that part the sentence, but the *Kaigun* officer strongly defended his idea.<sup>26</sup>

Finally Hatta realized that the refusal to the message brought by the *Kaigun* officer could result in the disintegration of the newly independent Indonesian state. To achieve the independence more than 25 years Hatta should experience being in jail and thrown away. If the newly born Indonesian state was broken the areas outside Java would again be occupied by the Dutch, and the Dutch would carry out the *divide et impera* policy to occupy Indonesia again. Based on that opinion, Hatta told the officer that

he would like to discuss this very important problem next morning at the meeting of *PPKI*.<sup>27</sup>

On the following day the 18<sup>th</sup> of August 1945, before the meeting of *PPKI* began, Mohammad Hatta invited Ki Bagus Hadikusumo, Wakhid Hasyim, Kasman Singodimedjo, dan Teuku Hasan to hold an introductory meeting to discuss that problem. They agreed that newly born Indonesian state would not break so that the part of the sentence which would result in discrimination was wiped out and shortened and changed into *ke-Tuhanan yang Maha Esa* (God Almighty).<sup>28</sup>

The plenary meeting of *PPKI* began at 11.30. At the introduction of the meeting Sukarno as the head of the meeting asked that the meeting would follow the constitution designed by *BPUPKI* as much as possible. Only important changes would be made, small things should be left behind. He hoped that they would be successful to finish the arrangement of the constitution and the choice of the president and the vice president. Before the discussion on the preamble and the constitution began, Sukarno gave chance to Mohammad Hatta to read the draft of the preamble which has been changed with the

<sup>26</sup> *Ibid.*, p. 72.

<sup>27</sup> *Ibid.*, pp. 72-73.

<sup>28</sup> P.J. Suwarno, *Op.Cit.*, p. 78.

compromise of some members before the meeting began.<sup>29</sup>

Then Mohammad Hatta came up in front of the meeting and said that in fact according to the plan, the statement of the independence should be put in the preamble; but now in accordance with the situation that statement of the independence was dropped out, whereas the draft of the preamble formulated by the Nine Committee was changed with the compromise of some members of PPKI. Then Hatta read the whole draft of the Preamble on the 4<sup>th</sup> paragraph as follows:

*“Kemudian dari pada itu untuk membentuk sesuatu Pemerintah Negara Indonesia dan seluruh tumpah darah Indonesia, dan untuk memajukan kesedjahteraan umum, mentjerdaskan kehidupan bangsa, dan ikut melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi dan keadilan sosial, maka disusunlah kemerdekaan kebangsaan itu dalam suatu Hukum Dasar Negara Indonesia yang terbentuk dalam suatu susunan Negara Republik Indonesia yang berkedaulatan rakyat, dengan berdasar kepada: ke-Tuhanan Jang*

*Maha Esa, menurut dasar kemanusiaan yang adil dan beradab, persatuan Indonesia, dan kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan, serta dengan mewujudkan suatu keadilan sosial bagi seluruh rakyat Indonesia”<sup>30</sup>.*

(Then to form the Government of the Indonesian State and all Indonesian people, and to advance public welfare, to make clever the lives of the people, and participate in the world order based on the independence, the eternal peace and the social justice, the independence of people is arranged in the Basic Law of Indonesian State which is formed in an arrangement of the State of The Republic of Indonesia which has people's sovereignty, based on: God Almighty, according to the base of fair and civilized humanity, Indonesian unity, and people governed by wisdom in agreement of representativeness, and also by realizing social justice for all Indonesian people).

Thus *Pancasila* was formally formulated in the Preamble of the 1945 Constitution. If we follow the process of its formulation

<sup>29</sup> *Ibid.*, p. 73.

<sup>30</sup> *Ibid.*, p. 74.

since the 1<sup>st</sup> of June up to the 18<sup>th</sup> of August 1945, we can realize that *Pancasila* experienced the development of its function. On the 22<sup>nd</sup> of June 1945 *Pancasila* which was formulated by the Nine Committee and then was agreed by the plenary meeting of *BPUPKI* was a compromise model between those two groups, the one which struggled for nationalism as the State base and the other which struggled for the base of Islamic country. But on the 18<sup>th</sup> of August *Pancasila* which was reformulated by *PPKI* developed into a compromise model between the nationalists, the Moslems, and the Christians-Chatholics in the state life. Based on *Pancasila* which becomes the model of compromise The 1945 Constitution was formulated, and then The Constitution became the base for founding the government of the Republic of Indonesia<sup>31</sup>.

After passing quite a long historical process *Pancasila* experienced maturity so that when founding the State of The Republic of Indonesia, our founding fathers agreed to choose *Pancasila* as the foundation of the state. On the way of the Indonesian state structure there had been changes of the constitution, when The 1945 Constitution was changed by *RIS* Constitution, then changed into The Temporary Constitution,

and came back to The 1945 Constitution. This fact indicated that *Pancasila* had been agreed as a value which has the highest truth. Therefore historically, the life of the Indonesian people could not be separated from the values of *Pancasila*.<sup>32</sup>

#### c) *Pancasila* Viewed from Philosophical Aspect

The existence of *Pancasila*, beside viewed from cultural and historical approaches could also be viewed from the philosophical approach. One of the philosophical approaches used is the phenomenological approach, i.e. by observing social phenomena, the principles of *Pancasila* could be found out which become principles behind the social phenomena. P.J. Suwarno<sup>33</sup> gave illustration observed dealing with the member of a family who suffers from a serious disease. Sisters, brothers and relatives of that sick person come to visit him. What moved them to visit that sick person? The participation to feel the illness of the sick person which can reduce the suffer from his illness, because those sisters, brothers and relatives are human beings who have experiences of being sick and know how the sick person suffers from his sickness. Thus their only starting point is human being including the sick person. Here *the principle of humanity* is implied in their activities to visit that sick person.

At the sick person's house, those who come to visit him discuss about

<sup>31</sup> *Ibid.*, pp. 76-77.

<sup>32</sup> Walfarianto, *Op.Cit.*, p. 3.

<sup>33</sup> P.J. Suwarno, *Op.Cit.*, p. 92.

the solution for the sick person to be soon well again and recovers from his illness. They are debating about the cure carried out for the sick person. Those who still belief to the shaman and the utility of the traditional medicines propose to look for a magic shaman soon for the sick person. They support their arguments indicating the positive aspects of a shaman, such an informal procedure, human service, not directly and immediately draw the account, up to the time the patient dies he does not draw the account, even he participates at the burial of the dead person. Whereas those who have advanced ideas propose to bring the sick person to the doctor even to hospital if it is needed. They also propose arguments which support their ideas, such as the bigger certainty to cure the sick person because of the capacity of the doctor, cleanness and being free from superstition, etc. Therefore a hot discussion happens which leads to a compromise to bring the sick person to the hospital, but not neglecting the existence the shaman, because a shaman can cure the sick person without his presence. This debate of course indicates the phenomena of *the principle of compromise/agreement*.

After they arrive at a compromise/agreement to bring the sick person to the hospital and to look for a magic shaman, then appears another problem, that is the fund to realize that compromise/agreement. They are really consistent with their compromise/agreement, that is those who are rich are ready to contribute financial aid, whereas those who are poor

do not contribute a financial aid, because they do not have much money, but they would like to contribute their physical power by conducting the sick person to he hospital. The solution of this problem really indicates the phenomena of the *principle of social justice for all people*, because the sick person can get medical care, those who are rich can contribute enough financial aid, whereas those who are poor can help by giving their physical power, so they are responsible in accordance with the abilities which they have and there are no neglection toward the rights and obligations of each individual.

After all efforts had been carried out all of them gathered and prayed to God according to their beliefs respectively asking for the recovery of the sick person. This phenomenon indicates the principle of *God Almighty* among the group of people who pray together to God asking for the recovery of the sick person. By making efforts together to solve the problem experienced by one of their brothers the unity among them is deeply felt. This phenomenon indicates the principle of *unity* which becomes a coherent factor for all those activities.<sup>34</sup>

Based on the above description it is clear that from the cultural, historical, and philosophical perspectives *Pancasila* clearly indicates its existence in this Nusantara world. Therefore what Paulus Wahana<sup>35</sup> said is true that *Pancasila* has a status as the foundation of the state, because it has the principles

<sup>34</sup> *Ibid.*, p. 93.

<sup>35</sup> Paulus Wahana, *Op.Cit.*, pp. 43-

which become bases for the founding of Indonesian State. Those principles are God Almighty, humanity, unity, people and justice. If we think deeply, it is clear that substances which become bases of *Pancasila*, either directly or indirectly are causes for the existence of our country: it will not exist without the existence of the people who are united to develop our country in order to realize social justice, and this happens because of God's power. Therefore it is possible and there is no difficulty to make an effort in order the life of the state has accordances whith the bases of Pancasila (God, humanity, unity, people and justice).

## 2. The Impact of Pancasila Toward the Provision of Death Penalty in the Penal Code Bill

At the Focus Group Discussion (FGD) carried out with some society circles living in in three villages, namely Ngeglok, Gading and Susukan of Purwosari sub District, Gunung Kidul Regency, Yogyakarta Special District, we found out that the people there do not understand about penal law reform, even they do not know that the penal code which is prevailing now in Indonesia is the inheritance of the Dutch colonial. They do not understand about the history of the penal code and the process of penal law reform. According to J.E. Sahetapy,<sup>36</sup> The Republic of Indonesia as an independent country and has sovereignty will not

permanently use *Wetboek van Strafrecht (voor Nederlansch-Indie)* known as *KUHP* (Indonesian Penal Code) which arranges death penalty in articles 10 and 11.

Half of the society circles of those three villages agreed to wipe out death penalty whereas half of them would like to defend it in the effort of penal law reform. Those who agreed to wipe it out had the argument that death penalty is against Pancasila especially the first and the second principles. According to Tim Redaksi Fokusmedia,<sup>37</sup> one of the values found in the first principle of Pancasila is that Indonesian people declare their belief to God Almighty. From this value it is clear that Indonesian people should respect God's authority as the creator of all beings, including human beings. In this case human beings have no right to end the life of the others even those who are the offenders of extraordinary crimes. It is only God Almighty who has the right to create and to end human life.

Dealing with the second principle, according to Tim Redaksi Fokusmedia,<sup>38</sup> one of the values of the second principle is to acknowledge and treat human beings in accordance with their dignities and prestiges as God's creatures and respect values of humanity. In this case Indonesian people should not take the right of God to create and to end human life. The life and death of a human being is determined by God and it is beyond the right of human beings. Although

<sup>36</sup> J.E. Sahetapy, 1982, *Suatu Studi Kasus mengenai Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, Edisi Kedua, CV Rajawali, Jakarta, p. 4.

<sup>37</sup> Tim Redaksi Fokusmedia, 2007, *UUD'45 Dan Amandemennya*, Cet-Keempat, Fokusmedia, Bandung, p. 82.

<sup>38</sup> *Ibid.*

some offenders committed serious crimes which should be sentenced with death penalty by the judge, it would be better to change it into life imprisonment and let them die naturally in the prison according the time given by God to call them back to Him as the Creator.

Whereas those who would like to defend death penalty stressed that it is still needed for offenders of extraordinary crimes such as terrorism, corruption, sadistic murders and genocide. Although Article 28A of The 1945 Constitution provides that everyone has the right to live and to defend his life and the continuance of his life and even Article 28I paragraph (1) of The 1945 Constitution provides that the right to live is the basic right of human being and cannot be diminished at whatever condition. Article 28J paragraph (1) of The 1945 Constitution provides that every one is obliged to respect human right of the others in the order of social, national and civil lives. Paragraph (2) of that article provides that in performing his rights and freedom, every one is obliged to obey the limitation determined by law, religious values, security and public order in a democratic society.

Ideologically Indonesia is a democratic legal state based on *Pancasila*. Dealing with death penalty, both the proponents and opponents of death penalty based their opinions on *Pancasila*. This phenomenon can also be seen from a research result carried out in 1981/1982 by The Law Faculty of Diponegoro University collaborating with the Supreme Court.

That research result reported that “there was a tendency that both the proponents and the opponents of death penalty used *Pancasila* as “justification”<sup>39</sup> Therefore dealing with death penalty Indonesia is still a *retensionist* country, that is a country which still defends death penalty in its penal code and is different from *abolusionist* countries which have wiped out death penalty from their penal codes.

The Constitutional Court Decision Number 2-3/PUU-V/2007 also discribed deference expert opinions about death penalty based on *Pancasila*. Some experts supported death penalty but some others experts refused death penalty based on *Pancasila*.<sup>40</sup>

Based on the fact the legal drafters of the Penal Code Bill put out death penalty from the provision on kinds of punishment and arranged it as “specific punishment” to fulfill the will of both groups. Article 65 paragraph (1) of The Penal Code Bill determines that the main punishment consist of: a. Imprisonment, b. Cover punishment, c. Supervision punishment, d. Fine; and e. Social work punishment. Article 66 of The Penal Code Bill determines that death penalty is a specific main punishment and always be threatened alternatively. The explanation of Article 66 states that death penalty is really specific. If compared with the other kind of punishment, death penalty is the heaviest one. Therefore, it

<sup>39</sup> Syamsul Hidayat., 2010, *Pidana Mati Di Indonesia*, Yogyakarta, Genta Press, p. 5.

<sup>40</sup> Constitutional Court Decision Number: 2-3/PUU-V/2007.concerning Legal Chalenge of the Law Number 22 of 1997 concerning Narcotics against the Constitution of the Republic of Indonesia.p.79-139.

should be threatened alternatively with the other kind of punishment such as life imprisonment or 20 (twenty years) imprisonment at the most.

Article 87 determines that death penalty is sentenced alternatively as the last effort (*ultimum remedium*) to protect the society. The explanation of Article 87 states that this provision again stresses the specific character of death penalty that is it can only be sentenced as the last effort to protect the society. This policy indicates that death penalty will still exist in the penal code in the future (*ius constituendum*) but it will be used by the judge selectively with special considerations in very serious cases such as narcotic criminal acts, humanity criminal acts, genocide, murder aforethought and violence theft.<sup>41</sup>

Such a policy also indicates that the state has a choice not to abolish death penalty but to defend it only for specific criminal acts. In this case the state would like to realise Pancasila as the state ideology which should be open to people's voices about death penalty, both the proponents and the opponents who use Pancasila as justification.

### C. Closing

#### 1. Conclusion

Based on the above discussion and analysis, we can conclude that the impact of Pancasila as the state ideology of

Indonesia toward the provision on death penalty in the Penal Code Bill is that the legal drafters of the Penal Code Bill put out death penalty from the provision on kinds of the main punishment and arranged it as a "specific punishment" to fulfill the will of both proponents and the opponents of death penalty who used Pancasila as "justification". Besides there are other factor like human rights, international perspective and other relevant significant factors can also be consider by the government to put death penalty as alternative punishment.

#### 2. Recommendation

Based on the above conclusion we can recommend that to defend or to wipe out death penalty in the effort of penal law reform depends very much on the government's policy, so it is recommended that the provision of the legal drafters of the Penal Code Bill on death penalty as a "specific punishment" can be supported because such arrangement is really an impact of Pancasila as the state ideology of Indonesia.

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<sup>41</sup> Paulinus Soge, 2010, "Pembaharuan Sistem Hukum Indonesia Perspektif Hukum Pidana", Masalah Aktual dalam Hukum: Sumbangan Pemikiran bagi Pembangunan Sistem Hukum Indonesia, Fakultas Hukum Universitas Atma Jaya Yogyakarta, p. 112.

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### Decision

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