

**THE ROLE OF LEGAL PHILOSOPHY IN THE FORMATING OF
PROVINCIAL REGULATIONS**

***PERANAN FILSAFAT HUKUM DALAM PEMBENTUKAN
PERATURAN DAERAH PROVINSI***

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ABSTRACT

Indonesia is a democracy because its people are involved in policy-making. As a state of law, both rulers and citizens, as well as the nation itself are subject to the law. All attitudes, actions taken must be in accordance or based on the laws and regulations that apply in the Unitary State of the Republic of Indonesia. The emergence of laws and regulations is the result of the translation of public policy in the midst of the survival of a democratic society into a normative language order. Legal products are regulatory measures that need to be integrated into the regional autonomy system. High quality local legal products mean that these legal products include the preparation of material and technical regulations to solve problems and meet community needs. The formation of local legal products pays attention to the views, awareness, and legal ideals of life, including the spiritual atmosphere and the Indonesian state philosophy of Pancasila and the 1945 Constitution of the Republic of Indonesia. Regional legal products must be based on considerations and reasons that show that the direction of regional regulation is more democratic towards the formation of regional legal products that are really needed by the community. The normative legal research method is based on the idea of describing the research.

Keywords : Legal Philosophy, Rule of Law, Regional Legal Products.

ABSTRAK

Indonesia adalah negara demokrasi karena rakyatnya terlibat dalam pembuatan kebijakan. Sebagai negara hukum, baik penguasa maupun warga negara, serta bangsa itu sendiri tunduk pada hukum. Segala sikap, tindakan yang diambil harus sesuai atau berdasarkan dengan peraturan perundang-undangan yang berlaku di Negara Kesatuan Republik Indonesia. Munculnya peraturan perundang-undangan merupakan hasil dari penerjemahan kebijakan publik di tengah-tengah kelangsungan hidup masyarakat yang demokratis ke dalam tatanan bahasa yang normatif. Produk yang sah merupakan langkah regulasi yang perlu diintegrasikan ke dalam sistem otonomi daerah. Produk hukum lokal yang bermutu tinggi berarti produk hukum tersebut meliputi penyusunan regulasi bahan dan teknik untuk memecahkan masalah dan memenuhi kebutuhan masyarakat. Pembentukan produk hukum daerah memperhatikan pandangan, kesadaran, dan cita-cita hukum kehidupan, termasuk suasana spiritual dan falsafah negara Indonesia dari Pancasila dan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Produk hukum daerah harus didasarkan pada pertimbangan dan alasan yang menunjukkan bahwa arah regulasi daerah lebih demokratis terhadap pembentukan produk hukum daerah yang benar-benar dibutuhkan oleh masyarakat. Metode penelitian hukum normatif didasarkan pada pemikiran untuk mendeskripsikan penelitian.

Kata Kunci : Filsafat Hukum, Negara Hukum, Produk Hukum Daerah.

I. INTRODUCTION

Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that the Indonesian nation is a proud nation, which emphasizes that Indonesia is a democratic country because it encourages its citizens to participate in political activities.¹ Indonesia is a country of laws. The rule of law is severe that various aspects of regulations are mandatory and severe penalties are imposed for violations. A strong country is a country that has rules.² Of course, this rule limits all forms of authority. Until finally justice and balance can be realized in social life.

As a state of law, both rulers and citizens, as well as the nation itself are subject to the law. All attitudes, actions taken must be in accordance with or

¹ <https://docplayer.info/109980231-Jurnal-terakreditasi-volume-3-nomor-5-juli-asosiasi-pendidikan-tinggi-ilmu-komunikasi-issn-print-issn-online.html>

² <https://osf.io/kcns4/download?format=pdf>

based on the laws and regulations that apply in the Unitary State of the Republic of Indonesia.³

Laws and regulations are written regulations that generally contain legally binding norms stipulated by authorized bodies or employees through the mechanism of drafting laws and regulations based on Law Number 12 of 2011 concerning the Formation of Laws and Regulations. The formation of laws and regulations is part of the performance of public services to the community, in accordance with the general principles of good governance.⁴

The process of forming laws and regulations is a product of the translation of public policy into normative language in a democratic legal society. As stipulated in Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the provincial and regional governments regulate and control their own governance in accordance with the principle of autonomy and the obligation to support the government.

The implementation of regional autonomy as a form of regional realization is responsible for the regulation, development and research of potential information sources in each region. Local governments are empowered in accordance with the obligations of Article 18 paragraph (6) of the 1945 Constitution of the Republic of Indonesia and Law Number 23 of 2014 concerning Local Government. Local governments have the right to issue Regional Regulations and regulations to carry out autonomous and other additional missions. Following the aspirations and needs of the community, as long as it is in line with the public interest and higher regulations.⁵

Regional autonomy makes full use of the principles of autonomy in the sense that local governments are given the authority to control and regulate all governance other than the central government, including the formation of regional legal outcomes. The provincial government involved is the provincial government and the legislature. Legal products are regulatory measures that need to be integrated into the regional autonomy system. High quality local legal products mean that the legal products include the preparation of regulatory materials and techniques to solve problems and meet community needs.

In the formation of Regional Regulations, the regulations formed are a reflection of the spiritual and philosophy of the Indonesian state which comes from Pancasila and the 1945 Constitution of the Republic of Indonesia.

The relationship between legal philosophy and the formation of Regional Regulations is that legal philosophy plays a role in guiding the formation of

³ https://www.bphn.go.id/data/documents/ae_peraturan_perundang-undangan_peninggalan_kolonial_belanda.pdf

⁴ Hartono. (2012). Pengkajian dan Penelitian Hukum dalam Menunjang Pembentukan Peraturan Perundang-Undangan di Daerah. Bogor: Makalah. p. 3.

⁵ <https://www.ayobandung.com/regional/pr-79668707/ini-rincian-pendapatan-dan-belanja-apbd-cirebon-2020>

regional legal products in a more democratic direction and directing the formation of legal products that are really needed by the community.

The problem of legal philosophy that arises in constitutional life in relation to law and power is that the law is obliged to be obeyed, but in reality the law is not obeyed in the life of a legal society the less support is needed for power. Law is a source of power in the form of power and authority in exercising negative power. Because power stimulates transcendental behavior that transcends the authority that holds it. Law without power is wishful thinking, and power without law is dzolim. Law is closely related to social and cultural values.⁶

In order to accelerate the realization of the public interest through improved services, empowerment, and community participation in connection with the implementation of government tasks delegated by the Central Government to the Regional Government based on the provisions stipulated in Law Nomor 23 of 2014 concerning Regional Government. the division of affairs submitted by the Central Government which is the basis for the implementation of regional autonomy provides the authority to regulate and manage its own government affairs.

II. METHOD

The research conducted is library research or document research aimed at or carried out only on laws and regulations relevant to the problem under study. In addition, sociological and historical research is also carried out so that the research is comprehensive, because the research conducted requires data support, so a community approach must be taken. The normative legal research method was chosen based on the consideration that the purpose of the research is to describe the object under study. As support, legal history and comparative law approaches were used. This approach is used, considering that the provisions regarding the implementation of Regional Government and culture cannot be separated from the historical background. In addition, this research cannot be separated from the point of view of legal analysis, as well as the scope of freedom of action independently by the Regional Government.

III. ANALYSIS AND DISCUSSION

a. Definition of Philosophy and Philosophy of Law

Philosophy in the Big Indonesian Dictionary has many meanings. The first definition of philosophy is to know and investigate the nature of everything that exists, its causes, origins, and the causes of laws. The second definition of philosophy is the theory underlying the essence of thought and

⁶ <https://media.neliti.com/media/publications/97436-ID-hubungan-hukum-dan-kekuasaan.pdf>

activity, the third is science with logic, aesthetics, metaphysics and epistemology, and the fourth understanding is philosophy.⁷

The famous philosopher Plato (427-347 BC) defined philosophy as the science interested in achieving original truth, and Aristotle (382-322 BC) defined philosophy as another field of science, namely the understanding that metaphysics is a science that includes existing truth, logic, ethics, economics, political science, and aesthetics.

In general, the concept of philosophy is a science that seeks to achieve the original nature of truth, and its thinking is characterized by: 1) Reasonable, systematic, consistent and integrated. 2) About macro and microcosm. 3) Both sensory and non-sensory. The essence of truth demanded by philosophy is the truth about life and the nature of life, not only in theory but also in practice.⁸

Philosophy has several main areas of knowledge. The main areas of philosophy are ontology (metaphysics), epistemology, value (value theory), and morality (ethics). Metaphysics is concerned with the nature of things. Epistemology is concerned with the knowledge that humans acquire. Value science, or value theory is a field of philosophy that specifically discusses the nature of value in relation to something. Meanwhile, moral philosophy discusses values related to human behavior, which includes good and bad, right and wrong.⁹

Purnadi Purbacaraka & Doerjono Soekanto list nine legal implications, namely:¹⁰

1. Knowledge, which is knowledge that is organized systematically based on thinking power.
2. Discipline. It is a system that teaches about the reality or phenomena encountered.
3. Norms, which are guidelines or standards for appropriate or expected attitudes or behaviors.
4. Legal Order, namely the arrangement and expiration date of legal norms that apply in writing at a certain time and place.
5. Officers, namely people who are closely related to law enforcement officers.
6. Determination of the ruler as a result of the discretionary process.
7. Governance Process, the process of interrelationship between the main elements of the national system.
8. Stable or normal behavior, i.e. suspension of repetitive behavior for the purpose of peace.

⁷ <https://kbbi.web.id/filsafat>

⁸ Silde Muchsin, yang disampaikan pada mahasiswa Pascasarjana Program Magister Hukum Untag (Universitas 17 Agustus) Surabaya angkatan ke 18 tanggal 11 November 2007.

⁹ Abdul Ghofur Anshori, 2009, *Filsafat Hukum*, Yogyakarta: Gadjah Mada University Press, p. 1.

¹⁰ Darji Darmodiharjo dan Shidarta, *Pokok-Pokok Filsafat Hukum (Apa dan Bagaimana Filsafat Hukum Indonesia)*, PT. Gramedia Pustaka Utama, Jakarta, Cet. VI Mei 2006, p. 11

9. Values, the structure of abstract concepts about what is considered good and bad.

Philosophy of Law examines law speculatively and critically¹¹ This means that the philosophy of law tries to examine the value of propositions that can be classified as law:

1. The philosophy of law is speculative because it raises questions about the nature of law.
2. Legal philosophy seeks to critically consider existing legal concepts in terms of consistency, responsiveness and function.

In simple terms, legal philosophy can be interpreted as a branch of behavioral or ethical philosophy. In other words, because legal philosophy is a science that studies legal philosophy philosophically, the object of legal philosophy and its objects are studied in depth to the core or foundation called essence.

b. Law and Law Formation

As a state of law (Rechtstaat), Indonesia basically aims to implement legal protection. Law and the image of law (justice) are values and cultural phenomena as a whole. The application of legal philosophy in the life of the nation has different characteristics depending on the philosophy of life of each country (Wealtanchauung). To explain: a state without ideology is a failure. The basic norm is the national worldview (Wealtanchauung), which is generally a national philosophy or ideology.¹² The fundamental values that underlie the ideals and moral principles of the Indonesian nation are contained in Pancasila, which is a means of unifying society and directing the nation's motivation to realize the ideals of nation and state in Indonesia.

The formulation of Pancasila in the fourth paragraph of the 1945 Constitution of the Republic of Indonesia is the source of all sources of law in Indonesia which is the product of the Legal Philosophy of the Indonesian state, the emergence of Pancasila is based on the many ethnic, racial, background, and ideological differences that exist in society, therefore the

¹¹ Dalam hal berfilsafat hukum secara spekulatif dan kritis ini nampaknya telah dipraktekkan oleh kalangan Kristiani pada era lampau, dalam kajian sejarah berfilsafat hukum memunculkan interpretasi, termasuk interpretasi pada teks hukum maupun pada kitab suci, diantaranya menggunakan metode hermeneutika, yang lebih lanjut memunculkan problem teks kitab suci pada abad-abad pertama Masehi, dimana terhadap teks-teks kitab suci itu, kalangan Kristiani mencoba memberikan dua macam penafsiran, yaitu *penafsiran simbolis* dan *penafsiran harfiah*. Kedua macam interpretasi teks ini tampil dalam kontroversi antara Mazhab Antiokhia dan Mazhab Aleksandria, yaitu dua pusat agama Kristen pada awal perkembangannya. Mazhab Antiokhia menafsirkan kitab suci secara harfiah, sedangkan Mazhab Aleksandria secara alegoris atau simbolis. Kemudian pada generasi selanjutnya agama Kristen terpecah karena perbedaan prinsip-prinsip hermeneutika. Disatu sisi golongan Protestan memegang prinsip *sola scriptura* (hanya kitab suci), pada sisi yang lain Gereja Katolik memegang prinsip tradisi, dimana kitab suci ditafsirkan dalam terang tradisi.

¹² Hans Kelsen, 1998, *General Theory of Law and State*, London University, p. 118

Legal Philosophy was created to unite Indonesian society in one nation, one unit, one language, and the principle of family.

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia explicitly states that “The State of Indonesia is a State of Law. The idea of the rule of law is built by developing the rank of law itself as a functional and equitable system, developed by organizing the superstructure and infrastructure of political, economic and social institutions that are orderly and organized, and fostered by building an irrational and impersonal legal culture and awareness in the life of society, nation and state.”¹³

The definition of law can be grouped into two, namely law in the form of laws and law in the sense of law enforcement implementation by law enforcement officials. The role of law is important, namely as a means of implementing decisions made by the state. One aspect of legal rationality is that the law becomes more formal and procedural, with all the consequences of being increasingly accepted and used.¹⁴

According to E. Uterecht, law is a set of living orders (commands or prohibitions) that regulate social order, which are obeyed by members of society and can be subject to government action if violated.¹⁵

Based on the opinion of O. Notohamidjojo, the definition of law is all written and unwritten rules between national communities and nations, based on two principles of justice and ease of use for social order and peace.¹⁶

The legal definition of law is a right that is established in legal form by the government of the country. The law acts as a protector of human interests, the law must be enforced professionally. The notion of law can run normally, peacefully, and orderly. Criminal charges require legal certainty, namely reasonable protection against arbitrariness. The law can effectively protect the rights and obligations of each individual, and strong legal protection is generally enforced. Order, security, tranquility, prosperity, peace, truth, and justice.¹⁷

c. The Role of Legal Philosophy in the Formating of Provinsial Regulations

The applicable law is described as formal, rational, systematic, generally applicable to all citizens, procedural, operated by state bureaucrats,

¹³ Prof. Dr. Jimly Asshiddiqie, S.H. https://www.pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf

¹⁴ Satjipta Rahardjo, *Penegakan Hukum Suatu Tinjauan Sosiologis*, cetakan ke II, Yogyakarta: Genta Publishing, April 2011, p.95.

¹⁵ Prof. Chainur Arrasjid, S.H., 2000, *Dasar-Dasar Ilmu Hukum*, Sinar Grafika, Jakarta, p. 21.

¹⁶ Abdul Ghofur Anshori, *Mata Kuliah Filsafat Hukum pada Program Pasca Sarjana Magister Hukum Universitas Janabadara Yogyakarta Tahun Akademik 2011-2012*.

¹⁷ Soejadi, 2003, *Refleksi Mengenai Hukum dan Keadilan, Aktualisasinya di Indonesia*, Universitas Gadjah Mada, Yogyakarta p. 5.

financially financed in writing, and autonomous.¹⁸ To realize Indonesia as a state of law, the state is obliged to organize national legal development, which is carried out within the scope of domestic legal order in a planned, integrated and sustainable manner, rights and obligations to protect all Indonesian people according to the Constitution of the Republic of Indonesia Year 1945. Based on Article 18 paragraph (6) of the Constitution of the Republic of Indonesia Year 1945, the Central Government gives authority to the regions to implement regional autonomy in an effort to promote it. Realizing community welfare through improved services, empowerment, and community participation.

Law formation in Indonesia is regulated by type and hierarchy in Law Number 12/2011 on the Formation of Legislation. In the formation of law must include three theories, namely *Materiele Theorie*, *Formile Theorie*, and *Filosofische Theorie*.¹⁹

Article 2 and Article 3 of Law No. 12/2011 on the Formation of Legislation regulates the source of Indonesian state law and the legal basis of legislation.

In an effort to implement regional governance, it is directed to accelerate the realization of community welfare through improved services, empowerment, and community participation, as well as increasing regional competitiveness by taking into account the principles of democracy, equity, justice and the uniqueness of a region within the system of the Unitary State of the Republic of Indonesia.

This is a form of efficiency and effectiveness of local government administration that needs to be improved by further considering aspects of the relationship between the Central Government and the regions and between regions, as well as the opportunities and challenges of global competition in the unity of the state administration system.

In accordance with the mandate of Article 18 paragraph (6) of the 1945 Constitution of the Unitary State of the Republic of Indonesia and Law Number 23 of 2014 concerning Regional Government, there is authority given to the Regional Government which has the right to establish Regional Regulations and other regulations to implement autonomy and assistance tasks in accordance with the aspirations of the community and the needs of the region as long as it does not conflict with the public interest and higher regulations.

¹⁸ Subiharta, *Moralitas Hukum Dalam Hukum Praksis Sebagai Suatu Keutamaan (Legal Morality in Practical Law as a Virtue)*, Jurnal Hukum dan Peradilan, Volume 4, Nomor 3 November 2015 p. 390, <https://jurnalhukumdanperadilan.org/index.php/jurnalhukumperadilan/article/download/53/64>

¹⁹ Muchsan, *Materi Kuliah Penemuan Hukum pada Program Pasca Sarjana Magister Hukum Universitas Janabadra Yogyakarta Tahun 2011-2012*.

The region as a legal community unit that has autonomy is authorized to regulate and manage its region according to the aspirations and interests of its people as long as it does not conflict with the national legal order and public interest. To provide wider space for regions to regulate and manage the lives of their citizens, the Central Government needs to pay attention to local wisdom in formulating policies, and vice versa, regions have Regional Regulations and others. paid to regional policy makers in the form of policies. Thus, there is a balance between synergistic national interests, while maintaining the conditions, uniqueness, and local wisdom in managing the entire government.

In essence, regional autonomy is a legitimate community unit that is empowered by the Central Government and in its implementation regulates and controls the work of the government itself, which is delegated to the region by the regional head and the regional legislature.

As a consequence of the position of the Regional People's Representative Council as an element of the Regional Government, the composition, position, role, rights, obligations, duties, authorities, and functions of the Regional People's Representative Council are not regulated in several laws but are sufficiently regulated in this law as a whole to facilitate integrated arrangements.

Regional Regulations made by Regions only apply within the boundaries of the jurisdiction of the Region concerned. However, the Regional Regulations stipulated by the Region must not contradict the provisions of laws and regulations of a higher level in accordance with the hierarchy of laws and regulations. In addition, Local Regulations as part of the system of laws and regulations must not conflict with the public interest as regulated in the rules for the preparation of Local Regulations.

Regional Regulations consist of Provincial Regional Regulations and Regency / City Regional Regulations. The formation of Provincial, Regency / City Regional Regulations must include the stages of planning preparation, division, stipulation and enactment which are guided by the provisions of laws and regulations.

Provincial Regional Regulations are laws and regulations formed by the Provincial House of Representatives with the joint approval of the Governor. Provincial Regional Regulations are carried out in one Regional Legislation Program based on the provisions of laws and regulations and local content material in accordance with the provisions in Law Number 12 of 2011 concerning the Formation of Legislation *jo*. Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation.

In this case, further arrangements for the formation of Provincial, Regency / City Regional Regulations have been regulated in more detail in the Minister of Home Affairs Regulation Number 80 of 2015 concerning the

Formation of Regional Legal Products *jo.* Regulation of the Minister of Home Affairs Number 120 of 2018 concerning Amendments to Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Formation of Regional Legal Products.

Regarding the provisions regarding the content material that must be contained in the formation of Provincial Regional Regulations, Article 5 paragraph (5) of the Minister of Home Affairs Regulation Number 80 of 2015 concerning the Formation of Regional Legal Products, Provincial Regional Regulations contain content material to regulate:

1. Provincial authority.
2. Authority that is located across districts/cities in one province.
3. Authority that is used across districts/cities in one province.
4. Authorities whose benefits or negative impacts are regencies/cities within one province.
5. Authorities where the use of resources is more efficient when exercised by the provinces.

The drafting of Provincial Regional Regulations by the Provincial House of Representatives applies *mutatis mutandis* to the drafting of Regency/City Regional Regulations by the Regency/City House of Representatives.

IV. CONCLUSION

From the description above, we can conclude that the provincial government has the authority to regulate regional development based on the characteristics of the region and can produce prosperity and welfare of the community. To regulate the entire government structure of a region, it is necessary to make laws and regulations that meet the needs of the community. in terms of the enactment of state procedures, this must be included to regulate the region in accordance with the law. The stage of ratification of state regulations is clearly stipulated in Law Number 12 of 2011 concerning the Formation of Legislation *jo.* Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation which is then delegated by Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Formation of Regional Legal Products *jo.* Regulation of the Minister of Home Affairs Number 120 of 2018 concerning Amendments to Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Formation of Regional Legal Products.

The role of legal philosophy in the formation of national order is based on the application of legal philosophy knowledge, and the objects of legal philosophy and these objects are studied in depth to the core or foundation called essence. The formation of Regional Regulations by the Regional Government can be a guide for the systematic and orderly running of the Regional Government.

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