Transplantation of Foreign Law into Indonesian Copyright Law: The Victory of Capitalism Ideology on Pancasila Ideology

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The Journey of Indonesian history has 350 years experience under the imperialism of Netherland and Japan until the era of post-independence which was still under the shadow of the developed countries. The Indonesia became more and more dependable on the foreign countries which brought influence to its political choice in regulating the Copyright Law in the following days. Indonesian copyright protection model which economic goal firstly based on the country’s Pancasila philosophy, evidently must subject to the will of the era that move towards liberal-capitalist. This era is no longer taking side to Indonesian independence goal to realize law and economic development based on Pancasila, especially the first, fourth, and fifth sila (Principle). The goal of law and economic development in Indonesia, regulated under the paradigm of democratic economy is to realize prosperous and equitable society based on Indonesian religious culture principle that can no longer be realized.

Pancasila as the basis in forming legal norms in Indonesia functioned as the grundnorm which means that all the legal norms must be convenient and not to contradict the principles of the basic state philosophy of Pancasila. But the battle of foreign ideology in legal political choice through transplantation policy, did not manage to give the victory to Pancasila as the country’s ideology, but to give the victory to the foreign capitalistic ideology instead. It resulted with the non-enforcement of Copyright Law. Borrowing the term used by Van Vollenhoven – the rejection on Indonesian Copyright Law was not because of the weak legal sanction, but due to the failure in the law enforcement, because the legal substance regulated in copyright laws that ever enacted in Indonesia, have never been part of their law; never been part of the nation’s soul, or have never been the law of Indonesian society, but it is a law that was transplanted, and forced to be enforced in Indonesia. One law that is originated from capitalistic ideology, not originated from Pancasila ideology. This is the end of the ideological battle in choosing the formulation policy of Indonesian Copyright Law. It can also be said that it is the Victory of Capitalistic Ideology on Pancasila Ideology as the end of Pancasila Ideology.

Keywords: Transplantation, Capitalistic Ideology, Pancasila Ideology, WTO, TRIPS Agreement, Grundnorm, Weltanschung, copyright, cinematographic rights

Pancasila Ideology\textsuperscript{1} is a state ideology in Indonesia which was made as the basis in establishing the Republic of Indonesia. Because of that, Pancasila\textsuperscript{2} is the weltanschauung as the way of life of the nation, as the source of all laws enacted by the Government of Indonesia, together with the Parliament of Indonesia. Pancasila was born with the suggestions of the founding fathers of Republic of Indonesia which was initiated since 1 June 1945 through philosophical approach of the warriors of Indonesia’s independence – which incorporated in the Committee of Nine.\textsuperscript{3} The culture and structure of Indonesian society itself, is very plural, consisting of ± 320 ethnics or tribes and 6 religions/beliefs.

Though, Indonesia got freedom from the Netherlands and Japan on 17 August 1945 but it is still bound with bureaucracy structure left by Netherland colonialist and also, in law. Indonesia still had to enforce the Netherland Colonial Law for next few years until the existence of new legislation made by the Government of Indonesia.\textsuperscript{4}

In the next phase, Indonesia lived in a world environment that obliged Indonesia to conduct international relations. These relations were not only limited in defense matters but also further embodied diplomatic, economic, securiy, health, culture, education and in many other fields. But for economic corporations, Indonesia kept depending on foreign countries bilterally for economical aids from World Bank, International Monetary Found (IMF) and also from Inter Governmental Group on Indonesia (IGGI).\textsuperscript{5} These aids affected the law making in Indonesia to adjust the Acts in Indonesia with legal rules of the donor countries in not only the economic field matters but also in in the field of politics.

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The involvement of Indonesia in the World Trade Organization also brought many influences in its legislation such as, in the Copyright Law of Indonesia which must be at par with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), the result of an Agreement of World Trade Organization (WTO).

Of course the intervention of the foreign laws into the legal system in Indonesia in the copyright field as the part of intellectual property rights is regulated in TRIPS Agreement and can not be avoided. Together with the entry of the foreign law, Indonesia which at the beginning wished to make Pancasila as the ideology in making its national law, turned out to be unable to realize its goal. The foreign law with the background of capitalist ideology has won the battle and defeated Pancasila Ideology in forming Indonesian Copyright Law.

**Pancasila Ideology**

Seventy eight days to the independence of Indonesia, exactly on 1 June 1945, Soekarno in his speech put the basis of the state which entitled “Pancasila”. The idea and suggestion about Pancasila was not just born easily, but it had a very long process and journey.

Judi Latif, called it as a genius heritage of nation and Indonesian society. Pancasila is the abstraction from the original paradigmatic values of Indonesian culture and society dug from the land of Indonesia itself, as said by Soekarno in many of his speeches.

As the digger, advisor of Pancasila, Soekarno trully realized the important meaning in putting the basis of the country on the the character of the nation itself. Indeed, in the beginning there were a lot of offers ideologies proposed in Douritsu Zyunbi Tyoosakai Assembly. There was a proposal to build this country on the basis of Socialist Ideology. There was also proposals on Maxis Ideology, Soekarno took examples of some countries, such as, Saudi Arabia established by Ibn Saud on the Ideology of Islam, Lenin established Soviet countries on Weltanshauung Marxistische, Hitler established Germany on Weltanschauung National Sozialitische, Dai Nippon country established on weltanschauung Tenoo Kodoo Seishin, Sun Yat Sen established China on San Mi Chu I (Mintsu, Minchuan, Min Seng and nationalism). Those were the basis in each country based on the degree and history of the its nation.

Pancasila in many literature stated as the result of the feeling of nectars of socio-cultural life of Indonesian society. The nectars of civilization, cultures, the nectars formulated by the thinkers and the founding fathers of this country which methodologically was a result of an abstraction of the original paradigmatic values of Indonesian culture and society.

Pancasila formulation which has been agreed by the founding fathers of Indonesia objectively was admired by an expert of Indonesia, George Mc Turnan Kahin from Cornell University USA. In his book *Nationalism and Revolution*, Kahin mentioned that the formulation of Pancasila ideology as, “Pancasila is the best exposition of history I have ever seen”.

The philosophical value contained in Pancasila was also appreciated by Bertrand Russell, a philosopher from England, who mention that Pancasila was a creative synthesis between Declatarion of American Independence (democracy-capitalist ideology) with Comunist Manifesto (communist ideology). The view on Pancasila phiosophy also brought by Routges who stated that “From all countries in South-East Asia, Indonesia is the country which in its Constitution, the first and the most explicit in conducting psychological background which were trully from all revolutions against the colonialists”. In the state philosophy, Pancasila, described the reasons deeper than the revolutions. Based on other perspectives, Koentowidjoyo emphasized the importance radicalization of Pancasila in Indonesia.

Technologist awareness must be altered with ideology awareness and technologist society must be altered with Pancasila society, combination of cultural, structural, and transcendental factors combined in the principle values.

Those principle values were made the basis for the formulation of legal order, as a philosophical basis as and as a state philosphy, the source of all legal source. As a state ideology, the ideal goal for Pancasila was to stain the legal order which will be enforced in Indonesia. The color of Pancasila in legal norms would be seen in the legislation that is enforced in Indonesia.

**Intervention of Foreign Ideology**

The alteration and replacement of the philosophical value, are the right words to formulate an ideology as philosphical basis in formulating a legislation in one country, but the substance of the legislation does not
reflect the ideology that has been agreed as the basis of the establishment of the nation. For Indonesia’s case, that is what has happened in the formulation of Copyright Law. There were some values that still reflect the original culture, but there were also some that has been uprooted from its origin. Uprooted from the root of culture and sociology which shaped the legal civilization. Uprooted because the legal civilization is no longer built on the original paradigmatic value of Indonesian culture and society but built with the values adhered by other nations, other civilizations with socio-cultural values of other nations.\textsuperscript{11}

Copyright legal protection is a protection that refers to one model which was first introduced by society and countries in Western parts of the world (America and Western Europe). The protection principle refers to economic principle which is rather individualistic-capitalistic by putting individual economical right higher than communal right, which does not have humanity vibes adhered by societies living in Eastern parts of the world.

Indonesia’s experience of being under the Imperialists of Netherland for 350 years, has left legal heritage in the independent country until there is new legislation made by the Government of Indonesia to replace the leftovers from the Imperialist of Netherland. Copyright Law of the Netherland Imperialist of 1912 (Auteurswet 1912 Staatblad Number 600) remained enacted for 70. The legislation of Netherland Imperialist of 1912, was replaced in 1982 through Act Number 6 of 1982, 37 years after the independence of Indonesia.

At least, in regulating the National Copyright Law, there were five philosophical values of Pancasila which were changed and replaced, in its own measurement. Those five values were appropriate with the five principles which have been agreed upon as the basis of philosophy in regulating the legislation in Republic Indonesia.

First, the value of God or Divinity. The value of God in the first principle of Pancasila, was preceded by many arguments in the assembly of the Committee of Indonesian Independence Preparation. The order of this value should be realized in Indonesian Legislatio including Copyright.

Second, the philosophical value of humanity, that all legislation activities must referred to the humanity value, has been replaced with materialistic and economic values, in formulating National Copyright Law.

Third, the value of nationality, the unity value in a same degree in state activity must be placed in one strong and fair unity. The value of nationality should be implicated to protect the national purpose, while giving protection to the citizen’s rights. Also, citizens must be provided with the chances to develop themselves and to create activities to improve the nation. The country must have a strong position while facing the other countries. Therefore, the value of nationality must be made as the soul to prevent hidden imperialist movement with another ways, such as, international loan or by using international law instrument.

Fourth, the value of discussion, deliberation, and kinship. These values should be reflected in every regulation in legislations enforced in Indonesia in both legislative products and the Acts such as, Copyright Law. The value of kinship planted long before in Indonesia, became something that distinguish Indonesian society from the society in Western parts of the world. The discussion and deliberation can be made as the shield in preventing the entry of liberal democracy.

Fifth, the value of justice and welfare must be reflected in legal norms of National Copyright Law which is faced with the capitalistic and liberal values. The welfare of Indonesian society which is referred to social welfare is different if compared with the concepts of welfare with capitalistic background.

If these five principles of Pancasila are put in philosophical order in forming the legal order, then by borrowing the framework of the theory by Hans Kelsen, Pancasila can be placed as the grundnorm (basic norms) which is a logic transcendental requirement to enforce the legal order in any country. Furthermore, according to Hans Kelsen, people must adapt with what has been appointed and that is the normative character of law.\textsuperscript{12} Kelsen himself did not mention content of Grundnorm itself. But he did mention that, every order of positive law must be referred hierarchically to the grundnorm. So it can be confirmed that Kelsen made the steps hierarchically for the enforcement of legal order. The Grundnorm contains very abstract values. Mahadi\textsuperscript{13} tried to describe Kelsen’s theory in connection with Pancasila as grundnorm to the order of behaviour as:
According to Mahadi, it is a simple distance, from abstract values (Pancasila values) to a concrete one (legal behavior). Mahadi described the steps in the following order:

The order is Pancasila as the Grundnorm (highest step), derived to the next step as the values (in the form of legal values), then derived to the next step as norms, derived to the next step as positive law. After the positive legal norm is made as the basic reference to behave (legal behavior) is already concrete. Back to the theory of Kelsen, the main goal is to answer, what is law and how the law was made. Not the question how the law ought to be or how the law ought to be made. That is the consequence of choosing Ideology in a country as the Grundnorm.

As the state ideology that has been chosen and set as the source of all legal sources, then the choice of legal policy must refers to Pancasila as the philosophical basis. National legal system in many definitions must have the characteristics based on Pancasila Ideology. This is what Satjipto Rahardjo called as Pancasila Legal System.

As a country that already has its own legal system before the national legal system that refers to ideological principle Pancasila being formulated, it is obvious that it will affect the direction and the journey to national legal politics. The interaction between nations in information and transportation of technology and the exchange in goods and service trade, all of these, caused Indonesia to follow the changes happened in world and it affects its legal policy. The friction of values can no longer be avoided both naturally and consciously. The development of values means the previously existed values still existed but they are developed or renewed as demanded by the time and era.

It is obvious when the national Copyright law (started with Auteurswet 1912 and ends with Act number 28 of 2014) is under the influence of capitalistic-liberalist values replacing the values of Pancasila. The replacement of the values was so real that Article 9 Paragraph 2 in Act Number 28 of 2014 emphasized the need to obtain permission from copyright holder to rent the copyright in cinematography. If anybody bought a piece of Video Compact Disk (VCD) or Digital Versatile Disc or Digital Video Disc (DVD) to be used as an instrument for “Family Cinema” the person must obtain permission from the cinematography copyright owner. What is rented is a right to enjoy the work, not to duplicate or re-produce the copyrighted work. The normative formulation in Article 2 (2) is so capitalistic that when a person buys a car and the car is rented to a third party; this kind of legal relation should not be obliged to obtain permission from automotive industry that produced the car. The genuine difference between ideological principle of Pancasila and capitalistic principle is that some of the things that don’t need to be protected become a must to be protected for the purpose in protecting the rights (capital or property) of the authors or copyright holders.

The friction did not just happen, but without being realized by the Government and Indonesian Parliament. Legislative is the foremost guardian that brings this incident to be happened. The choices of the politician were not based on the pure goal to realize the goal of the nation which was already formulated by the founder of the nation and loaded in the preamble of Constitution of Republic Indonesia. Not many of the politicians of this country perform as statesman or technocrat. Many of the notes from politicians are under the influence of pragmatists way of thinking, so that finally many names appeared for them as plebeian or countrified politicians or “jumping-flea” politicians. These terms show that
the goal of this country can not be realized with the existence of that kind of politicians. It is often that the authority to be able to make regulations of the politicians is lost to the executives that can be seen or reflected, if we study the regulation carefully. It is in this process such as in proposing the framework of the Act, collecting information, and socializing the framework of the Act. In the case of resulting National Copyright Law (Act Number 6 of 1982 until Act Number 28 of 2014) the legislative was still in charge in the formulating process of those Acts. It called up some impression by not only putting the legislative in a weak position, but furthermore, legislative here only seem like a justification institution in formulating the Copyright Law, a justification institution in the meaning of an institution that only gives its stamp in the end of the process or we can say in the final process when the Act is being discussed in the House of Representative. The result is that the Act is more of the will of executives than the will of society.

If the domination of executives is becoming bigger in formulating the substance in an Act, then actually, the resulted Act, will contain the “spirit” of power inside it.

Furthermore it will cause the concept “state of law” to be replaced with “state of power”. At the beginning, the concept state of law (rechtstaat) is replaced in meaning with state of power (machtstaat). Executives become wilder in formulating and running operational activity of the state. The authority to make the legislation is no more than an effort to justify the will of executive. The impact is, the bigger the power of executive is, the bigger the potential of the country to become the state of power, not the state of law.19

When power is put above everything, the potential of humanity will be threatened more. Dehumanization of law, is the condition that is going to happen in the following days. To lead and to run state activity with power approach will always be paid with a very expensive price. The price has a value of economy and also spiritual value. There will be time when economic value is put forward. And this will bring impact in materialistic value and hedonism. This condition obviously has new color in the civilization of the nation. The spiritual values, rooted on religious values grown and developed are now replaced with materialistic values. A spiritual satisfaction in life such as happiness, peace, and comfort is finally defeated by materialistic ones.

The value of kinship has been replaced by individualistic value. The attitude of the society which rather shows obedience to the leaders, teachers, or to society, has been shifted clearly in showing resistance. The protagonist value (obedience) has been completely shifted to be antagonist value (resistance).

The attitude of institutional ego and ego-sectored, is strengthening the view that thinking systematically is no longer considered as the right way of thinking to solve many problems in this nation. The result is, the position of the country is getting weaker and weaker by days. That is how the impact of the political choice of transplantation of foreign law into national law has taken place since it is not filtered with the basic ideology and philosophy of the country. Wild, that is the name of a power politic which is not limited by law based on the original paradigmatic value of Indonesian culture and society. Liberal capitalist is waiting in front of this nation. Imperialism can no longer live in the time after World War II but imperialism has already changed into the creation of dependable process, economically and politically. Economically, the colonialism is conducted through financial loans in international financial institution such as IMF and World Bank. The next colonialism is by using international law instrument and international entities where Indonesia is the member, the colonialism finally also went into the field of law by obliging Indonesia to adjust the legislation with the international legal instrument, having the background of capitalist ideology. That is the real form of ratification of GATT/WTO 1994 which contain TRIPS Agreement inside.

The Agreement is becoming the basis in formulating the Acts which should have referred to philosophical/ideological basis of Pancasila as the grundnorm intended to strengthen the identity and the position of the nation has been shifted to weaken the position of this country. The authority of an independent country has been shifted into the authority of a shrouded imperialism. National Copyright Law that should contain values reflecting the aspiration and the will of the society reflected as in Pancasila shifted to capitalist ideology.20

Entering the era of globalization, means to bring the country to the global world without any limit of national walls. Uruguay Round Discussion for instance, which at the beginning was intended to handle World Trade issues in integrated way, but then
has defeated many more issues such as intellectual property right protection. Many considerations conducted by Indonesia in Uruguay Round Discussion such as, the connection of trade sector in the country with international trade sector. Indonesia can no longer count its own economy development on oil, because of that, Indonesia need to count on export of non-oil goods, and it caused Indonesia to be obliged to adjust certain deregulation and bureaucratic steps. From international aspect, the non-oil export security also depend on International market disclosure, here is where the foreign factors meet the values of Indonesia. The Indonesian values, became shifted, or must be shifted to liberal-capitalist, which is offered by the open world trade system. Even though this field of trade is a neutral field of law which means not entirely connected with cultural factors and religious factors, but this will still bring impact on the political choice and the existence of legal civilization of Indonesian society in understanding the Indonesian values contained in Pancasila ideology as grundnorm.

**Legal Transplants Terminology**

Legal transplants or legal borrowing or legal adaption, is a term introduced by Alan Watson, to mention one process in borrowing or taking over or replacing one law from one place or one country or one nation to another place, country, or nation, to be implemented along with the previously existed law. The legal transplants also can happen because of the must to transform the International Agreement (in the form of law making) as Indonesia is one of the members of the International Convention. This kind of case can be seen in the case of the provision transformation of GATT/WTO and the following Agreement such as TRIPS Agreement which became the basis in transplanting the Intellectual Property Rights regulation of Indonesia, and the TRIMs Agreement which became the basis or foundation of transplantation on legislation regarding the foreign investment, also, some other International conventions regarding environment which were made as the basis in regulating the legislation regarding he environmental law in Indonesia. Beside that, legal transplants also can happen because of the existence of colony or annexation or imperial by one country on another country. For the case in Indonesia, the colony conducted by Dutch Government has “pushed” Indonesia to conduct law adjustment from the heritance law of Dutch Colonial into Indonesian National Law which will become the seed for transplantation.

The protection of intellectual property right adhered in Indonesian Legal System, is not detached from the influence of Western Law. In the history of Indonesian journey, the influence of Dutch Colonial law, was seen thicker in the Indonesian law formulation, including in Copyright Law which is derived from Auteurswet Stb. 1912 No. 600. Different from Adat Legal system adhered by Indonesia, Dutch Colonial Law, ideologically and philosophically, adhered individualistic view with capitalistic vibes.

The individualistic principle and capitalistic economic principle, has brought the Western into protected works in the field of science, art, and literary that has formulated as Copyright, which is an exclusive right or special right that is attached to the Author or Right Holder. Another person outside the Author, may not enjoy the Copyright without the permission of the Author. This was then developed in the Eastern countries, after the Western has some improvements in science and technology and won many wars and dominated politics in Eastern countries. The western countries were then known as part of the developed in science and technology also as the founder of modern civilization. The law that is developed in the West, was also viewed as modern law, a more rational law, more democratic and fair and more open to all levels of society that is not distinguished among human for their races, tribes, religions, and other differences.

**The Influence of Globalization**

The wave of modernization which brought western civilization (including science and technology) and legal system penetrated throughout the world, among the eastern countries –Indonesia had to adopt these ‘modern’ laws. In this context, Indonesia had to participate in the international organizations as the member and the member of various bilateral agreements (in the form of treaty) or regional and international agreements (in the form of convention).

Globalization offered by the western civilization motivated from the achievement of Uruguay Round which produced international trade system, embodied in GATT and WTO was more than what had been followed. Besides that, developed countries threatened that they did not want to do investment and even denied the export license on the products from the countries which are in the category of the violators of copyrights or hijackers. That was why Indonesia had to have Copyright Law which had been in
accordance to the international protection standards, although at that time it was not a necessity to have that kind of law for Indonesia.

At the beginning, the political choice of Indonesian legal provisions was very pragmatic. But then it decided to modify the prevailing law, Auteurswet Stb No. 600/1912 rather than making its own Copyright Law. This law was, of course, the product of Dutch colonizer, but the choice of Indonesian Legal Policy. Indonesia began to think about amending the law in 1982 to frame the law which had the nuance of Indonesia or to refer to legal principle of original paradigmatic values of Indonesian culture and society. The amendment occurred because of the demand for the current situation about political, economical, and other socio-cultural contents which were continuously changing as the result of scientific and technological advancement. In the period of Dutch rule, as has been mentioned in, Stb. 1912 No. 600 was enacted as the legal instrument which protected creative works, known as Auteurswet. Until Indonesia got its independence, this Auteurswet was still in effect – of course, it was based on Article II of Transitional Provisions of the 1945 Constitution of the Republic of Indonesia at that time – till Law No. 6/1982 on Copyright which carried in State Gazette of the Republic of Indonesia No. 15/1982 was enacted on 12 April 1982, and Supplement to the State Gazette of the Republic of Indonesia No. 3217 abolished Staatsblad 1912 No. 600 on Auteurswet.

Political Choice of Law and the Shift in Philosophical Values

The shift in philosophical values in enacting Indonesian Copyright Law used pragmatic political choice with law transplantation model. The content of the law should (das Sollen) be able to accommodate all Indonesian expectations, ideas, and ambitions which contained the original paradigmatic value of Indonesian culture and society (das Wollen) which was formulated in the Indonesian ideology, Pancasila, as the Indonesian philosophical basis, the groundnorm, and was then issued as the value system or legal principle and realized in the concrete legal norms.

The law transplantation would continue without stopping as what Watson said, quoted by Esin Orucu: “The law transplantation still exists and will go on well as what occurred to Hammurabi.” Esin Orucu further pointed out: What is regarded today as the theory of ‘competing legal system’, albeit used mainly in the rhetoric of ‘law and economics’ analysis, was the basis of the reception of laws that formed the Turkish legal system in the years 1924 – 1930. The various Codes were chosen from what were seen to be ‘the best’ in their field for various reasons. No single legal system served as the model. The choice was driven in some cases by the perceived prestige of the model, in some by efficiency and in others by chance.

Orucu concluded that there was no single legal system which was used as legal development model in some countries. Taking the example of Turkey, he explained that after the fall of Osmanian dynasty, the government got many legal systems to be used as the model for legal development in Turkey. Criminal Law and Civil Law were obtained from Switzerland while Administrative Law was obtained from French Law model. By choosing various law models through the policy of transplantation, Orucu pointed out, Turkey under the regime of Mustafa Kemal Al-Taturk was successful in using transplantation law politics to become cultural legitimization device because the law model would eventually be chosen to be not adhered to one of the dominant culture.

This was what Orucu said as the mixed system, and it grew since social mobility in the society could occur because of the expansion of one nation upon the other nations, for occupation (annexation), colonization, or efforts of modernization. Another type of the mixed system occurred because of voluntary absorption of foreign legal norms (in the case of Indonesia, for example, the absorption of the Islamic Law), infiltration or inspiration, and imitation as the realization of the changing in social structure as what Orucu pointed out:

Mixed and mixing system and the migration of legal institutions are two inseparable fields of study. The fact that law is not static lies at the bottom of all mixed systems. Moving populations add another dimension to this phenomenon. The coming into being of mixed jurisdictions is one of the outcomes of mobility of law and mobility of peoples. Law moved across boundaries. The simplest, most easily defined and understood forces behind these movements are expansion, occupation, colonization, and efforts of modernization, and the ensuing impositions,
imposed receptions, voluntary receptions, infiltrations, inspirations and imitations and concerted or coordinated parallel developments. Legal ideas, concepts, structures, and rules move from legal order to legal order along these paths. In such movement there is interference with the horizontal logic (internal symmetry) and the vertical logic (the typical pattern of unfolding) of legal systems or legal orders, sometimes creating confusion, after which the legal systems settled into mixed jurisdictions or hybrid systems.

**Indonesia’s Experiences**

For Indonesian cases, taking legal system from other countries and are developed to become the Indonesian legal system is not a new thing. The choice of concordance principle as the Indonesian legal politics in Dutch colonialism and was continued to be developed after Indonesia got its independence is one of the examples which explains that, in reality, taking foreign law model to become the Indonesian law model is not uncommon, and it is not bad to do it. Law transplantation has gone on since the pre-Dutch colonialism up to the present; it began from the changing of the original Indonesian law position (adat law and original custom) up to the existence of new legal principles which were not known in the Indonesian civilization (law).

The policy in legislation has brought Indonesian copyright law which is criticized a lot, especially for its substance and its law enforcement. This law failed to transform ideological/philosophical basis, Pancasila, into the Indonesian Copyright Law. Foreign ideological/philosophical influence gave its color to this law. Legal experts fail to make Pancasila as the “filter” ideology when the policy of law transplantation occurred in the establishment of the Indonesian Copyright Law. This case did not occur once but many times along the history of the amendment of the Copyright Law. In the case of the intellectual property rights, Candra Irawan and Budi Agus Riswandi warned it. Some of their warnings are:

1. Indonesia has to be aware of adopting The TRIPS Agreement.
2. Indonesian interest should be heeded in the process of transplantation.
3. It seems that the attempt to adjust the establishment of the intellectual property rights to The TRIPS Agreement is forced.
4. The aspect of Indonesian interest is not seen in the transplantation process, although the Indonesian interest is included in the preamble, but its norms does not reflect the soul (philosophical/ideological basis) of Indonesia.
5. Foreign interest is always put forward so that legal instrument of intellectual property rights becomes meaningless to the Indonesian interest.
6. Culturally, Indonesian life structure is communal and not individualistic. The TRIPS Agreement put forward individualistic culture which is, of course, not in line with the Indonesian culture.

The explanation reminds us of the theory which is pointed out by Robert B. Seidman in *The Law of Non Transferability of Law* which said that the law of a certain nation cannot be transferred out of the blue without transferring the aspects around it (socio-cultural aspects) where the law is established (is in effect).

As what has happened in Turkey, Ethiopia and the other colonies of France in Africa and in Indonesia, foreign law is successfully transplanted in its substance but fails in its implementation because of different factors in their cultural and social structures, such as, social, economic, political relationship, governmental bureaucracy, law enforcement bureaucracy, and other physical and subjective factors such as, local people’s custom, and so on. In various countries, the factors of geography, history, technological advancement have significant influence on the failure in applying law in which the norms come from foreign law transplantation, as it is pointed put by Robert B. Seidman and Ann Seidman:

*Turkey copied French law. Ethiopia copied Swiss law, the French speaking African colonies, French law, Indonesia, Dutch law. Universally, these laws failed to induce behavior in their new habitats anything like that in their birthplaces. Inevitably, people chose how to behave, not only in response to the law, but also to social, economic, political, physical, and subjective factors arising in their own countries from custom, geography, history, technology, and other non-legal circumstances.*

Referring to the above point of view, it is time for Indonesia, in the policy of its law development, to pay attention and consider the social and cultural factors because, according to Satjipto Rahardjo, law exists together with the other social systems, in a broader social system. M. Solly Lubis also confirms that law as
one of the sub-systems in the Indonesian system in the future, will be determined by the political choice of the legal policy.\textsuperscript{41}

**The End of Pancasila Ideology: The Victory of the Capitalist**

The world will end with the victory of capitalist, that is what Francis Fukuyama said in his book *The End History and The Last Man*.\textsuperscript{42} The battle of global economy has pushed the countries in the world after the ratification of World Trade Organization (WTO) which is the achievement of Uruguay Round in 1994 in Punta Del Este. The Uruguay Round resulted in the General Agreement Tariff on Trade (GATT) which contains 15 important issues regarding global economy including The TRIPS Agreement.\textsuperscript{43} Indonesia as the member of WTO also ratified the Agreement through Act Number 7 of 1994. The impact of the ratification is that Indonesia must adjust all of its legislations of intellectual property rights (copyright, patent, trademark, industrial design, plant variety, integrated circuits and trade secret).

In the journey, the political choice of national legislation regarding the regulation of intellectual property right referred to the political choice of transplantation. The politics of transplantation is a choice to regulate the Acts in the country by transplanting the law from another country, or a law which is outside from the legal culture of the nation.\textsuperscript{44}

Since the beginning Indonesia in the field of Copyright has implemented the political choice of transplantation through Act Number 6 of 1982 which was the transplantation from Auteurswet Staatblad 1912 Number 600. It is obvious that the normative instrument of Act Number 6 of 1982 was rooted from the *wet* from the Dutch colonial. Even ideologically, Act number 6 of 1982 was stained by the Western philosophical principle. Started with the meaning of copyright, the scope of creation which is protected, until the settlement models, they were all completely referred to capitalistic law.\textsuperscript{45} Copyright Law has been altered five times after its inception in 1982; Act Number 7 of 1987, Act Number 12 of 1997, Act Number 19 of 2002, and the last one is Act Number 28 of 2014, all are stained with capitalistic philosophical principle.

The politicians in the legislative unconsciously positioned themselves as the executives, because the way of thinking from the executives which is rather pragmatist is what has been followed by the legislators in regulating the Copyright Law after the amendment of Act Number 6 of 1982. The idea and suggestion of state of law, has been shifted to the state of power, there is no Article in the all legislations in Indonesia that gives any authority to the executive to formulate the next regulation - under Acts - in the hierarchy (Government Regulation) to run the Act instead. In the state of law, executive’s authority must be limited by law, not given a too big authority to act and even given authority to make the regulation in implementing the law. Indeed, an organic regulation must, and commonly to be made to implement the Acts, but the organic regulation is better to bind executive internally, it should be avoided to bind outside (external), let alone to bind the society which contain rights and obligations, because the latter mentioned is a corridor of legislative’s authority, not executive’s. Even though in the Indonesian constitutional order the authority in legislation is becoming fifty-fifty between House of Representatives with the Executives, even executive has the authority of legislation plus one more authority that is to make Government Regulation to replace the Acts.

**Friction of the Values**

In formulating the National Copyright Law for those 5 times amendment, a value friction on the original paradigmatic value of Indonesian Culture and society which contained in Pancasila as the philosophical principle of the nation, has happened. Pancasila was the way of life of the nation, and was the source of all legal sources. A law that is not adjusted with Pancasila, had the potential to be tested (*toetsingenrecht*) through the Constitutional Court with material testing right. Although, the material testing right has always been compared with the Constitution. Not with Pancasila as the basic law (*grundnorm*) or philosophical principle in formulating legislation. This was what happened in regulating the national Copyright Law, although it is unseen with the eyes, but philosophically, the values contained in the Act are contradicting with Pancasila ideology.

The value of God (divinity) has shifted to secularism, the value of humanity has shifted to materialism, the value of kinship has changed and shifted to individualism. The value of obedience (protagonist) and to be consistent with Pancasila, has changed and shifted to contradict (antagonist) and to be inconsistent with Pancasila. The value of democracy economy has changed and shifted to capitalistic economy.
If all these times, in the Copyright Law Number 19 of 2002, only the cinematographic works and computer program that needed agreement from the Author if they are going to be rented (rental rights), in Copyright Law number 28 of 2014, the permission is not only in rental right on cinematographic works and computer program, but also for all works or creations even for neighbouring rights. Copyright is not only formulated as an exclusive right (abandoning the talents from Almighty God) but also formulated as economic rights and this latter is becoming very dominant in Copyright Law Number 28 of 2014. This is the proof of the capitalist’s victory on Indonesian Copyright Law which was just enacted in 16 October 2014, exactly 4 days before the handover of the presidential position from Susilo Bambang Yudhoyono to Joko Widodo.

The perspective of the government and the legislative is no longer putting copyright law in one sub-system which is part of the legal system in the national system. The existence of institutional ego and sectored-ego in the formulation of Indonesian copyright law was very real in those 5 amendments. The regulation of the copyright field, concerned with each department, not only with socio-cultural, science, and literary, but also concerned with technology, taxes, trade, and even in investment instead. The investors did not come with money, but come with knowledge and technology which is the form of copyright.

The choice of Pancasila ideology was meant to strengthen Indonesia, with a different identity of Indonesia which is different with the countries adhering socialist and capitalist ideology. As a country with sovereignty, Indonesia should be a country with strong politic economy, defense, and legal system, which count on its own chosen ideology. But in the case of the legislation of the Copyright Law, the political choice, which at the beginning was strengthening the position of the nation, now is weakening the position of the state. One country with discussion and deliberation system changed into liberal-democracy system. Finally, all of the values of Indonesian true social and culture paradigm contained in Pancasila ideologies, such as, the value of democracy economy, shifted into the value of capitalist economy and the discussion-deliberation system shifted into liberal-democracy system.

Pancasila ideology which was dug by the funding fathers of the nation, dug from the original paradigmatic value of Indonesian culture and society, born and hoped to be developed well in Indonesia, finally is murdered and buried by its own people. “The End of Pancasila Ideology”, that is the right sentence to mention the incapability of Indonesia to reject the capitalistic ideology and the international pressure in the legislation process of National Copyright Law through legal transplants policy.

Pragmatist Legal Culture

The legal culture of the society which rather pragmatist, caused their legal choices completely full of economical considerations. When they find something cheap (and sometimes with a better quality) they will not care with the more expensive one, even though to buy the cheapest is to violate the law. This is the case around the copyright piracy in cinematography and music and songs works that are put into VCDs and DVDs. Furthermore, the quality of the pirated DVDs is not so different with the original ones. The pragmatist culture which developed well in the middle of the society, abandoning the right of the people, will always stain the effectiveness in Copyright Law enforcement.

The legal goal of Indonesia was formulated not only after the reign of the Colonialist, but also furthermore before Indonesia was independent from the Colonialist, on 28 October 1828 in the day of the Youth Pledge, it has been formulated that the law which would be enforced in this country was the Adat Law. This was the first legal policy principle, formulated by the youth, the best children of this country that time, and beside enacted the language policy, national awareness policy, cultural policy and Indonesian awareness policy.

Legal transplants were inevitability based on legal policy which should be based on the Youth Pledge. Only because the incapability of this country in holding into the real identity of the nation, weak in capital, weak in science and technology and also weak in national management, then the independency of the nation become weak also, finally this country is lost on the global power that pushed this country into one new power, that is globalization demand. The dependency of Indonesia on the countries that gave the loans which incorporated in IMF and World Bank since the era of new order, is causing Indonesia to struggle more to be a independent country. Let alone the dependency in military defense aspect with strategic position implicitly under he shadow of
American military power. By that, it is understandable that Indonesia chose the pragmatist choice of legal transplants or the provisions in WTO/TRIPS Agreement to be transplanted into the national Copyright Law. This is more to be a demand than inevitability.

The weakness of demanding position of Indonesia internationally, was because the lack of management order and the weak skill in the meaning of natural source management which cannot be measured and unsystematically, even though rich in raw materials and human resource but the lack of mastering the skills caused to choose the pragmatist legal policy.

The history of the journey of National Copyright Law has been through a very hard road with many obstacles. The ratification of GATT/WTO 1994 has been conducted, the National Copyright law was also adjusted with the demand of World Trade System. Indonesia chose more than minimal requirements that were appointed in that Convention. Indonesia has chosen the direction and legal policy of its national Copyright Law, in line with the will of GATT/WTO 1994. The direction of Indonesian legal policy is getting clearer, to be directed to global capitalism. The end of history, said Fukuyama, the world is going to end with the victory of the capitalist. According to Fukuyama, in Asia, the capitalist will grow well in Indonesia. The choice of legal policy is what causing the capitalistic development. The term used by Fukuyama as the end of ideology of Pancasila will become a truth if studied well. A political will is necessary from the government and all the citizens with a strong will and hardship in the order of basic policy in formulating Indonesian law in the future to be back to the basic state’s philosophy. To study all legislations in Indonesian Republic, before altering and testing them in the Constitutional Court, not only formality, but also materially regarding the appropriateness of the legislation with the grundnorm Pancasila.

The process of acculturation of the culture cannot be avoided in this era of globalization. The wave of modernization powered by the sophisticated information technology put Indonesia to have to follow the movement, even though by that, Indonesia must make a lot of sacrifice. The first sacrifice was the faded original paradigmatic value of Indonesian culture and society.

In the order of enactment policy, the world, often lose the hope and trust in Indonesia. The cases involving people with a bigger crime has stained international media and the aspect of violation on copyright always stated in the international media, which all emphasized the bad law enforcement in Indonesia.

On one side, the consumers of cinematographic works are having the benefits because they can buy the pirated Digital Versatile Disc or Digital Video Disc with cheaper price, but on the other side, the creativity of the authors and producers and also the other parties in making the cinematographic works became obstructed. The cost, energy and time for the work cannot be covered by the sale of the cinematographic work. To make a cinematographic work it is not by just doing it out of hobby or interest in art, but it needs a normative commitment. In the following days, the work should get a strong legal protection. Without that, there will be no movie producer, movie director, actor, actress, or cameraman who wants to spend his time working to make a copyrighted cinematographic work.

It is the time for the National Copyright Law to think about the concern of the authors, producers, and all related parties in making the cinematographic works. Nevertheless, the concern of the civilization and national economy has also affected the Indonesian cinematography world development and that depends on the copyright protection. Even so, the tendencies of National Copyright Law to take side on the growth of national economy must be limited with the values of Pancasila as the state’s ideology. The foreign ideology penetration into the national ideology which caused this country lose its identity should be avoided.

As a social phenomenon, the instrument of legal policy can be made as the tool to design the society in one side. In the other side, law is not in a empty space, but it is in the national system. The change in the society will be followed by the change in its law. There is no static civilization, civilization will always grow and change following the alteration in the society. Every change will occur some paradigm shock. The shocked paradigm may be put in the ideological joints, but not only there, it will also penetrate into the national system which finally caused a shock in the cultural structure of the society. If its not avoided, then the shocks will keep on happening until it arrive in one state of balance. In legal language, that balance is always called by the name legal harmonization. The effort to create harmonization should be designed right as a choice of
legal policy. Because of that, the choice should be conducted consciously, not letting it just flow because that will cause the loss of control of the final direction. Because of that, Mahadi offered to search similar spots from what has already found as a difference. It should be searched the similar spots on the more idealist suggestions with the practical concerns.

It is already the time for Copyright Law to adopt the original paradigmatic value of Indonesian culture and society, to be made as the legal principles in regulating the National Copyright Law. On the other side, the globalization demand offered by the intellectual property rights according to TRIPS Agreement with the demand to put modern factors as the global economic demand. The difference in the culture of Indonesian society, subject to the local values (act locally), must be found with the values built by the global values (act globally). That is the nuances to meet the difference spots so that the National Copyright Law can be a “act locally” law, “commit nationally” law and “think globally” law. For example: the limitation on copyright at the beginning called as a good one in Auteurswet 1912 Stb. Number 600 or in the Copyright Law as the result of transplantation which has been adjusted with TRIPS Agreement, formulated that Copyright is:

*Copyright is an exclusive right for the Authors or the Right Holders to announce or duplicate his works or giving permission for that without decreasing the limitations according to the enforced legislations.* \(^{48}\)

This legislation did not reflect the “commit nationally”, “act locally”, but “think globally”, to make it both “commit nationally”, “act locally”, and “think globally”, it must be regulated like this:

*Copyright is a right born from the talent of human by the blessing of the Almighty God which is given to the Author or right holder to announce or duplicate the Creations or giving permission for that without decreasing the limitation according to the enforced legislation.*

As a religious country which acknowledges the existence of God and has made Pancasila as the basic principle and put the Divinity in the first principle, would bring the consequence that a creation is not a special right. The meaning of special right is like the right was born the skill of the human himself, whereas the talent, knowledge and imagination of the human, all subject to the will of God. A person who was given a skill or talent by God for something, is the chosen people by God. Not everyone can be a painter, singer, poet, or a writer. Also, not everyone has the talent to be a dancer, batik artist, or director who can make a high quality cinematographic work. All are because of the blessing from the Almighty God, not merely because of the ability of the human that can claim an exclusive or a special right. By putting the Copyright as the blessing of the Almighty God given to the Author, human will be able to understand that the true Author is the God. Human is just the mediator for God to create the creations which will end to the use for human beings. With this kind of philosophical understanding, it will bring a logic consequence in copyright protection, for example the social function of copyright will become one priority so that Copyright is not merely considered as a material thing. This fault is what was found in Article 9 paragraph (2) Act Number 28 of 2014 which was transplanted from TRIPS Agreement which obliged everyone to obtain permission form the copyright holder in renting the copyright. In the previous legislation, it was only limited to cinematographic works and computer program instead.

The provision above again showed the legal norm which is not “commit nationally” because this Act was contradicting with the Indonesian private law which placed that in the material law system adhering to the closed principle, that the transfer of the right caused the right holder to obtain an absolute right on the object except the transfer is in renting and giving a personal right, but in this case, it was the other way around when someone obtained the right by the trade to enjoy the right. This provision is out from the national material law system, so it is not “commit nationally”. By looking at the normative truth in the National Copyright Law in these 90 years (from Auteurswet Stb. 1912 No. 600 until Copyright Law Number 29 of 2014) and national the legal policy choice in the field of intellectual property rights (including copyright) the law will strengthen the thesis of Robinson, who said that since the era of Dutch Colonialism, Indonesia has started its journey to enter the capitalist-economy world and it grew well in the era of new order. Soeharto leadership, also assured Arief Budiman (with the consideration that Indonesia is a shy capitalist country) that Indonesia has became a capitalist country and also stopped the
hope of the founding fathers Mr. Hatta (which continued by Mubyarto and Adi Sasono) on building the democracy economy goal, all can be measured from many normative provisions poured in many legislations in Indonesia. This time especially with the corrected Article 33 of the Constitution 1945 through the amendment, it can be understood and assured where actually the direction and the political way of Indonesian economy is brought to, and what economic building actually is created through the Indonesian legal policy choice.

The pragmatist legal policy choice (studied from the transplantation case of National Copyright Law in many phases of history) which rather left the philosophical values of Pancasila, will bring a simultaneous effect to the life of national economy (as the sub system in the national system). If the law which is being built is rather towards liberal democracy and capitalistic economy, then in the future, this country will be won (in the battle with Pancasila ideology) by liberal democracy politics and capitalistic economy politics, and this will strengthen the thesis of Fukuyama in his book The End of History which stated that this world will end with the victory of liberal democracy and capitalistic economy and also it assured Ian Bremmer in his book The End of the Free Market which concluded that the winner in the free market battle will end with the birth of Country Capitalization and it is also a long term threat for the world economy. The world will be marked with the birth of global capitalism, according to Frieden.

Referring to the view of Fukuyama and Bremer, it should be the time for Indonesia to look back to the statement from 18 August 1945 and Presidential Decree on 5 July 1959, back to the Constitution of 1945, with modification on the state form and the alteration of the state institutions or the state entities which felt no longer capable to anticipate the global civilization development, in the legal policy choice (legal transplants politics) because the pragmatist legal policy which referred to the liberal democracy is escorted with capitalistic economy that will only lead this country to a greater distance of the rich and poor society, the government with society, intelligent society with un-intelligent society will end at a great difference in the aspect of social, economy, and culture which will be a threat to the nourishment of the country in the future. This will also be a warning (of course with responsibility) for the developed countries in the world incorporated in G-8 and the developed economic countries in the world (G-20) which has spread the “virus” of liberal democracy and capitalistic view which is threatening to the human on earth.

By borrowing the framework of the values, abstraction hidden in the life of Indonesian society from Mariam Darus to find the legal principles combined with the theory framework of Nuances from Mahadi, in the legal transplants policy, it should be referred to the legal principles hidden in Indonesian society that is the original paradigmatic value of Indonesian culture and society as the shield to filter the foreign legal values which is contradicting with the way of life of Indonesian society, the weltanschung of Indonesia, philosophical spirit or the soul which became the foundation or the movement of the country, ideology and the basis of the establishment of the state then adjusted with the globalization demand to find the law that is “commit nationally, think globally, and act globally”.

In order to make every citizen of this nation to open their mind to reconsider, if the constitutional system is already right, the form of the unity country with the territory autonomy chosen right is able to answer the aspiration of the society with more than 240 million people.

The form of the unity country adhered by Indonesia today, still cannot answer the challenge of the plural society of Indonesia as poured in the state goal with the principle of Pancasila ideology.

Legal transplants may be success to reach its goal in a federal country, to think globally can only be answered by a federal country. Commit nationally also can only be accommodated for a country by federal country, act locally can only be absorbed by federal country. The tendencies of the world to move to liberal capitalism also can only be accepted by the federal country and Pancasila can only be existed in the middle of the global wave, that is by conducting abstraction of the Pancasila values through actualization of the values which is contextual so that the soul of pluralism and inclusivism contained inside can be used to formulate the umbrella law born in the form of Central Government Act. In the local government, the concrete law can be formed in Local State Act. And because of this, the law and the local wisdom will live, grow, and develop.

This recommendation is not intended to divide or dismiss Indonesia to become a new country, also not intended to delete Pancasila, but intended to hold the
Republic of Indonesia, to stay in Pancasila. Borrowing the thought of Otto Bauer as always used by Soekarno, “this country was established based on character community which developed with the experience of community in togetherness”. So the establishment was not because of the same culture or same language, but the same experience resulted by history. That was why Soekarno emphasized on nation building of Indonesia but the process to stay as a nation must always be continuous, if not, it is going to be evaporated. If Pancasila, by Yudi Latif, was seen able to create a plenary country, it actually can only be realized if the values of Pancasila is being actualized contextually to answer the relevancy of the need in present and future time, although it can be understood that the past happened not because of the fault in Pancasila but because of the violation on Pancasila by the government which caused severe impact on the development of the country. By leaving Pancasila as the principle of intellectual property rights development policy including copyright, as caused by the developed countries, the owner of intellectual property rights, managed to accelerate the victory of capitalist in Eastern part of the world. Intellectual property rights instrument has played important role as a tool to colonize the third world country.

The world right now is in a hard situation to be predicted. The world order right now is built on the push and power from capitalistic economy made by the Western. The Eastern including Indonesia is in confused position to wait for tomorrow as said by Ganguli when ended his explanation regarding intellectual property right beyond the horizon.

The wisdom gained over several generations has brought the world at crossroads, where the horizon is only limited by human imagination. The knowledge era is on an underfinned trajectory that is resurfacing the world beyond recognition. Such as a virtual world will have surprises to offer in all fields, including IPR, and the challenge will be to visualize and prepare for them ahead of time. Alice in her ‘Wonderland’ said to the rabbit “Show me the way!” The rabbit responded “Where do you want to go, dear Alice?” She exclaimed “I do not know!” The rabbit totally at loss with this response, murmured “If you do not know where to go, how do I show you the way?” Does the wonder-world of today know where it wants to go? Only time will tick its way.

Conclusion

The choice of legal transplants policy of foreign law into Indonesian Copyright Law in the order of basic policy was happening in the period of post-independece previously after, systematically, by the government of Dutch Colonialist, through the concordance legal policy, it has introduced the Copyright Legal Instrument through Auteurswet 1912 Stb. No. 600 and it continued in the era of globalization after the ratification of GATT/WTO with the following instrument, TRIPS Agreement which has been dominated by the power of the developed countries, with all the dynamics and has caused the battle of ideology, between capitalist ideology and Pancasila ideology with the victory for capitalist ideology. Pancasila ideology which is the abstraction of the original paradigmatic value of Indonesian culture and society which in following days was set as the grundnorm in regulating National Copyright Law, turned out to be having some changes. The values of Pancasila or the legal principles which are changing the value of Divinity shifting to the value of secularism, the value of humanity which contain collectivism or togetherness is shifting to individualism or rather shifting to dehumanism, the value of unity or nation is shifting to the hidden imperialism, the value of democracy in discussion and deliberation is shifting to liberal democracy, the value of social justice and welfare in economy is shifting to capitalism. All happened because of the strong politics domination in law. Politics is still in the highest place in the management of Indonesian Government Bureaucracy, so that the politics is determinant to the law. Politics is becoming the variable independent and law is becoming the variable dependent. Law is really positioned as the product of politics, and in the other side the behaviour of the politicians and the legislatives is far from the hope to representate the voice of the people who are still faithful with Pancasila.

The existence of foreign law in Indonesia, not only shifting the existence of the nation’s ideology, but also has made the society confused and lost, unable to determine which is right or wrong, all is becoming strange and the society of Indonesia became stranger in their own country.

Pancasila, as the result of historical journey of Indonesia and the result of political compromise on the pluralism reality of Indonesia which then was made as the ideology of the nation and the grundnorm
in forming the legal norms (legal substance), need to be maintained, but the vessel to accommodate it in the form of constitutional structure (legal structure) today, need to be re-studied by formulating the government structure which is appropriate with the improvement of human civilization (think globally), and also able to catch the vibe and the passion of legal pluralism of Indonesia (act locally and commit nationally) to be realized; and efficient government bureaucracy, the effectivity of the work of the state institutions, saving on the budget and accuracy of the development goal, and also the controlled security and law enforcement, the absorbed values of local wisdom, the fair distributed economy sources.

In the context of national legal development of Indonesia, an effective constitutional structure and government bureaucracy will enable the absorption of the hidden values in the society of Indonesia which is very plural and in the order of basic policy and enactment policy, the National Copyright Law will be more realistic to be put on the Grundnorm Pancasila as the abstraction of the original paradigmatic value of Indonesian culture and society. Pancasila can be functioned as the filter to filter the foreign legal values which are not appropriate with the way of life of Indonesia, the weltanschung of Indonesia, the spirit or philosphic soul which became the basic of the journey of the nation, ideology and the basic of the establishment of the country for then implemented in legal norms of Copyright concretely so that there will be adjustment with the demand of globalization. All will end with the discovery of the law that “commit nationally, think globally, and act locally”.

References
2. The word Pancasila is from Sanskrit (a language used in ancient Hindu Holy Book in Indonesia) which consists of the words Panca and Sila. Panca means five, Sila means basis. Five basis made as ideology or philosophical basis in establishing Republic Indonesia: 1. Belief in the one and only God, 2. Just and civilized humanity, 3. The unity of Indonesia, 4. Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, 5. Social justice for all people of Indonesia.
3. The names of the founding fathers incorporated in the Committee of Nine are: Ir. Soekarno, Mohammad Hatta, Achmad Soebardjo, Mohammad Yamin, KH Wahid Hasjim, Abdoel Kahar Moezakar, Abikusno Tjokrosujono, H. Agus Salim and Alexander Andries Maramis.
5. So many scientific activities in reforming the law development, politic (bureaucracy) and economy of Indonesia sponsored and financed by the world financial institutions such as, holding seminars in all universities in Indonesia regarding perfecting Intellectual Property Right Law, such as, Intellectual Property Right Law Seminar, cooperation between Law Faculty-USU with Noute van Haersolte Amsterdam–Medan–Law Faculty USU on 10 January 1989 under the sponsorship of IGIG, then the forming of Presidential Decree 34 of 1986 team led by Secretary, Minister of Cabinet under the sponsorship of foreign countries. The team was made after the President of America visited Indonesia to meet President Soeharto. In this conversation with President Soeharto, Reagan suggested to alter the Indonesian Copyright Law which was unable to protect his country’s works. When the case of piracy of Bob Geldof’s Copyright in humanity concert “Live Aid” held by Bob Geldof to collect funds for the starving people in Africa that was just some little part of the example of the pressure on Indonesia under the regime of Soeharto. This regime was the regime of leadership in Indonesia under the shadow of America. Even in the regime of Soeharto, the chance to grow the capitalism was so big, as written by Richard Robinson, Indonesia The Rise of Capital, Equinox Publishing, Jakarta, 2008. Wardaya T, S J, Indonesia Melawan Amerika Konflik Perang Dingin 1953-1963. Galang Press, Yogyakarta 2008. Before the fall of Soekarno, the cold war happened between Indonesia and America since 1950 until 1963 when finally the regime of Soekarno fell in 1965, with that communist soverignty in Indonesia came to an end. Regarding the role of America in replacing the regime of Soekarno see further Geerken Horst H, A Magic Gecko Peran CIA Di Bulik Jatubnya Soekarno (Translation Tingka Adiati), Kompas, Jakarta, 2011 which clearly defined the involvement of America behind all of the incidents. After the reign of Soeharto, America started to “pluck its nail” and haunt all military policies and economic policies of Indonesia. Emmerson Donald K, Indonesia Beyond Soeharto, Negara Ekonomi, Masyarakat Transisi, Gramedia, Jakarta, 2001; Franklin B, Weinstein, Indonesian Foreign Policy and the Dilemma of Dependence From Sukarno to Soeharto, Equinox Publishing, Kuala Lumpur, 2007; Jenkins D, Soeharto & Barisan Jenderal Orba Rezim Militer Indonesia 1975–1983, Komunitas Bambu, Jakarta, 2010.
6. What is meant by foreign law here is Western legal system by European Continental and Anglo Saxon legal system.
Foreign Law is a term used here to differ it with the original law of Indonesia (adat rechts) which have the basis of Pancasila Ideology.

7 Latif Y, Negara Puripurna Historisitas, Rasionaltas dan Aktualitas Pancasila, Gramedia, Jakarta, 2011 p. 2. In his explanation, Latif cited the speech of Soekarno: One night on 1 June 1945, Soekarno prayed, because the next day he was going to make a speech in front of an Dokonisus Zyamby Tyosvaki Assembly, to answer a question regarding the basis of the independent country of Indonesia. In his speech, as cited by Judi Latif, Soekarno said: In the middle of the night which the next day was my turn to make my speech, I stopped out of my house in Pegangan Tiran Street Number 56. I was out in a very quiet night and I looked to the sky. I saw shining stars, hundreds, thousands, even tens of thousands and here I felt how little the human being is. That was when I felt how arrogant I was. That was when I felt a very big and heavy responsibility which is put on my shoulder………Oh My Lord, Allah, ya Rabb tomorrow I am to give the answer on a very important question….give me Your clue. After I made my prayer I had my clue, the enlightenment. An enlightenment that said: “dig what is about to be answered from the land of Indonesia itself”. Then that night I dig what is in my memory, dig what is in my mind, my imagination, what is buried in the land of Indonesia, so that as the result of that experience can be used as the basis of Indonesia as an Independent country in the future.


10 Koentowijaya, Selama tinggal Mitos, Selamat Datang Realitas, Mizar, Bandung, 2003, p. 145. The existence of Pancasila in legal system Indonesia, formulated in one unity that is unification of Constitution 1945 preamble and the body of the Constitution which consist of 16 Chapters and 37 Articles, 4 Articles of Transitional Regulation and 2 Articles of Addition Regulation. Pancasila is poured in the Preamble part in Paragraph 4. The enactment was conducted on 18 August 1945, one day after Indonesia got its independence. The assembly opened at 11.30 (or 10 WIB) in the Cuong Sangi in building, in Pejambon Street Number 2 Jakarta with his enactment ceremony led by the leader Ir. Soekarno and vice-leader Drs. Moh. Hatta and attended by 25 members.

11 Collision between civilizations happened. Indonesian civilization which derived from togetherness ideology, discussion and deliberation is facing the Western civilization which derived from individualistic ideology with liberal democracy. The development of economy in Indonesia refers to Indonesian civilization with the principle of democracy economic (the economy of Pancasila) is facing the development of economy principle that refers to Western philosophy with capitalistic economy principle. Huntington Samuel P & Benturan Antar Peradaban dan Masa Depan Politik Dunia, Qalam, Yogyakarta, 2003.


14 There are three principles that need to be noted in regulating the law (every acts) philosophical principle, that is Pancasila, juridical principle or constitutional principle of the Constitution 1945 and operational principle that is the Broad lines of State Policy or now it is called as National Long Term Development Plan. Those three principles called by Solly Lubis as National System Ideal Principle. National System Structural Principle and National System Operational Principle. Solly Lubis M, Sistem Nasional, Mandar Maju, Bandung, 2002.

15 Rahardjo S, Sisi-sisi Lain dari Hukum di Indonesia. Kompas, Jakarta, 2003, p. 10. The definition of Pancasila legal system meant as a bowl to accept all values adhered by Indonesian society that is the value based on the root of legal culture such as kinship, paternalistic, adjustment and balance and also deliberation. These values are different from formal system used and dominated by liberal legalism which in the following days will cause a problem when the legal norm is being implemented. The law formed referred to capitalistic and liberalistic legal system which in following days regulated based on legal order in Indonesia both in the suggestion and proposal in the beginning or in the birth process until finally verified as the Act then enforced to bind all society. Whereas there is still conflict inside, that is a conflict of ideology which like it or not, made the law being rejected when implemented by society. There will be impression that rule of law is not being enforced in Indonesia, whereas there is distance between the rule of law with cultural social structure of its society. The value of kinship, paternalistic and deliberation can not just accept that kind of thing in law enforcement. Satijpto Rahardjo saw that this problem not only happens in Indonesia, but also in East Asia such as, Korea, Japan, and Thailand.

16 Before Indonesia formulated its national legal system, the country already had a plural legal system that is Adat Law, Customary Legal System, Islam legal system. Thalib S, Politik Hukum Baru, Mengenai Kedudukan dan Peranan Hukum Adat dan Hukum Islam Dalam Pembinaan Hukum Nasional, Bina Cipta, Jakarta, 1986; Besides that, in the time of Dutch Colonialism, this territory of colonialism was subjected with the law of colonialism also based on concordance principle; started with private law, commercial law, criminal law, private practical law and criminal practical law and other fields of law spread sporadically including law regardingCopyright that was Auteurswet 1912 Sth Number 600. Soetandyo Wignjosoebroto, described well regarding how
in following days the colonial law is like water that slowly move but definite and finally accepted as national law. Wignosoebroto S, *Dari Hukum Kolonial ke Hukum Nasional Dinamika Sosial Politik Dalam Perkembangan Hukum di Indonesia*, PT Raja Grafindo Persada, Jakarta, 1994, p. 19.

Unfortunately, not all of the utility by that kind of protection can be enjoyed by the authors. Producers and distributors are the party who enjoy more of it. Without realizing it, the norm only brought big benefit for businessman in the field of cinematographic work. The producers and distributors are becoming wealthy in one side, but in the other side the actors, script writers are often in poverty. This is the result of capitalistic ideology which by Joost Smiers Marieke Van Schijndel suggested that the copyright protection need to be re-ordered. It is about how many artists can have a more appropriate life. Joost Smiers Marieke Van Schijndel, *Imagine There is No Copyright and No Cultural Appropriate Life*. Joost Smiers Marieke Van Schijndel suggested that the copyright protection need to be re-ordered. It is about how many artists can have a more appropriate life. Joost Smiers Marieke Van Schijndel suggested that the copyright protection need to be re-ordered. It is about how many artists can have a more appropriate life.

At the time when Copyright Law was born, the power of president (executive) in formulating the Act was so strong. Article 15 Paragraph (1) of the Constitution 1945 stated that: President hold the power to legislate with the Agreement from the House of Representatives. Article 20 Paragraph 1 stated: Every Act demand to be agreed by the House of Representatives. After being amended, president is only given right to propose the framework of the legislation to the House of Representative, and then the House of Representatives hold the authority to make the Act. In short, the result of the amendment of Constitution 1945 designed the process of formulating the Act which extremely different from before. The president of president that stated in the previous version now is in the hand of House of Representatives. Muhammad Mahfud M D when introducing the dissertation of Pataniari Siahaan, which then made as a book, Siahaan P, *Politik Hukum Pembentukan Undang-undang Pasca Amandemen UUD 1945*, Konstitusi Press, Jakarta, 2012, 14–15.

At least, this is what implicated by Mahfud M D that many Acts that were made to fulfill the need of state administrators is outside the explicit demand of the Constitution and outside the need and the will of the society and even deviate it ideologically. That is why in the law making (in legislations) become very important, and so important that Satjipto Rahardjo said that the law formulation is the beginning of all the process of society order as the dividing conditions between the condition without law, and a condition regulated by law. Furthermore, T Koopman, said that the main goal of legislation is not only to create codification for the norms and values of life in society, but furthermore to create modification in the life of society. Siahaan P, *Politik Hukum Pembentukan Undang-undang Pasca Amandemen UUD 1945*, Konstitusi Press, Jakarta, 2012, p. 15.

Kartadjoemena saw that Indonesia had some interest in Uruguay Round, in Indonesian perspective, according to him, Uruguay Round was a new experience in handling International trade issue in an integrated way. But, he brought forward that looking from the timing, the time is coincide with new steps in economy policy in the country that directed to the effort in accelerating the export of non-oil and an improvement in efficiency through deregulation, de-bureaucracy and adjustment structurally. For the first time the rule of game in GATT/WTO 1994 became an important factor and it directly connected with Indonesian national purpose in the field of trade. Kartadjoemena H S, *GATT/WTO dan Hasil Uruguay Round*, UI Press, Jakarta, 14-15.

The choice of the term legal transplants started by following the lecture by Ningrum Natasya Sirait in one semester in 2011-2012 in the subject Comparison between legal systems. She introduced a book written by Alan Watson with the title "Legal transplants An Approach to Comparative Law" published by Schochish Academic Press, America, 1974. Reading this literature, caused the title of dissertation which previously was “Foreign law Adopting” then became “Legal Transplantation”. The legal terminology “recht terminologie” regarding legal transplantation is used by many legal experts to mention one policy of the state that is to take over the foreign law to be made as the law in its own country. There are a lot of terms used to mention that incident, started with borrowing the foreign law, adopting, legal migration, translocation, until foreign law colonization, and also legal grafting. Let’s just say the term legal receptions which were brought by Loukas A Mutelis and Moh Koesnoe, legal borrowing or legal adoption brought by Alan Watson before he arrived to the term legal transplants, the term legal migration was used by Katharina Pistor, legal colonization used by Galanter, translocation of law by Antony Allot, legal surgery by Loukas M. Mistelis, Legal Transposition by Esin Orucu, Legal change by Haim H Cohn, Store J, *Legal Change Essays In Honor of Julius Stone*, Blackshield Butterworths Pty Limited, Australia, 1983, p. 36. Even Roscoe Pound have ever used the term “assimilation of materials from outside of the law”, to mention various process of transplantation of the law. Budiyani T, *Transplantasi Hakum Harmonisasi dan Potensi benturan Studi Transplantasi Dokrin yang dikembangkan dari tradisi Common Law pada Undang-undang*, PT Griya Media, Salatiga, 2009, p. 124, p. 4. The professor of law from Delf Universiteit, W C Van Den Berg who is also the advisor of Eastern languages and Islamic Law in Dutch Indies government, has ever studied adat rect in Indonesia and made a theory which is becoming very well known “Receptio in Complexu”. This was also about Transplantation of Islamic law (religious law) into *Adat law*, even, said Berg, Islamic Law is completely represented by Adat law. As long as it is not the other way around, said Berg, according to this teaching, the local law will follow the religious law even though it changes its religion; it will still follow its own religious law faithfully. Thalib S, *Politik Hukum Baru Mengenai Kedudukan dan Peranan Hukum Islam Dalam Pembinaan Hukum Kolonial*, Bina Cipta, Jakarta, 1987, p. 51. But this opinion was challenged by Hazairin; he said that not all of the adat law was represented from Islamic law. Hazairin, *Tujah Serangkai Tentang Hukum*, Bina Aksara, Jakarta, 1985, p. 44. The point is Berg used the term reception for the term transplantation.


25 Netherland Legal system based on Indo-Germany legal system and Christian-Roman legal system that was renewed through revolution, started with what is called by “Papal Revolution” until what is known as the revolution of liberalist-bourjois society of France by the end of 19th century. An opening of a very wide plantation in Sumatera with Liberal policy by opening private investment from Europe has brought the journey of Indonesian law into the private foreign capital protection with law Dutch Law enactment policy in Indonesia as the colony of Netherland. Even though in the end, resistance often happened on the policy of Netherland’s plantation from the labors which brought conflicts, but the law heritance that they left after the independence of Indonesia, still stained Indonesian law with liberal-capitalistic spirit.


27 Even though there is no absolute bond, according to the legal system in Indonesia, with the international agreement – even though Indonesia does not adhere to the theory of International legal primate, according to Moechter Koesoemaatmadja, which means without the transformation of international law into Indonesian law, the law is always binding - but, according to Hikmahanto, the obligation to transform international law to the Indonesian law (for the international law which has the category of law making) has to be done. The obligation to transform international agreement which has the category of law making is usually in the written form. For example, in Article XVI, Paragraph (4) of WTO Agreement, it is said, “Each member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligation as provided in the annexed Agreements.” The same is also found in Article 4, Paragraph (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; it is also mention that Each State Party shall ensure that all acts of torture are offences under its criminal law. Observing the provision, according to Hikmahanto, we have to interpret that a country has to interpret it to the Indonesian legal provisions from the international provisions which have been followed. In his explanation, Hikmahanto analyzes the arguments which often exist in Indonesia, whether Indonesia has to transform the international agreement into its legal provisions, laws, and regulations after it has participated in the international agreement which is categorized as Law-making? In his opinion, in a law-making international agreement, Indonesia has to interpret it in its own legal provisions. Hikmahanto studied the case of ratification from the Convention on International Interests in Mobile Equipment and from the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment. Broadly speaking, Indonesia ratified Capetown Convention with the Presidential Decree No. 8/2007. Juwana H, Hukum Internasional Dalam Perspektif Indonesia Sebagai Negara Berkembang, PT Yarsif Watampone, Jakarta, 2010, 85-92.
28 The interesting case is that when the export of Indonesian garment was denied to enter the United States in around 1990s because Indonesia was categorized as the hijacker of intellectual property rights. The same case also occurred to China since China was also categorized as the hijacker of Copyright or even the biggest country as the hijacker of copyright.

29 It is seen that the mathematics of its law to its own substance, it is nearly similar, that is, to copy the wet inheritance of Dutch colonialism. This Auteurswet 1912 was imposed throughout Netherlands East Indies, based on concordance principle. This wet in its origin country, the Netherlands, was renewed on 1 November 1912 which was the renewal of the first Copyright Law made in 1881. The renewal of this law was made because the Dutch Kingdom, along with the other European countries, had been committed itself to Bern Convention of 1886. After the Dutch Kingdom renewed the Copyright Law in 1881 to Auteurswet 1912, Dutch Kingdom was committed itself to Bern Convention 1886. Of course, Indonesia as one of Dutch colonies had to participate in the convention by registering itself in Staatblad 1914 No. 797.

30 BPHN, Seminar Hak Cipta, Binaicpta, Jakarta, 1976, p. 82.


32 Although its substance is the same as Auteurswet Sib. 600/1912.

33 Alan Watson, see note 22, p. 5.


37 In the Hindu era, Hindu law gave the color to legal relationship among the entire people in Indonesia at that time, and also occurred when Islam came to Indonesia. Islamic law also gave the color to the legal development. Therefore, it is true what Roscoe Pound pointed out that the history of legal system was the history of borrowing and assimilating legal materials from other legal systems.

38 Irawan C, Politik hukum Hak Kekayaan Intelektual Indonesia, Mandar Maju, Bandung, 2011, 14 -22.


40 Seidman A and Seidman Robert B, State and Law in the Development Process Problem-Solving and Institutional Change in the Third World, St. Martin’s Press, 1994, p. 44


46 Saidin OK, 42 Tahun UUPA: Hak Ulayat, Keberpihakan Setengah Hati, in Republika newspapaer, 26 September 2002.


48 Indonesian Act Number 28 of 2014, Article I Paragraph 1.


54 For example by running federal country, but still in the territory of Indonesian Republic, but also committed with Pancasila and the Constitution of 1945 which in turn could establish the adage Bhinneka Tunggal Ika which means that the pluralism in unity, because only by that can the bureaucracy can be shortened, the efficiency in running the state, the culture and local law (act locally) which based on the original paradigmatic value of Indonesian culture and society which abstracted in Pancasila ideology that stained the concrete legal norms poured in the legislations and the organic regulations (commit nationally). The assumption that needed to be offered as an alternative is that Indonesia must take acceleration steps to save “the state ship” which now is in a very critical condition which sign is the internal conflicts in some big political parties and the not finished agreement in implementing direct or indirect vote which ended with the birth of government regulation Number 1 of 2014.
The development in federation issue is worth to be appreciated, because just by that the foreign laws which will be transplanted into national law as the globalization demand can be accommodated and implemented concretely in the form of legislation formulation which can filter the entry of foreign ideology for the its turn that the soon to be born legislation can be accepted in global order (think globally). Because just by that the values of adat law and the concept of adat law enforcement can be “turned on” again in the process of justice, that what was actually developed by Van Vollenhoven and Ter Haar in the past did not too bad to be continued today, because the theory which was known as “beslissingen leer” actually has offered the same principle with the justice model used by Anglosaxon countries that is “the law is judge made law” and this can give the feel of justice to the society and by that the law based on the foreign law can answered the globalization demand (think globally).

It is unfortunate that the politics in Indonesian constitution today still urged to keep the unity country form. The form of the 70 years independent country, has not managed to realize the state goal and even today, still fight in the issues of specialty between the central and the local which is always won by the central. The results from the local often be brought to the central and the local got the “left-overs”.

Aceh may run its Islam Syari’at, but the same legislation does not apply in the territory of Bali. Tolerant can be kept through the Central Government Act, that it the soul of pluralism, the true mean of bhinneka. This is the political step to end the issues that had happened for years in this country, so that every society of Indonesia can live in a real country, not in Republic of imagination. There must be a courage to create “United States of Indonesia” to compare “United States of America, if not, Indonesia will always be a loser country of the developed countries by transplanting every regulations of the developed countries which eliminating the values of Pancasila which will end with the lost identity of Indonesia.

