Neoliberalism and Legal Globalization: The Government's Fallacy on Implementing Pancasila and 1945 Constitution

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ABSTRACT

Neoliberalism which has manifested through various economic, political and governmental practices as a consequence of globalization, has become an excessive practice of globalization, until Pancasila as an element of *staatfundamentalnorm* (principles of fundamental State rules) which is the spirit, the spiritual principle for all regulations, has a special position, which by legal means cannot be changed by anything; its functions and mandates can be "castrated" through the government's political actions through the misguided practice of legal globalization. The law is in such a way as to be "disassembled" and "patched up" to ratify, realize, all government practices that are actually contrary to the mandate of the 1945 Constitution. Law no longer has the power as a norm, a guide, in controlling the practice of government freedom. Instead, the law is globalized to accommodate it. This is the real failure of the government, when the state's foundation can no longer be enforced, then whose interests has the government been fighting for? The writing of this journal is a normative research (doctrinal research) that is descriptive, analytical, and exploratory, which is intended to describe as accurately as possible the legal materials regarding government regulations related to the practice of globalization, such as the practice of privatizing State-Owned Enterprises (SOEs). From the results of this study, it can be concluded that the government's participation in economic globalization through the privatization of SOEs is very contrary to the norms and values regulated in Pancasila and the 1945 Constitution of the Republic of Indonesia as the *grundnorm*.

Keywords: *Neoliberalism, Globalism, Globalization, Legal Globalization, Privatization, State-Owned Enterprise, SOE.*

1. INTRODUCTION

1.1 Related work

In the perspective of neoliberalism, the character of the government is always seen as pessimistic, inefficient, and tends to fail in managing the economy. Limiting market mechanisms, and tends to lead to the political interests of the authorities and has the potential to give birth to a corrupt economy. So that it is believed, the private sector and individual entrepreneurs have better creativity and entrepreneurial initiatives in carrying out economic activities.

Neoliberalism was originally a political economy theory which stated that human well-being could best be achieved by liberalizing individual entrepreneurial liberties and skills and placing those freedoms and skills into an institutional framework characterized by strong private property rights, free markets, and free trade.[1] In its development, neoliberalism has now become part of a more extreme development ideology than before and is enforced by international financial institutions.

The position of the state in economic activity is to create and protect the existence of institutions characterized by strong private property rights, free trade, and free markets. For example, the role of the state is to guarantee the value and integration of currency, to build structures and functions of the military, defence, police and law needed to protect private property rights and to ensure that the market runs properly. If the market has not been created, the state must create the market, even with state intervention.[2] That is the role of the state in the perspective of neoliberalism, other than that, the state should not do anything else.

To spread this understanding, it is necessary to have international financial institutions that play a role in ensuring this neoliberalism. This is where the roles of the IMF, the World Bank, and the World Trade Organization in disseminating the understanding of neoliberalism to countries that use its services. The IMF, World Bank, and United States Treasury made the best set of rules for promoting development, the Washington Consensus.[3] The name and concept of the Washington Consensus was first introduced by John Williamson, an economist from the Institute for International Economics in 1989 and 1990.[4]

This is what underlies countries affected by the economic crisis and get help from international financial institutions, that's where the practice privatization will begin.

The origin of the implementation of privatization that hit countries in the world, especially developing countries, cannot be separated from the economic policy package known as the Washington consensus policy / neoliberal policy direction. As stated by Stigliz, Washington's policy is an economic policy formulated by the International Monetary Fund/IMF and the US Treasury in 1989 as an effort to save the country's economy from the pressure of a budget deficit and the threat of hyperinflation. Washington/ Neoliberal policies include the policy of eliminating subsidies, implementing privatization and implementing liberalization of the financial and trade sectors.[5]

A paradox that in fact the privatization of SOEs stems from the theoretical roots of government failure in managing the economy (*government failure*): monopoly theory, property rights theory, principal agent theory. And this is evident from a number of state-owned enterprises which were declared unhealthy because they experienced a deficit caused by mismanagement, abuse of power, and misappropriation of funds (corruption). The government also took privatization steps to reduce the budget deficit, support state revenues, create economic efficiency, reduce government intervention in the economy, and open up healthy competition in the economy. Furthermore, this trend is better known to the public by globalization.

The privatization of SOEs as a manifestation of the practice of economic globalization and neoliberalism, is currently not only happening in Indonesia, but is happening in almost all developed and developing countries. This trend began to develop when Prime Minister Margaret Thatcher for the first time privatized her SOES in the 1980s. Seeing the success he achieved, then this practice was followed by other countries and disseminated with various ideas and thoughts as well as liberal economic theories that support it. As if, it becomes a magic drug for countries that are affected by economic diseases and is believed to be able to improve and improve company performance. The 1997 monetary crisis was the first milestone in the emerging privatization wave, which was marked by the entry of the IMF to remedy the crisis in Indonesia.[6]

Law No. 19 of 2003 concerning SOEs defines privatization as the sale of Persero shares, either partially or wholly, to other parties in order to improve company performance and value, increase benefits for the state and society, and expand shares by the public.

As mandated in Article 33 of the 1945 Constitution, ideally SOEs are formed by the Government of Indonesia with the main aim of controlling the essential sectors that are the necessities of life for the needs of many people, so that in their management they can ensure the fulfilment of community welfare. Then, it is strengthened by the concept of a national economy compiled and organized on the principles of kinship and economic democracy; which substantially contains the meaning of, by, and for the people.

Economic globalization consists of the globalization of production and finance, markets and technology, organizational regimes and institutions, enterprises and labour. According to Cochrane and Pain, globalists believe that globalization is a reality that has real consequences for how people and institutions around the world operate. They believe that countries and local cultures will be lost in the face of a homogeneous global culture and economy. However, globalists do not share the opinion of the consequences for the process.[7]

Positive and optimistic globalists respond favourably to such developments and argue that globalization will result in a tolerant and responsible world society. Pessimistic globalists argue that globalization is a negative phenomenon because it is actually a form of western colonization (especially the United States) that forces a number of homogeneous forms of culture and consumption that appear to be true on the surface. Some of them then formed groups to oppose globalization (anti-globalization).[8]

One of the important positions and functions of Pancasila as a value system for the Indonesian nation is as a way of life (*Weltanschauung*). What is meant by the nation's view of life is the direction of all activities or activities of life and life in all fields. Pancasila as *Weltanschauung* is a unity, cannot be separated from one another, all the precepts in Pancasila are an organic unity.[9]

Pancasila is a reality in the life of the Indonesian people and has a rational and emotional connection with the law (science) in Indonesia. Pancasila as a holistic legal paradigm, implies that in processing and practicing a law, it must pivot, proceed and lead to the noble values of Pancasila, rooted in truth, and have become a national consensus to be used as guidelines in all national activities.

1.2. Contribution

In this paper, the authors collect material from various sources, both printed media, journals or related regulations, so as to find a process of discovery that has systematic, controlled, empirical characteristics and is based on appropriate theories and hypotheses. Thus, the results of this paper have the latest conclusions and there is an element of novelty from previous papers. Therefore, it

may be used as research material for those who need it, and as inputs for the government use on policies improvements.
The paper presents findings by comparing Indonesian's constitution and regulation to both theories and the economic & political decisions done by the government by privatizing most of State-Owned Enterprise was not a right and commendable thing to do.

1.3 Paper Structure

The rest of the paper is organized as follows. Section 2 stating the problem on the Law basis in terms of power abuse done by government. Section 3 presents a methodology framework applied on the research. Then, the framework is supported by theories as stated Section 4. Section 5 develops discussion and conclusion on the normative and empirical research. Finally, Section 6 presents recommendation and direction for improvements.

2. PROBLEM STATEMENT

Prior to the globalization of law, the government had full sovereignty to change or form legislation in the economic field. However, this sovereignty has now been lost, especially legislation in the fields of trade, investment services, intellectual property rights, and other provisions.
At the ideological level, the law with the Pancasila paradigm is a law full of values, called Pancasila values. Pancasila values are an integral part and become the content of every legal norm. Values which are the basis, principles, and the beginning of the birth of legal norms, can also be said to be the spirit or soul of legal norms. While at the empirical level, the influence of Western positivism, identifying legal (science) tends to be limited to knowledge (knowledge) about legal norms and skills (skills) in carrying out the law. In a narrow sense, the legal norm as a physical-empirical reality which is clearly concrete and definite. None other than the positive legal norms in the form of written legal norms as often referred to as statutory regulations. Thus, law (science) in Indonesia should include values, knowledge, and skills. This is a typical Indonesian legal ideology, which is full of spiritual values, material values, and vital values, but is universally objective.[10]
Regrettably, this continues to happen without any vocal and significant reaction from practitioners, theorists, and the public. Why does this condition continue to occur and become a "common" behaviour in politics, law and government economy? Therefore, the purpose of writing this journal is to answer to what extent is the practice of neoliberalism in Indonesia? What is the most crucial form of neoliberalism? What can the law do to restore the Pancasila ideology back on the Indonesian earth?

3. METHODOLOGY

The approach method used in writing this journal is a normative and empirical juridical approach that seeks to harmonize the applicable legal provisions in legal protection against other legal norms or regulations in relation to the application of these legal regulations in the field. The research specification used is descriptive-analytical, by describing the applicable laws and regulations in relation to legal theory and the practice of applying positive law related to the problem. This paper also looks at regulations related to legal, economic, government regulation, which have been regulated based on the *grundnorm,* and also looks at the factors that support the practice of neoliberalism as well as uncovers and analyses legal strengthening in regulating legal globalization and achieving the goal of sustainable economic law.
The implementation of materials and research data will be supplemented by Primary Data and Secondary Data. Primary data is obtained from constitution, laws and regulations, official legal institution, as main source of research, while Secondary Data is equipped from various complementary sources such as law literacy, legal research, libraries, books, and Google search engines.

4. LITERATURE REVIEW

In the opinion of Tony Prasetiantono, in academic discourse, the phenomenon of the privatization of SOEs has actually received adequate theoretical "umbrella" protection. Several arguments that support the privatization of SOEs are based on the theoretical roots of government failure to manage the economy (government failure), property rights theory, relationships principal-agent, and incentive problems.[11]
At least, there are 3 most classic theories as the essence and urgency of privatization:[12]
First, the *monopoly theory*, which simply says that SOEs in many cases often receive monopoly privileges. As a result, SOEs often fall into inefficient because of this privilege. Its advocates include Joseph Stiglitz and Steve H. Hanke.
Second, the *property rights theory*. In essence, private companies are owned by individuals who are free to use, manage, and empower their private assets. Consequently, they will push their efforts to be efficient. Private property rights have created incentives for company efficiency. On the other hand, SOEs are not owned by individuals, but by the "state". In reality, the notion of "state" is blurred and unclear, so that it is as if they are actually "ownerless", the result is clear, the management of SOEs lacks incentives to encourage efficiency.
Third, the *principal agent theory*. In this theory, it is revealed how the map of the relationship between the principal (the owner of the company, in the case of SOEs is the government) and the agent (the company, namely SOES). In the private sector, company management (as an

agent) must clearly be submissive and loyal to the owners or shareholders. While in SOEs, who wants to be loyal to? Here then the nuances of "politicization" become thick, because various political interests are actively playing, which in the end causes SOES to be exploited by politicians, so that SOES managers are forced to "serve" politicians, which interferes with their movement towards efficiency.

Peacok (1930) defines privatization as the process of transferring industrial ownership from the government to the private sector. Dunleavy (1980) defines privatization as a permanent transfer from the activities of producing goods and services carried out by state companies to the private sector. Clementi (1980) defines almost the same, namely as the process of transferring ownership of public sector companies to the private sector. Savas (1987) defines privatization as an act of reducing the role of the government or increasing the role of the private sector, especially in activities involving ownership of assets. Dubleavy defines privatization as the permanent transfer of goods and services production activities carried out by state companies to private companies or in the form of non-public organizations.[13]

James Petras and Henry Veltmeyer say that privatization is always associated with the denationalization of the economy. Privatization is a political act as a global economic strategy rooted in attacks on civil society and democratic politics, in violent interventions and arbitrary executive decrees. Privatization was carried out under imperialism-controlled international banks, with imperialist-funded consultants and government agencies completing the programme, setting prices and identifying potential buyers. The framework of privatization is driven by economic superpowers whose priority is to hit through the transfer of property which will undergo a transition to neoliberal capitalism and cannot be reversed.[14]

5. DISCUSSION AND CONCLUSION

From the above thought it can be said that privatization is a process of transferring ownership from what was initially managed by the state and public institutions to being transferred to individual and individual ownership. The transfer of ownership from the public to private means also results in the transfer of power and benefits of a business. Privatization requires that power and benefits are owned by individuals.

The privatization process must meet two criteria, namely ***ethical*** and ***strategic***. Ethically, it means that privatization should not mean "*foreignization*". Not because we don't believe in foreigners, or anti-foreigners, or xenophobia, but so that privatization goes according to the nature of privatization, which is to invite the Indonesian people to own SOEs. Strategically, the more ideal privatization is the one that starts with restructuring, profiting, then privatization.[15]

If we examine in depth the mandate in Article 33 of the 1945 Constitution, it turns out to be very contrary to the idea of free trade, efficiency or globalization. Some terms are closer to social democracy, for example, togetherness, sustainability, environmental insight, and independence. These values emerged as a reaction to global economic developments. Even in paragraph (4) it is also called "economic democracy". However, the term actually existed in the 1945 Constitution before the amendment, even though it was an explanation of paragraph (1) Article 33. The term is actually an explanation of what is meant by a joint effort based on the principle of kinship. In principle, this principle is the main substance of the Pancasila economic system.

Referring to the substance of the Pancasila Economic System in the 1945 Constitution and Pancasila, it is clear that in practice it will greatly limit market freedom, business competition, and limit foreign powers to be able to entrench and control the Indonesian economy. However, in the failure of the government to overcome the economic crisis so as to open the door for the IMF to provide financial assistance, there was an exchange transaction of agreements contained in the LoI (Letter of Intent) where the concept of privatization was included as part of the agreement.

The principle of privatization and the criteria for companies that can be privatized are regulated in articles 75 to 78. But looking at the reality, even healthy and profitable SOEs are not spared from the privatization steps taken by the government, without following the directions of the privatization process that previously had to be preceded. with restructuring and profiting. This is certainly disappointing, because it is clear that in practice it is not in accordance with the aims and objectives of the privatization of SOES and is no longer in line with the concept of the mandate of the 1945 Constitution.

According to Prastiantono, privatization in reality is not just a package built to address fiscal problems that occur in several countries. However, the main component of a new governance paradigm called neoliberal is the demand for efficiency and effectiveness of government which is currently considered below standard and often under budget pressure.[16] Privatization is a corporatist paradigm, created to build market mechanisms, profit orientation and minimize the role of the state in managing the economy and natural resources.

The privatization step taken by the government for SOES is the obligation of the LoI with the IMF. Therefore, the implementation of privatization in Indonesia is influenced by two aspects. Namely external aspects and internal aspects. The external aspect is the influence of the IMF and the global influence towards a free market which demands the absence of monopolies and more efficient and effective companies (states) in order to compete both in the domestic market and in the international market. Meanwhile, the internal aspects are the poor performance of SOEs, which often facilitate the occurrence of corruption, collusion and nepotism, the lack of concentration of effort in managing SOEs and the heavy burden of the government budget to support these SOEs.[17]

These aspects, of course, show the poor inculcation of Pancasila values in the nation's character through the poor

performance of the above SOEs. Very contrary to the principles of Pancasila as the main source of legal force. Systematically-hierarchically, Pancasila places the first principle of "Belief in One Supreme God" to the fifth principle of "Social Justice for All Indonesian People". This hierarchy is an embodiment of the value of "Belief in the One Supreme God" as the axis and animates the entire order of values, norms (rules); which is then manifested in the form of other laws and regulations. Therefore, the cultivation of law by any human (legislator) must be oriented to the pleasure of God Almighty as a source of absolute justice; not for personal interests or for certain groups, can be implemented and accounted for to God Almighty.

6. RECOMMENDATIONS

Globalization in the context of legal developments in Indonesia, or what we call legal globalization, should be a form of legal ability to develop, strengthen, and be efficient, in regulating and controlling global developments that are able to erode the values and order of the nation and state. Not being a tool capable of "outsmarting" all forms of globalization; especially in the economic and political fields.

Revolutionary legal development is to consciously and fundamentally change the economic legal system which has so far been of "liberal" quality and under the control of developed countries into an economic law system of "kinship (*ukhuwah*)" or "democracy" quality, as stated in the values -the values of Pancasila and Article 33 of the 1945 Constitution. A 'family' or 'populist' quality economic law system is actually a legal system that does not just rely on the rule of law but pays more attention to the rule of morals and the rule of justice. The legal system is then reciprocally integrated with the Pancasila economic system. The economic law development strategy in Indonesia needs to also pay attention to the concept of sustainable economic law development, which means that development is no longer just 'unpacking' the articles in a law or making new laws, but also paying attention to and empowering the carrying capacity of other aspects, which are:

- legal education
- reform of legal substance
- authoritative and efficient dispute resolution mechanisms,
- empowerment of business ethics,
- fostering a nationalist spirit in the members of the Legislative Assembly, the
- commitment of the president and vice president, whose activities are carried out in a connected, joint, and continuously support each other.

Therefore, a typical Indonesian legal methodology is needed which lies in the object of cultivation, the method/method of cultivation and the purpose of cultivation. Overall, Indonesian legal methodology should be able to assist a number of theories to explain theological, metaphysical, and physical realities, both those that run in an orderly and orderly manner or those that are chaotic, anomalous and even anarchic. A complete and comprehensive explanation, both outward and inward aspects, both essence and existence, both meaningful and symbolic of the reality studied by legal science, so that from time to time the development of law in Indonesia is getting closer to absolute truth and justice. All forms of irregularities (anomalies) that take place in the form of various legal issues that have failed to be resolved by conventional legal science, may be able to awaken us to the need to return to the original legal paradigm belonging to the Indonesian nation, Pancasila.[18]

The function and position of law in the Pancasila Economic System must act as genuine science to be able to reach as deep as possible regarding the order of life that is based on absolute justice. Indonesia as a state of law (*rechtstaat*) then "social justice for all Indonesian people" will only be achieved if the law practiced in the economic system is the correct law, the law laden with the values of Pancasila.

If the function and legal position cannot be returned sincerely to the frame of Pancasila, then the entire arrangement of laws and regulations to the implementation of policies related to the privatization of SOEs will only lead chaos and lead to anarchy. Because values, norms and facts do not run harmoniously and consistently. As the adage "*Solus publica suprema lex*" (public interest is above everything, including above the law). In line with the adage conveyed by Cicero: "*Ubi societas ibi justiciar*" (where there is society and life, there is justice/law).

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