

# Policy of Nation's Capital Transfer in the Perspective of Power Separation

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**Abstract** --The government's policy in conducting the transfer of the National Capital is considered to cause polemic in the community. Because the study of relocating the capital is based on the one-sided policy aspects delivered by the executive. This is certainly very appropriate to be reviewed in the perspective of constitutional law in the trias politica theory space. The capital transfer policy, that is previously in Jakarta, is naturally accompanied by a revision of the Law in advance relating to the national capital of Indonesia. One of the laws and regulations referred to is the Law of the Republic of Indonesia Number 29 of 2007 concerning the Government of the Special Capital Province of Jakarta as the Capital of the Unitary State of the Republic of Indonesia. If the government's commitment is to run the rule of law, then the principle of the rule of law must be the main guideline in the policy of relocating the capital city of the main country, namely the formation of a law firstly by involving the executive and legislative organs.

**Keywords:** transfer, capital and separation of powers

## I. INTRODUCTION

Jimly Asshiddiqie mentioned that there are at least 11 main principles contained in a democratic rule of law, namely: (i) the guarantee of evenness and equality in shared life; (ii) recognition and respect for diversity / plurality; (iii) rules which are binding and used as a source of mutual referrals; (iv) the existence of a dispute resolution mechanism based on the shared regulatory mechanism; (v) recognition and respect for human rights; (vi) limitation of power through the mechanism of separation and distribution of power accompanied by a mechanism for the resolution of state disputes between state institutions both vertically and horizontally; (vii) an independent and impartial judiciary with the highest authority on the basis of justice and truth; (viii) the establishment of a judicial institution specifically to guarantee bankruptcy for citizens harmed by government decisions or policies (state administrative officials); legislative and executive branches; and (xi) recognition of the principle of legality or 'due process of law' in the entire system of state administration [1].

Following up on the concept of the rule of law, there are things that must be considered. So according to Kant in order to be called a rule of law, something must have two main elements, namely:

1. There is a protection of human rights.

2. There is a separation of powers within the state. Thus, the emergence of the first type of rule of law which only acts as a separation if there is a dispute between its citizens in carrying out its interests which are referred to as: "State of Night Guard" or "Nachtwachter Staat" or "Police State" or "L'etat gendarme". In the next development, the rule of law as a liberal understanding or philosophy changed to the rule of law which organized people's welfare. To ensure that arbitrary acts and the ruling State do not take place in carrying out the welfare of the people, according to Stahal the two main elements above are added by two more basic elements that will be explained in the following points, namely:

3. Every State action must be based on law which was made first. The state can only act in the interests of the people if the law is already in place. The next development related to the law making is the long process and often the law neglects the needs of the community. So often the Government takes its own policy by making these Government regulations for the community. At first glance we see a violation of the rule of law's principle because the one who made the regulations is not the legislative body, but the executive. But this can be neutralized, for example, by giving the right to examine these regulations, to the Supreme Court and if they conflict, they should be repealed. Then if there is a dispute between the authorities and the people, the fourth element is made:

4. Administrative Justice to resolve the dispute. This court must fulfill two requirements, namely:

- a. Not impartial or biased even though the government is one of the parties.
- b. The people or officers must consist of experts and the related field [2].

The thing to note from the above idea is related to the basic principles of the rule of law where the rule of law is also very dependent on the concept of separation of powers. In the concept of separation of powers, a clarity of roles and duties from the executive, legislative and judiciary is needed.

Responding to the theory, one of the things that made a polemic was the government's policy in moving the capital. The Government of the Republic of Indonesia, led by President Joko Widodo in this case, has given

confirmation to carry out the transfer. One of the efforts is to make a decision on the Kalimantan region as the capital.

The transfer of the capital in the Republic of Indonesia is very possible because in the Constitution of the Republic of Indonesia and its Amendments are not explicitly regulated. In Chapter II paragraph (2) of the Constitution of the Republic of Indonesia, it is written: People's Consultative Assembly meets at least once every five years in the national capital. In the Constitution there is no article that states where and how the national capital is regulated. Departing based on the above, thus there is high flexibility in regulating including moving the national capital. In relocating the national capital, of course we need strong and fundamental reasons for the effectiveness of its functions [3].

However, the problem in the transfer of capital that should be a concern is what if it is seen from the perspective of the state system relating to the aspect of separation of powers. Certainly it is very interesting to do a study related to the concept of transferring capital policy from the theory of separation of power and the ideal concept of transferring capital policy from the theory of separation of power considering that there has been a perspective that the transfer of the capital to the president's prerogative rights.

## II. DISCUSSION

Transferring the capital that is led by President Joko Widodo has not only entered the level of discourse but has entered the policy level. Differences in interests have indeed become one of the background issues, which is the main problem in the conviction of the KTA's mother, but still, within this framework, the President of the Republic of Indonesia has established a policy of transferring the capital seriously.

The transfer of the capital of the Republic of Indonesia is possible as the Constitution of the Republic of Indonesia and its Amendments are not explicitly regulated. In Chapter II paragraph (2) of the Constitution of the Republic of Indonesia, it is written: People's Consultative Assembly meets at least once every five years in the national capital. In the Constitution, no article states where and how the national capital is regulated. Thus, there is high flexibility in regulating, including moving the national capital. In relocating the national capital, of course, we need reliable and fundamental reasons for the effectiveness of its functions [4].

This is what needs to be understood in terms of the conceptual theory of the separation of powers. The existence of the transfer of power is inseparable from how the separation of powers was carried out appropriately

and strategically in compiling the policy of transferring the capital of the Republic of Indonesia.

As Miriam Budiardjo said, political power is defined as the ability to influence public policy (government) both in its formation and its consequences, in accordance with the objectives of the holder of power itself. For example, in the government system (political system) that applies in Indonesia as a constitutional convention that the President or Mandatory MPR prepares materials for horizontal MPR provisions. If these materials are drafted as MPR statutes, then the MPR is made the provisions, the President/The MPR's mandate has influenced public policy (MPR policy or provisions) both the formation of the MPR's provisions and its consequences and certainly in accordance with the wishes of the President as the holder of government power [5]. So according to Kant to be called the rule of law must have two main elements, namely:

1. There is a protection of human rights.
2. There is a separation of powers within the state. Thus, the emergence of the first type of rule of law which only acts as a separation if there is a dispute between its citizens in carrying out its interests which is referred to as: "State of Night Guard" or "Nachtw achter Staff" or "State of Police" or "L 'tight gendarme". In the next development, the rule of law as a liberal understanding or philosophy was changed to the rule of law, which organized people's welfare. To ensure that there is no arbitrary action and the ruling state in carrying out the welfare of the people, according to Stahal, two more basic elements that will be explained in the following points, namely:
3. Every State action must be based on the law which was made first. The new state can act in the people's interests if there is a law for that action. Further development is not possible, because to make a law is a long process, and often under the law and the needs of the community, the government takes its policy by making the government regulation down. At first glance, we see a violation of the rule of law's principle because the one making the regulations is not the legislative body, but the executive. However, the matter can be neutralized, for example, by giving the right to examine these regulations, to the Supreme Court, and if they conflict, they should be repealed. Then if there is a dispute between the authorities and the people, the fourth element is made:
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Based on the argument above, the existence of a separation of powers is a strong proposition wherein in formulating the policy of moving the national capital must be placed in the portion of the legality of the location of the authority of power between the executive and legislative families in compiling the strategic policy of the transfer of the national capital.

The idea of the separation of powers, which is avoided by the existence of centralized power, is the emergence of insight where the nature of power is not given by one party. In the study by entering the 17th century, the deconstruction of the absolutism of royal power is more intense. Theorist Rousseau, further strengthened the concept of social contracts. Everyone's freedom and equality is the foundation of the formation of modern society. Social contract is not a historical fact, but a postulate to protect freedom and equality in society. In addition to Rousseau, Montesquien in the 18th century was instrumental in laying the foundation of the organization of power. The basic idea of trias politica is to prevent the accumulation of power in one hand and arbitrariness [7].

In the model of legal policy formulation, Indonesia recognizes a theory of separation of powers in which the law established in a state must reflect an appropriate legal formation system. This is the basis for the formation of the Indonesian state, which is influenced by the flow of continental European law, which emphasizes the nature of written law in carrying out the wheels of government in a country.

Locke responded to what was stated above distinguishing four functions of the state, namely the formation of laws (legislating), making decisions (judging), using the power internally in implementing the law (employing forces internally in the execution of the laws) and using the power -the power abroad in defending the community. Locke named the first function as legislative power, the second function was called executive power, the third function he called federative power, which included war and peace power and foreign power [8].

Besides that, what needs to be understood is that in Continental European countries, the conception of the rule of law has experienced quite rapid development, especially the development of the principle of legality which is always interpreted as a government based on law (*wetmatigheid van bestuur*) and then developed into a government based on law (*rechtmatigheid van bestuur*). The development of the conception is a consequence and the development of the conception of the material state

law, so that the government is entrusted with greater duties and responsibilities to improve the welfare of its citizens. However, the government is also given an increasingly loose space to move, which tends to give birth to the free government (*vrij bestuur*) accompanied by a loose policy space in the form of *freies ermesen* [9].

The principle of legality, referred to in this case, is in the principles of the rule of law, which should be implemented in Indonesia. Within the principle of legality, there is an implication that citizens must be free from arbitrary actions by government officials or officials. The government must submit to Positive legal rules. All actions of the government and its officials or officials must always be based on positive legal rules as a legal basis. According to Mochtar Kusumaatmadja, the implementation of the legality principle demands fulfillment:

1. Legal and constitutionality requirements demand that all actions of the government and its officials must rest on the rules of law in the constitutional framework.
2. The statutory requirements establish various sets of rules regarding the way the government and its officials take action so that citizens can know what they can expect from the government and its officials.
3. The statutory requirements only bind the community members after being enacted and do not have a retroactive force.
4. The principle of free justice that guarantees objectivity, impartiality, justice, and humanity.
5. The principle that a judge or court may not refuse to hear a case brought before him on legal grounds regarding the case being non-existent or unclear (the principle of *non liquet*) [10].

Based on the argument of legality above, the separation of powers in the state administration theory that is being implemented today leads to the authority of the government in taking the policy of moving the capital city of the country must be based on legality, which is a prior arrangement. This is what must be applied by the government in the transfer of state capital.

In addition, besides legality, the concept of the government in implementing the transfer of the state's capital is postulated on aspects of community interests or public legal awareness. Public legal awareness becomes the government's argument in implementing the law as well as possible.

If the rule of law is formed by paying attention to the legal awareness of the community, then it does not only do legal development fit into the paradigm of full human development - that is, building Indonesian society in accordance with human values and human rights and

democracy - but also in order to realize order as a basic condition (fundamental) for the existence of an orderly society. Because living in a state in a heterogeneous law state whose population such as Indonesia must pay attention to a life that can make it lasting because it has values of life that are obeyed. These values must be rooted and then transformed as a system of values that can be the glue for establishing a harmonious and mutually respectful living together [11].

Creating legislation in accordance with the law that lives in the midst of society as a living law is the right choice that can no longer be bargained, because every law that is born through mutual awareness of the community will become a social value that lives between them, and in turn will become guidelines for behavior, from which certain legal principles can be formulated and will further form basis of formulating legal norms. In addition, the law has function not only as a means of social control (social control), but the law also functions in an effort to move the community to behave in accordance with new ways to achieve a state of society that they aspire to. But on the one hand, development activities must also be well maintained and protected so that the changes that occur due to development itself continue to run in an orderly manner and as follow regulations. The two legal functions mentioned above, can be said to be a harmonious blend in creating laws that are in accordance with the conditions of a developing society such as Indonesia [12].

Based on the description above, if it is reviewed in the Natinal Legislation Program (Prolegnas) 2020 policy, the implementation of the relocation policy of the new national capital can be seen in the proposed legislation in 2020. This is the impression if the application of the principle of legality is not well implemented by the government regarding the relocation policy of the national capital.

Some Prolegnas policies implemented in 2020 are proposing:

1. Bill on Criminal Law Draft (RKHUP)
2. Bill on Social Protection and Assistance
3. Bill on Drug and Food Control
4. Bill on the Development of the Pancasila Ideology Direction
5. Bill on the National Post (Mail) and Logistics System
6. Bill on Amendments to Law Number 36 Year 2009 concerning Health / Draft Bill on National Health (omnibus law)
7. Bill on Customary Law Communities
8. Bill on Employment Creation (Omnibus Law)
9. Bill on the State Capital (omnibus law)

It can be seen that the contents of the Bill on the State Capital (omnibus law) can be interpreted if the

regulatory arrangements related to the transfer of new capital cities are proposed by the government through the national legislation program and may not be approved by the legislature the contents of the proposal.

Some laws that should have been changed in advance by the government in making the policy of moving the national capital include:

1. Law number 29 of 2007 concerning the provincial government of the capital Jakarta as the capital of the Republic of Indonesia,
2. Law Number 24 of 2007 concerning Disaster Management,
3. Law Number 3 of 2002 concerning National Defense,
4. Law Number 23 of 2014 concerning Regional Government and,
5. Law Number 10 of 2016 concerning Regional Elections.

It is ideal that the policy of transferring the national capital be accompanied by a clear legality to the regulations first, so that the impression of haste in organizing the country is properly carried out as it should be. On the other hand, clear regulation also guarantees legal certainty and legal order through the formation of statutory regulations by the state in protecting the people.

Legislation is a written rule made by an authorized agency for that, which is based on attributive authority or delegative authority is part of written law. Legislation as part of written law, contains binding norms that apply in general, which regulate the elaboration of basic laws in the life of society, nation and state [13].

HAS Natabaya also said that the advantages of legislation as part of written law can lead to legal be certain, easily recognized, and easy to make and replace them if they are no longer needed or inappropriate. Furthermore, Bagir Manan said that the use of legislation did not mean it did not contain problems, including:

1. The laws and regulations are inflexible. It is not easy to adjust the laws and regulations to the development of the community. Formation of legislation requires certain time and procedures. Meanwhile the society changes constantly even might be very quickly. As a result, there is a sort of gap between the laws and the community. In such circumstances, the community will grow their own laws in accordance with needs. For people who are unable to grow their own laws will be "forced" to accept legislation that is "outdated". The implementation of inappropriate laws and regulations can be felt as "injustice" and can be an obstacle to the development of society.
2. The laws and regulations are never complete to

fulfill all legal events or lawsuits, and this gives rise to what is commonly referred to as the legal vacuum or "*rechtsvacuum*". Perhaps what is appropriate is the legal vacuum (*wetvacuum*) not the legal vacuum (*rechtsvacuum*) this is in accordance with the teachings of Cicero *ubi sociates ibi ius*, then there will never be a legal vacuum. Every society has a mechanism for creating legal norms if "official law" is inadequate or does not exist [14].

Departing from this point, it is appropriate that in the future, the government's strategic policies in implementing policies in the rule of law must put in place mechanisms to implement the law accordingly. The existence of the principle of legality must be a guideline in formulating government policies, especially in the case of moving the national capital.

Learning in the future is that, of course, every policy must be done with legal steps, the principle of legality needs to be a guideline in every decision of government policy. This may not be a problem as news published in the mass media, one of the online media which states that Jokowi Officially Decides the Capital of the State to Move to East Kalimantan [15], whereas in terms of state of the Law, the existing Law has not yet been ratified to be changed.

### III. CONCLUSIONS

Based on the description above, the conclusion in this research is that the Policy of the transfer of capital, which is generally in Jakarta, is accompanied by changes in the Law relating to the national capital of Indonesia. One of the laws and regulations referred to is the Law of the Republic of Indonesia Number 29 of 2007 concerning the Government of the Special Capital Province of Jakarta as the Capital of the Unitary State of the Republic of Indonesia. If the government's commitment to run the rule of law, then the principle of the rule of law must be the main guideline in the policy of moving the capital city of the country, especially in the formation of laws involving executive and legislative organs, not just executives.

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