



Working Paper Series No.036

**The Stagnation of Law and Democracy in
Regional Government in Indonesia**

SATRYA Pangadaran MARPAUNG

Universitas Pelita Harapan

spm1084@yahoo.com

ASLI Visiting Fellow
(28 January 2013 to 27 February 2013)

December 2014

The **ASLI Working Paper Series** is published electronically by the Asia Law Institute, whose Secretariat is based at the Faculty of Law, National University of Singapore.

© Copyright is held by the author or authors of each Working Paper. ASLI Working Papers cannot be republished, reprinted, or reproduced in any format without the permission of the paper's author or authors.

Note: The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the Asia Law Institute or of the National University of Singapore.

Citations of this electronic publication should be made in the following manner: Author, "Title," ASLI Working Paper, No. #, Date, www.law.nus.sg/asli/pub/wps.htm. For instance, Chan, Bala, "A Legal History of Asia," ASLI Working Paper, No. 101, December 2010, www.law.nus.sg/asli/pub/wps.htm.

Asia Law Institute

c/o Faculty of Law,

National University of Singapore

Eu Tong Sen Building

469G Bukit Timah Road,

Singapore 259776

Tel: (65) 6516 7499

Fax: (65) 6779 0979

Website: <http://law.nus.edu.sg/asli>

Facebook: <https://www.facebook.com/pages/Asian-Law-Institute/438342726236158?ref=hl>

Email: asli@nus.edu.sg

The Asian Law Institute (ASLI) was established in March 2003 by a group of leading law schools in Asia. Its goal is to facilitate academic exchanges as well as research and teaching collaboration among colleagues from the thirteen founding institutions. The establishment of ASLI stems from the recognition that the diversity of legal traditions in Asia creates an imperative for Asian legal scholars to foster greater engagement with each other through collaborative research and teaching. The acronym "ASLI", which means "indigenous" in the Malay and Indonesian languages, represents the commitment of the founding institutions to establish a truly home-grown law institute in Asia. The ASLI membership has grown beyond the founding members and includes 35 new member institutions.

THE STAGNATION OF LAW AND DEMOCRACY IN REGIONAL GOVERNMENT IN INDONESIA

SATRYA PANGADARAN MARPAUNG*

ABSTRACT:

Indonesia is a unified state that recognises democracy and the rule of law. The second amendment to Article 18 of the *Constitution of the Republic of Indonesia 1945*, which relates to regional autonomy, has done much to further both these ideals. However, it is difficult to maintain the democratic process where regionally elected officials are concerned. In addition, regional elections tend to be influenced disproportionately by ethnic and cultural groups. This has a negative effect on the values associated with real democracy. Moreover, regional leaders have a great deal of authority in managing their areas (through taxes and levies) and expend a considerable amount of money on regional elections, a problem which is compounded by widespread corruption. This paper will examine some of the problems of regional government which have an adverse impact on democracy.

I. INTRODUCTION

Law and democracy are two important aspects in the development of a state. It is said that proper development of law and democracy will lead to progress of the state. A state that upholds the rule of law must have a constitution, which functions as a limitation of power on those in authority to prevent them from acting arbitrarily. Almost all states around the world have both a written and an unwritten constitution. The word constitution comes from the latin word *constitutio*. It is defined by K.C. Wheare¹ as a codification of rules that establish and regulate the government. The principle of democracy should underlie a constitution such that the constitution not only functions as a codification of rules, but also promotes the sovereignty of the people. A state's constitution serves as an indication of whether the state is a democracy. It also provides for the state's form of government, according to K.C. Wheare's definition. For example, Article 1(1) of Indonesia's constitution, *Undang-Undang Dasar*

* Fakultas Hukum Universitas Pelita Harapan. spm1084@yahoo.com.

¹ See KC Wheare, *Konstitusi-Konstitusi Modern* (Bandung, Indonesia: Nusa Media, 2005), hal 1.

Indonesia 1945 states: The State of Indonesia shall be a unitary state in the form of a Republic.² A republic is a form of government in which power resides in the people and the president is the head.³ In line with the definition of a republic, Article 1 (2) of *UUD RI 1945* states that sovereignty is vested in the people and implemented pursuant to the constitution. Article 1 (3) of *UUD RI 1945* emphasises that “The State of Indonesia shall be a state based on the rule of law.” These provisions reflect constitutional democracy. Democracy as defined by Abraham Lincoln is “government of the people, by the people, and for the people”. According to Carl J. Friedrich, constitutionalism is the idea that government can and should be limited by its legal powers. These limitations ensure there will be no abuse of authority.⁴ At the same time, the idea of popular sovereignty means that if the government oversteps its constitutional limitations, the people have the power to void the authority of the government. The principle of rule of law means that state power is limited by law, legal certainty and justice, which leads to the existence of democratic legitimacy.

Indonesia’s intention to participate and advance in the democratic process is evidenced by amendments on regional government in Article 18 of *UUD RI 1945*, which provides that Indonesia is a unitary state consisting of provinces, counties and cities, with each regional government having the right to manage its own affairs of government in accordance with the principles of autonomy and the duty of providing assistance. This mechanism is known as regional autonomy. According to *Law Number 32, Year 2004 on Regional Government*, there are three principles in the framework of regional autonomy, namely decentralisation, deconcentration and assisting task. Decentralisation⁵ is the handing over of authority by the central government to autonomous regions to control and manage administrative affairs within the system of the Republic of Indonesia. Deconcentration⁶ is the transfer of government authority by the government to governors as representatives of the government or vertical agencies in certain areas. The meaning of assisting task⁷ is the assignment from the government to the region or village, from provincial government to regencies or municipalities as well as from the regency to the villages to carry out certain tasks. These principles effect a change in Indonesian democracy as regards election of

² *Undang-Undang Dasar Republik Indonesia 1945*, Pasal 1, ayat 1 [*UUD RI 1945*].

³ Language Centre of National Education Department, online: <<http://bahasa.kemdiknas.go.id/kbbi/index.php>> (last accessed 30 January 2013).

⁴ Wheare, *supra* note 1.

⁵ *Undang-Undang Nomor 32 Tahun 2004 tentang Pemerintahan Daerah*, Pasal 1, angka 7 [*Law on Regional Government*].

⁶ *Ibid*, Pasal 1, angka 8.

⁷ *Ibid*, Pasal 1, angka 9.

regional heads and deputy regional heads (“Pemilukada”), who are directly chosen by the people.⁸ These developments have taken place with the aim of encouraging people to actively participate in the democratic process, such that the chosen regional heads will have the legitimacy of the people’s vote.

The election of regional heads through the concept of regional autonomy is a breakthrough for Indonesia in democracy. However, in reality, the development of law and democracy in Indonesia has not shown any positive results but has often generated problems and disappointment in the community. Election disputes, corruption, money politics, illegal levies, anarchism between groups and the issue of SARA are the problems that have always been faced in law enforcement and the democratic process. Therefore this paper will examine how the implementation of law and democracy in Indonesia are related to regional autonomy. What are the obstacles faced by Indonesia that caused stagnation in law and democracy? The method used in this research is normative (literature), namely the principles of the rule of law in view of the extent of the development of law and democracy in Indonesia. Legal materials used are primary sources of law such as *UUD RI 1945* and the *Law on Regional Government*. Secondary sources of law used are materials explaining the primary sources, consisting of relevant literature, journals and papers. Tertiary sources of law used are supporting references such as dictionaries and news media.

II. RULE OF LAW, DEMOCRACY AND REGIONAL AUTONOMY

In order to understand the relationship between rule of law and democracy, the concepts of law and democracy will first be explained. At its core, regional autonomy is an expression of the sovereignty of the people in a democracy. First, what is rule of law? The idea of *negara hukum* has long been pointed out by Plato, as he introduced the concept of *nomoi*. He claimed that good execution is a result of good settings of law. Plato’s idea of rule of law was emphasised by his student Aristotle in his book *politica*, which says a good state is a state that is ruled by a constitution and is legally sovereign.⁹ The development of the rule of law diverged between continental European countries and the Anglo-Saxon world. In the 19th century, in the Continental European legal system, Immanuel Kant introduced the concept “*Laissez faire, Laissez aller*”, which means to let every member of society hold its

⁸ *Ibid*, pasal 24, ayat 5.

⁹ Collection on Constitutional Law Lectures at the Faculty of Law Universitas Pelita Harapan.

own prosperity without intervention from the state. According to Kant, the key elements of *Rechtsstaat* consist of:

- a. protection of human rights;
- b. separation of power to ensure those rights.

The concept is called liberal rule of law, as a reaction against the absolute ruler, where the king can act arbitrarily and possess limitless authority. The concept is categorised as rule of law in the narrow sense as the government is only in charge of creating and maintaining law for the purpose of guaranteeing and protecting the interest of the group “*menschen von besitz und bildung*” – the liberal bourgeoisie. In this concept, the term “*nachtwakerstaat*” means the state only functions to ensure security in a narrow sense. The purpose of rule of law according to Kant is to provide legal protection for each individual and for groups. As the development of individuals always differs, there will inevitably be unbalanced competition among them. The strong individuals will get stronger and the weak will get weaker, eventually leading to social unrest in society. This weakness is the basis of new ideas on rule of law by Julius Frederick Stahl. According to him, the purpose of rule of law is not merely legal protection for individuals but how to create welfare within society. The government should not be silent or passive in the state but should be active in helping every citizen achieve prosperity. To prevent arbitrary behaviour, the elements of rule of law should be expanded to include:

- c. every action must be based on law that has been enacted in advance;
- d. the existence of independent Judicial Administration to adjudicate disputes between the government and citizens.

On the fourth element, Stahl stated that:

- 1) Administration court shall not rule impartially even though one party is the government;
- 2) Officers or the people in the administration court system shall consist of experts in their fields.

Stahl’s ideas are known as welfare state or *welvaarstaat*. In *welvaarstaat*, the task of the government is to make the interest of its citizens its priority. In so doing, the government

is limited by laws from acting arbitrarily. If disputes arise between the government and the people, an administration court that stands on its own shall settle them.¹⁰

At the same time, AV Dicey, who was born in an Anglo Saxon legal system, conceived a different concept of rule of law. Dicey argued that the elements of the rule of law are as follows:¹¹

- a. Supremacy of the law, which represents an absence of arbitrary power and that a person should only be punished if he violates the law.
- b. Equal position before the law, which means that the law should apply equally to both Civilians and officials.
- c. The assurance of human rights by law (or by the constitution in other states) as well as judicial decisions.

These two conceptions of the rule of law differ in their content and understanding of the rule of law but are similar in that both conceive the law to hold a high status in a state. In the 20th century, there is no modern state that is not based on rule of law, as pointed out by A. Hamid S. Attamimi.¹² The principle of the rule of law is embodied in the form of a constitution, both written and unwritten. A constitution (*droit constitutionnelle*) is a set of laws that define the basic principles of state organisation and state policy. A constitution¹³ contains limitations on the power or authority of the government, in terms of time, content, the scope of the government's authority as well as assurance of human rights protection. In addition, other functions of a constitution are to stipulate the constitutional system of a state such as the form of the state, form of government, and the democratic system. As was stated earlier, Article 1(2) of *UUD RI 1945* affirms that sovereignty is in the hands of the people and is carried out according to the constitution. Thus, it can be said that the Republic of Indonesia adheres to the sovereignty of the people and is a rule of law state. All actions by state officials and citizens must be in accordance with the applicable rules. Law in this case is the hierarchical order of norms, which culminate in the constitution, *UUD RI 1945*. Therefore, the implementation of democracy must also be based on the rule of law as set out

¹⁰ *Ibid*, hal 22

¹¹ Didi Nazmi Yunas, *ibid*, hal 22.

¹² Ridwan HR, *Hukum Adminisrasi Negara*, (Jakarta, Indonesia: PT RajaGrafindo Persada, 2006), hal 6-7.

¹³ B Arief Sidharta, "*Kajian Kefilsafatan tentang Negara Hukum*", dalam Jentera (Jurnal Hukum), "Rule of Law", Pusat Studi Hukum dan Kebijakan (PSHK), Jakarta, edisi 3 Tahun II, November 2004), hal 123.

in *UUD RI 1945*.¹⁴ On the other hand, the law that is applied and enforced should reflect the will of the people, through ensuring that citizens participate in state decision-making processes. Laws are not made to protect the interests of powerful people only, but rather, are to protect the interests of all citizens. The citizens' will is reflected in *UUD RI 1945*, which is a form of common agreement among all citizens. Therefore, *UUD RI 1945* is the highest law. All lower legal norms and practices of statehood must be in accordance with the provisions of *UUD RI 1945*.¹⁵ Sri Soemantri¹⁶ explained that according to the theory of the rule of law, the source of state sovereignty does not lie in God, the King or the state, but lies in the law. Hence, anyone should be subject to the law. In this regard, AM Donner said that the object of inquiry is the breakthrough of the constitutional law (*De doordringing van de staat met het recht*). The penetration of the state with law implies the existence of the law's position, meaning and role in that state. Another relevant concept is the sovereignty of the people. The answer to how people exercise the highest power in a state through popular sovereignty informs us on the meaning of democracy.

Sri Soemantri further explained¹⁷ that the principle of democracy relies on the people, for democracy is etymologically derived from the Greek words "demos" which means people and "cratos" which means rule. The concept of democracy applied in the ancient Greek state. Today, we recognise the existence of direct democracy and indirect democracy. In a direct democracy, the people can directly participate in decision-making, for example, if all the citizens of a state can be gathered in one place. However, this is almost impossible due to the number of citizens a state has. Even in the ancient Greek times, it was said that a fully direct democracy could not be achieved owing to two things¹⁸: first, not all citizens had voting rights because some, such as slaves, were not considered as subjects by the law. Second, not all citizens participated in decision-making because some of them surrendered their right to vote to rethorica, the leaders who were considered more capable in making decisions for the people. Hence the concept of indirect democracy was developed. Nowadays, nearly all states apply the principle of indirect democracy. Several types of democracy¹⁹ are practised in

¹⁴ Janerdi M Gaffar, *Demokrasi Konstitusional-Praktek Ketatanegaraan Indonesia Setelah Perubahan UUD 1945* (Indonesia, Jakarta: Konstitusi Press, 2012), hal 8.

¹⁵ *Ibid.*

¹⁶ Sri Soemantri, "Penerapan Kedaulatan Rakyat Dalam Kehidupan Bernegara Berdasarkan Pancasila dan Undang-Undang Dasar 1945", *Butir-Butir Gagasan tentang Penyelenggaraan Hukum dan Pemerintahan yang Layak* - Makalah disampaikan pada acara 70 tahun Prof. Dr. Ateng Syafrudin, SH (Bandung, Indonesia: PT. Citra Aditya Bakti, 1996), hal 450-451.

¹⁷ *Ibid.*

¹⁸ Moh. Kusnardi dan Bintang R.Saragih, *Ilmu Negara* (Jakarta, Indonesia: Gaya Media Pratama, 2000), hal 8.

¹⁹ Soemantri, *supra* note 16, hal 446.

various states, including liberal democracy, socialist democracy, centralist democracy and Pancasila democracy. Indonesia adopts the concept of Pancasila democracy, which will be the focus of discussion in this article.

In order for Pancasila democracy to be understood properly, it is necessary to explain the words democracy and Pancasila separately. The definition of democracy has been discussed previously as government by the people and for the people. An understanding of Pancasila in the context of the lives of Indonesian people consists of five precepts:

1. Believe in one Supreme God
2. Just and civilized humanity
3. The unity of Indonesia
4. Democracy led by wisdom of deliberations among representatives
5. Social justice for the people of Indonesia.

In short, Pancasila democracy is a democracy based on these five precepts. The elements of democracy in general and its application based on Pancasila, as quoted by Padmo Wahjono Subandi H. Al Marsudi, include the following:²⁰

1. Based on the sovereignty of the people's democracy.
It is included in the fourth paragraph of the preamble of the *UUD RI 1945*, which states that the sovereignty of the people shall be based on Pancasila.
2. Democracy based on public interest.
This is also known as *res publica*, and in *UUD RI 1945* it is in the form of a unitary Republic.
3. Democracy represents Rule of Law.
Rule of law (*Rechtstaat*) is generally defined as the Democratic Constitutional State. In *UUD RI 1945*, it is stipulated that the Indonesian state is based on law and not based solely on power (*Rechtstaat* and not *Machtstaat*). Now, with the revocation of an explicit explanation in *UUD RI 1945*, where *Rechtstaat* and not *Machtstaat* are no longer used, the position of the state based on law has been accommodated in Article 1(3), *UUD RI 1945*, which states: "Indonesia is a Rule of Law state".
4. Democratic state with limitations on government power.

²⁰ H Subandi Al Marsudi, *Pancasila Dan UUD '45 Dalam Paradigma Reformasi* (Jakarta, Indonesia: Rajawali Pers, 2012), hal 90-93.

UUD RI 1945 explains that government shall be based on the constitution and not on absolutism.

5. All democratic states have representative institutions.

Representative institutions in Indonesia consist of MPR, DPR, and DPRD, now coupled with DPD.

6. In a democratic country, the Head of State acts on behalf of the people.

The President is a mandatory member of the MPR and is responsible to the Assembly (see explanation in *UUD RI 1945*). As of the fourth amendment of *UUD RI 1945*, the President is no longer subject and responsible to the Assembly. After the fourth amendment, the President has constitutional responsibility, and if he violates the Constitution, he may be subject to impeachment.

7. State recognises democratic rights.

Fundamental rights under the Constitution are specified in the rights and obligations of citizens, as well as the rights and obligations of state officials.

8. State institutions originate from the sovereignty of the people.

UUD RI 1945 provided that state institutions are the highest institutions to implement people's sovereignty. But after the amendment, *UUD RI 1945* no longer recognises a highest institution. The Constitution is now based on the sovereignty of the people and on democracy, as explained in the fourth paragraph of the preamble of *UUD RI 1945*, which states the Constitution shall be based on Pancasila.

9. Every democracy has a purpose.

The purpose of Indonesian democracy is to create a fair and welfare society based on Pancasila.

10. Every democracy has its preservation mechanism.

The implementation of Pancasila is guaranteed as a requirement of the Head of State. Amending the basic law is difficult (see Article 37 of *UUD RI 1945*).

11. Every democracy has a legislative body.

Indonesia's legislative body is the DPR.

12. Every democracy has an executive body.

Indonesia's executive body consists of the President and ministers.

13. Every democracy has a judicial body.

Indonesia's judicial body consists of the Supreme Court and Constitutional Court, which have to be free from influence by the other branches of government.

14. In a democracy, citizens have equal status.

Every citizen is equal before the law and government shall abide by the rule of law without exception (see Article 27 (1) *UUD RI 1945*).

15. Democracy provides for freedom of aspirations of the people.

Freedom of association and assembly, and freedom of thought expressed verbally or in writing are to be determined by law (see Article 28 of *UUD RI 1945*).

16. Every democratic state outlines the procedures for implementing democracy.

The discussion above shows that the objective of Pancasila democracy is to create a just and prosperous society. For this to happen, Pancasila must be implemented through central and regional administration. As stated in Article 18(1) *UUD RI 1945*, "the Republic of Indonesia is divided into provinces and a province is divided into districts and municipalities, with each province, district, and city having its own regional government, regulated by law". Regional governance is one of the government's efforts to accelerate realisation of welfare for the people through empowerment, community participation, service improvement, and improving the competitiveness of the region, based on the principles of democracy, equality, justice, privilege and specificity of a region. In line with these efforts, the *Law on Regional Government* made progressive changes including implementing *Law Number 8 of 2005 on the Amendment of Act Number 32 of 2004* and *Law Number 12 Year 2008 on Amendment of Law Number 32 of 2004*.

The *Law on Regional Government* states that regional administration means the organising of state affairs by the regional government and parliament according to the principles of autonomy within the framework of the Unitary Republic of Indonesia as defined in *UUD RI 1945*.²¹ The government region itself is headed by a governor at the provincial level, the Regent at the district level and at the level of City Mayor. Furthermore, the regional government will run state affairs based on the principle of regional autonomy and has the right, authority, and duty to regulate their own affairs and interests of regional communities in accordance with the legislation. As explained above, there are three basic principles in the areas of autonomy, namely decentralisation, deconcentration and assistance task (*medebewind*). The third principle gives authority to regional governments through appointing regional heads, who govern areas with the primary purpose of promoting justice and the welfare of the people. Historically, the application of the principle of regional autonomy has undergone many changes and developments in accordance with the purpose of

²¹ *Supra* note 5, Pasal 1, angka 2.

democracy in Indonesia. The *Law on Regional Government* represents a commendable effort by the government and the larger society in their bid to realise democracy. Article 24(5) of the *Law on Regional Government* stipulates that the regional head and deputy regional head are selected as a pair by the people in the relevant region. The election process should be implemented based on the democratic principles of direct, public, free, confidential, honest and fair elections.²² This is in accordance with rule of law elements according to Scheltema as proposed by Arief Sidhartha.²³ The principle of democracy is one of the joints in the rule of law, which consists of:

- a. Direct, general, free, confidential, honest, and fair elections
- b. Government is responsible and to be held accountable by legislature
- c. All citizens have equal chances and opportunities to participate in the political decision making process and also in controlling the government
- d. All government actions are open to criticism and rational study of all parties
- e. Freedom of opinion or belief and expression
- f. Freedom of press and information
- g. The bill should be published to allow effective participation from the people

Electing regional leaders is one of the rights of a region in implementing autonomy²⁴, which also include ruling and organising its own government, managing apparatus, managing regional wealth, collecting taxes and levies, getting the results of the management of natural resources and other sources within that area, seeking other legitimate sources of income and gaining other rights set forth in the legislation. A region also has the following obligations:²⁵

- a. Protect the society, maintain unity, cohesion and national harmony and integrity of the Unitary Republic of Indonesia;
- b. Improve the quality of life of the community;
- c. Develop democracy;
- d. Create justice and equity;
- e. Improve the basic services of education;
- f. Provide health care facilities;
- g. Provide social facilities and public facilities;

²² See the *Law on Regional Government*, *supra* note 5, Pasal 56, ayat 1.

²³ Sidhartha, *supra* note 13, hal 124-125.

²⁴ See the *Law on Regional Government*, *supra* note 5, Pasal 21.

²⁵ *Ibid*, Pasal 22.

- h. Develop a system of social security;
- i. Draw up a regional spatial layout plan;
- j. Develop the productive resources in an area;
- k. Preserve the environment;
- l. Manage population administration;
- m. Preserve social and cultural values;
- n. Establish and implement appropriate legislation with authority; and
- o. Other obligations stipulated in the legislation.

Nevertheless, both the theoretical concepts articulated by legal experts and the legal provisions in the *Law on Regional Government* have not been implemented perfectly. The problems in regional autonomy are mainly regarding elections, corruption and extortion, and they are harming the principle of democracy and rule of law. In the "National Seminar on Evaluation of the General Election" organised by the Constitutional Court, Chairman Mahfud MD said that many issues surrounding the elections are directly relevant to democracy and law, such as:²⁶

First, the regional election has become an arena of unhealthy battle of power that gave birth to leaders who are not responsible enough in prioritising public interest above personal, group or party interest. The results of today's General Election cannot be said to be better than the results of the election through Parliament. Wantimpres members such as Professor Ryaas Rashid found that the General Election failed to elect a leader with good morals. It led to the release of about 150 permits examination of both the head of the Governor, the Regent and the Mayor of President Susilo Bambang Yudhoyono during the period 2004 to 2010.²⁷

Second, regional elections breed moral pragmatism among candidates, the organiser and the people, causing the elections to lose their integrity, accountability, independence and legitimacy. Moral pragmatism results in the practice of money politics in each phase of the election. A member of the Constitutional Court, Akil Mochtar,²⁸ said that money politics are the scourge of elections, forming the root of most frequently committed offences by

²⁶ Moh. Mahfud MD, *Evaluasi Pemilukada dalam Perspektif Demokrasi dan Hukum*, Demokrasi Lokal-Evaluasi Pemilukada di Indonesia (Jakarta, Indonesia: Konstitusi Press, 2012), hal 9-12.

²⁷ Izin Periksa Tiga Kepala Daerah Diproses, online: Nasional Kompas <<http://nasional.kompas.com/read/2010/06/21/18102634/function.simplexml-load-file>> (last accessed 30 January 2013).

²⁸ Maria Natalia, "'Money Politic' jadi Budaya Pilkada", online: Nasional Kompas <<http://nasional.kompas.com/read/2012/01/25/16240489/.Money.Politic.Jadi.Budaya.dalam.Pilkada>> (last accessed 30 January 2013).

participants of elections. Candidates may buy votes through giving money or other goods to voters to influence them, which is a commonplace offence in almost all regions in Indonesia. As an example, in the city of Waringin Barat, the pair of Dugianto and Eko Sumarno were involved in widespread vote-buying in all of the districts in Kabupaten Kobar, affecting the vote count for each candidate. It was also very common in Jakarta's regional election, which has just finished, where the Indonesian Corruption Watch (ICW) found twenty seven cases of money politics committed by a few candidates who gave money to the volunteers and distributed umrah packages to residents.²⁹ As long as the voting culture is money-oriented, it will be difficult to achieve democracy.

While the *Law on Regional Government* forbids money politics and provides in Article 117(2) that “any person who intentionally gives or promises money or other material to someone not to exercise their right to vote, or to choose a particular pair of candidates, or to use their right to vote in a certain way so that their ballot paper becomes invalid, is punished with imprisonment of at least two months and a maximum of twelve months and/or is fined a minimum of Rp 1 million and a maximum of Rp 10 million”, interestingly, throughout the 2005 to 2008 elections, not a single case of money politics was brought to the courts. There has also not been any election victory that has been annulled as a result of money politics. In Kabuptaen Balangan, a case of money politics still cannot depose the chosen regent.³⁰ At the same time, pragmatism has also led to less robust political parties³¹ standing for elections. Although differences in ideology promoted by any political party should create healthy competition and checks and balances on the ruling parties, in practice, each political party overlooks this in favour of adopting the “safe” approach of entering into a coalition with parties that may have different ideologies, especially if they are ruling parties, in order to obtain advantages and to win.

Third, incumbent regional head candidates engage in politicisation. In order for genuine results to be obtained from elections, the bureaucracy in a democracy should be neutral and objective, but in reality many incumbent pairs of candidates used institutional and even state

²⁹ Ira Sasmita, “Inilah Modus Politik Uang di Pilkada DKI”, *Republika Online* (6 July 2012), online: Republika Online <<http://www.republika.co.id/berita/menuju-jakarta-1/news/12/07/06/m6qcdz-inilah-modus-politik-uang-di-pilkada-dki>> (last accessed 3 February 2013).

³⁰ Irvan Mawardi, *Pelaksanaan Prinsip-Prinsip Negara Hukum Demokrasi dalam Pemilihan Umum Kepala Daerah (Pemilukada)*: online <<http://ptun-makasar.go.id/pelaksanaan-prinsip-prinsip-negara-hukum-demokrasi-dalam-pemilihan-umum-kepala-daerah-pemilukada-html>> (last accessed 3 February 2013).

³¹ Leo Agustino, *Sisi Gelap Otonomi Daerah-Sisi Gelap Desentralisasi di Indonesia Berbanding Era Sentralisasi* (Bandung, Indonesia: Widya Padjadjaran, 2011), hal 106.

facilities during the campaign. For example, during DKI Jakarta's election, Deputy Coordinator of ICW, Ade Irawan explained that politicisation of the bureaucratic form takes place through intimidating high school teachers, empowering the village and using the state's resources for the benefit of election budgeting.³² Jawa Barat's election also experienced politicisation of bureaucracy. This statement came from Chairman of the Election Supervisory Committee (Panwaslu) of West Java, Ihat Subihat, who said that all candidates for Governor of West Java involved civil servants (PNS) in their campaigns.³³ Take for example the Governor of DKI Jakarta, Joko Widodo, who actively helped the pair of Rieke and Teten Masduk. Whereas Article 79(3) of the *Law on Regional Government* states: State officials who are candidates for regional head and deputy regional head in executing the campaign must meet the following conditions: (a) not to use the facilities associated with the position; (b) undergo unpaid leave; and (c) set length of leave and vacation schedules with attention to the sustainability of the regional administration tasks. Paragraph (4) says that pairs of candidates are prohibited from using civil servants, members of the Indonesian Armed Forces, Indonesian National Police and members as participants in the campaign.

Fourth, racial issues still surface, for example in the election in DKI Jakarta. In a democracy, racial issues should no longer exist and they will only be a setback in democracy. A principle of democracy is that every person has the right to participate in politics, which is even confirmed in *UUD RI 1945*. But in fact, racial issues still exist.³⁴ For example, a Youtube video with the title "China cowboy eads Jakarta" contains the details of the May 1998 riots, indicating that racial issues are still an impediment to achieving democracy. Former Vice President of the Republic of Indonesia, Jusuf Kalla, said that the spreading of racial issues through the video endangered the integrity of the Nation.³⁵ Lectures of Rhoma Irama are also an important lesson for the people in a democracy and as a challenge to how people should think rationally for the future. Article 78(b) of the *Law on Regional Government* states that the campaign is forbidden to insult someone based on religion, tribe,

³² Imanuel More, "Politisasi Birokasi Masih Kental dalam Pilkada DKI", *Nasional Kompas* (7 September 2012), online: Kompas Gramedia Digital Group <<http://megapolitan.kompas.com/read/2012/09/07/18032695/Politisasi.Birokrasi.Masih.Kental.dalam.Pilkada.DKI>> (last accessed 3 February 2013).

³³ "Panwaslu: Semua Cagub Jabar Langgar Aturan Kampanye", online: Viva News <<http://us.nasional.news.viva.co.id/news/read/391440-panwaslu--semua-cagub-jabar-langgar-aturan-kampanye>> (last accessed 15 February 2013).

³⁴ "Kalla: Isu Sara Pilkada DKI Bahayakan Bangsa", *Tempo.co* (25 August 2012), online: Tempo Media Group <<http://www.tempo.co/read/news/2012/08/25/228425443/Kalla-Isu-SARA-Pilkada-DKI-Bahayakan-Bangsa>> (last accessed 15 February 2013).

³⁵ *Ibid.*

race, class, prospective of regional head / deputy regional head and / or political parties. Article 78(i) confirms that campaigns are prohibited from using places of worship and educational facilities. Violation of this article is a criminal offence and will be penalised in accordance with applicable regulations.

Fifth, there is a very high number of corruption cases involving Regional Heads. The Ministry of Home Affairs (Mendagri) recorded that out of 524 regional heads, 173 of them were involved in corruption cases from 2004 to 2012. Among them, 70 percent have been found guilty and dismissed.³⁶ This fact shows that corruption has spread not only at the national level but has also reached the regional level. Regional autonomy, which is regional authority to manage and organise regional interests to achieve prosperity for the people, seems to have been misused by regional heads. The principle of the widest possible autonomy and responsibility is rendered otiose by the number of heads of region involved in corruption cases. As said by Lord Acton, "power tends to corrupt, and absolute power corrupts absolutely" when the head of region uses the extensive powers he has through decentralisation for personal and group interests rather than for the welfare of the people. In addition, the high cost of elections is the primary factor behind the head's corruption, as they need to restore their capital during the campaign. A similar sentiment was expressed by Deputy Public of Internal Control and Anti Corruption Commission, Handoyo Sudradjat, who said that high political cost would lead to corruption.³⁷ Based on Litbang Kompas, the cost of provincial voting survey will cost around Rp 100 million to Rp 500 million. The cost for political campaigning through the media ranges from Rp 1 billion to Rp 5 billion per month and the cost for building a good image of the governor costs around Rp 258 billion.³⁸ The cost of the regional election itself is very high, for example, around Rp 258 billion for DKI Jakarta's 2012 election and around Rp 535 billion for Jawa Timur's 2008 election. In 2013, the East Java Election Commission spent around Rp 601 billion for the governor election.³⁹ The relative high cost of the elections, which according to Article 112 of the *Law on Regional Government* are part of regional budgets, will mean that the budget allocated for the people's welfare is consequently reduced.

³⁶ "Otonomi Daerah dan Korupsi", online: Koran Jakarta <<http://koran-jakarta.com/index.php/detail/view01/90339>> (last accessed 15 February 2013).

³⁷ "Biaya Politik Makin Mahal", online: Nasional Kompas <<http://nasional.kompas.com/read/2010/06/14/05115488/>> (last accessed 15 February 2013).

³⁸ *Ibid.*

³⁹ "Dewan Usulkan Anggaran Pilgub Jatim Rp.600,7 Miliar", online: Legislature, Jawa Timur Province <http://dprd.jatimprov.go.id/index.php?option=com_content&view=article&id=1043:dewan-usulkan-anggaran-pilgub-jatim-rp6007-miliar&catid=7:komisi&Itemid=9> (last accessed 15 February 2013).

Sixth, there is abuse of regional autonomy through extortion. The Buol case (Sulawesi Tengah) is as an example of how the head of region took advantage of entrepreneurs or investors to collect private profits. According to Socrates,⁴⁰ the law can also be influenced by economic factors, therefore there will always be people who will break the law for the sake of his own pleasure. With regional autonomy, regional heads have great authority to issue permits for investors or entrepreneurs, which in the Buol case relates to a letter of recommendation, leasehold, and Plantation Business Permit. Legal observers have expressed that Buol related cases, involving Regent Amran Hartati Murdaya Batalipu and businessmen, could be a form of extortion of businessmen by the regional head. There are typically two reasons for giving money to a regent: physical pressure and psychological pressure.⁴¹ Separately, Chairman of the Institute of Research and Economic Development (LP3E) Indonesian Chamber of Commerce (Kadin) Didik J. Rachbini said that the performance and governance of the bureaucracy and its very slow process of licensing became a major obstacle to investments in Indonesia.⁴²

From the problems outlined above, the morals of the leaders are at the centre of the development of law and democracy. Moral is derived from the word *mos* (*mores*), which is synonymous with decency, character or behaviour. Moral⁴³ is a teaching of good and bad deeds relating to the behaviour of the society. An individual who obeys the rules and the applicable norms is categorised as acting in accordance with good morals. If the opposite occurs then the person is considered immoral. Morals can be either rules or good faith principles. Morals also can be in form of faithfulness, obedience to values and principles of norms in the society. No matter how good the system, if the morals of the leaders and the people do not support the system, it will be difficult to achieve democracy and the rule of law. Good morals will allow the regional head to bring the people to fair and prosperous living based on Pancasila democracy. However, the lack of understanding from leaders on the meaning of moral values embodied in the Pancasila has given rise to immoral behaviour such as pragmatism, corruption, blackmail and other deviant behavior.

⁴⁰ Bernard L Tanaya et al, *Teori Hukum-Strategi Tertib Manusia Lintas Ruang dan Generasi* (Yogyakarta, Indonesia: Genta Publishing, 2010), hal 35.

⁴¹ “Saksi Ahli: Hartati Korban Pemerasan” *Suara Pembaruan* (11 October 2012), online: Berita Satu <<http://www.suarapembaruan.com/home/saksi-ahli-hartati-korban-pemerasan/25730>> (last accessed 16 February 2013).

⁴² “Birokrasi Hambat Daya Saing Ekonomi Indonesia”, online: Antara News <<http://www.antarane.ws.com/berita/334795/ birokrasi-hambat-daya-saing-ekonomi-indonesia>> (last accessed 15 February 2013).

⁴³ Jumanta Hamdayama, Heri Herdiawanto dan Fokky Fuad, *Pancasila Suatu Analisis Yuridis, Historis dan Filosofis* (Jakarta, Indonesia: Hartomo Media Pustaka, 2012), hal 124.

Lawrence Kohlberg⁴⁴ divided the levels of consciousness of morality into three major stages, namely: pre-conventional morality, conventional morality and post conventional morality. Each stage consists of two levels totaling six levels.

First, pre-conventional morality is morality that relies on a cost-benefit analysis. It is often called infantile morality. At the first level, adherence to the rules is not based on willingness. For example: Upik did not steal the cake not because he knew that stealing is wrong, but he was too scared of being scolded by his parents. At the second level, one's moral action is more rational albeit still slightly childish. The motivation behind moral actions is to achieve as much pleasure and to reduce pain. One's moral actions are only a tool or instrument to achieve this goal. For example, Arya knew that his boss was corrupt but did not bring his boss to the corruption committee because he wants to "negotiate" with the boss.

Second, conventional morality has a wider scope because a person has already taken into account others and is trying to refrain from what is forbidden. At the third level, what is true and good will be determined by others. A person refrains from corruption not because of fear of the sanctions but because of prohibition by family. Morality at this stage is still limited and what mostly occurs is conflict of loyalty between groups. For example, Jokowi is both a civil servant as he is the governor of DKI Jakarta, and also a member of PDIP. According to the party's demand he needs to help the candidate from his party. But the civil servants' committee forbids him from participating in campaigning and requires him to focus on his position as a governor. If Jokowi decides not to join the campaign, his action will be classified under the fourth level of moral consciousness. Choices are not based on things that will give more identity guarantee, but based on law. Obligations to do or not to do something shall be based on the applicable law. Jokowi's decision not to join the campaign could have caused the party to ostracise him, however, this was not a problem because he was obeying the law.

Third, post conventional morality has a universal nature. If on the fourth level laws must be obeyed, then on the fifth level people are aware that the existing laws are in fact agreements between parties. The agreement gave birth to law and, by agreement too, the law can be changed when it no longer fulfills its function. At this level, one engages in critical debate about the content of the law, rather than adopt a formalistic approach to the law. At the sixth level Kohlberg states that the development of a person's moral thinking reaches its

⁴⁴ Tanaya et al., *supra* note 40, hal 35-39.

highest point, which is a morality that never betrays the consciences and beliefs about what is right and good. At this stage, a person is not afraid to go against the grain, be bold in solitude and even be willing to die than to succumb to self-deception. Everything is done not merely for self satisfaction and self interest, but for the dignity of all mankind – a universal vision and mission. People who embody this, like Mahatma Gandhi, commit acts that often times are non-sense to ordinary people, because their morality is not irrational but far beyond exceeding transitional morality.

III. CONCLUSION

Law and democracy are like two sided coins. Law without democracy will lose its meaning, while democracy without law will lose its shape. On paper, it appears that Indonesia has made a lot of progress in the democratic process, through introducing regional heads who are chosen directly by the people. But in practice, the behaviour of the political elite and the people is still far from Indonesia's ideal of Pancasila democracy. Enforcement of the law is also far from just and prosperous. Another important factor is the immature level of morality of political elites, heads of regions and community leaders, as evidenced by the high incidences of moral pragmatism in the process of regional election and in democracy. Rule of law and Pancasila democracy can only be achieved if the leaders possess good morals and act in accordance with Pancasila to transform the regional community into a just and welfare society. Law enforcement efforts should also be boosted to set the tone for the people that law is the order of behaviour.