

Pancasila The Ultimate of All the Sources of Laws (A Dignified Justice Perspective)

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ABSTRACT

Until today in the Indonesian legal system, Pancasila (the Indonesian five tenets) is the first and foremost source of laws. Pancasila has been regarded as the ultimate or principal source of all the sources of laws, which has its legal force to govern the legal system of the Republic of Indonesia. In the past when the nation state of Indonesia had not been formed or was still in a state of divided sub-nations occupying the archipelago, it was considered as the Kingdom of the Netherland's colony and was known as "*Hindia Belanda*"; the source of law of the Kingdom of the Netherlands was in the main, automatically regarded as the sub-nations occupying the archipelago's source of laws. Indonesian jurist must stop making any reference to their system by pointing to sources such as: *common law*, *civil law*, *socialist law*, *roman law*, canonical law, *hamurabi* law or religious law which was in force in the past or is currently. However, as the character of Pancasila Legal System is inclusive, reference to the legal systems of any civilised nation can still be made in order to absolve the legal ideas in the other legal system.

Key words: Pancasila, The Ultimate Source, laws

1. Introduction

The principal and necessary condition generally known, whether it is in jurisprudence, theoretically or in legal doctrines, as well as the principle of law implementing in legal practice for an independent and sovereign nation state is to declare at the outset its ultimate source of all laws. The ultimate source of laws thereof is therefore synonymous with the first and foremost source of laws of a legal system. Until today in the Indonesian legal system, Pancasila (the Indonesian five tenets) is the first and foremost source of laws. Pancasila has been regarded as the ultimate or principal source of all the sources of laws, which has its legal force to govern the legal system of the Republic of Indonesia.

Pancasila has been stipulated as the first source and the foremost source of all sources of law which has been in force in the system of laws of the independent and sovereign nation state Indonesia. The stipulation of the Pancasila as the first and foremost source of all sources of laws in the Indonesian legal system as such might be considered as an indication of the fulfilment of the conditions in jurisprudence, theoretically, in doctrine, as well as in legal practice as mentioned above. The stipulation as such, is also fair and logical in other than a system of law, such as the Indonesian system, could in the end decide on when and at what moment a system of law of the independent and sovereign nation state has already been established and freed itself from its state of dependence and no longer relies on the source of laws which has been made outside its system.

In the past when the nation state of Indonesia had not been formed or was still in a state of divided sub-nations occupying the archipelago, it was considered as the Kingdom of the Netherland's colony and was known as "*Hindia Belanda*"; the source of law of the Kingdom of the Netherlands was in the main, automatically regarded as the sub-nations occupying the archipelago's source of laws. Apart from the source of the Kingdom of the Netherland's law, in the past the custom of the people living in the archipelago had been considered as their source of laws.

These customary laws were called 'Adat Law'. The Adat Laws were different from one area to another and applied differently and distinctly from one people to the other, depending on their native origin and habits. By the declaration of the independent and sovereign Indonesian Nation State on the 17th of August 1945, the Indonesian state was finally formed and therefore automatically had its own distinct legal system governing across its jurisdiction. One might legitimately think that by this time the Indonesian nation state had already found its ultimate source all sources of laws for the country.

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With having its own ultimate source of all laws in the system, it could be said that the the legal relationship of the old colonial laws in the *Hindia Belanda*, with its mother source in the Kingdom of the Netherlands, must have been understood differently. With the proclamation of Indonesia's independence, this new and sovereign country has since then, had its own legal system and is therefore the ultimate source of all the sources of its law. The old "stream", which depended on its "water" from the Kingdom of Netherlands, has been disconnected and stopped permanently. The existing binding laws and regulations in the independent and sovereign Indonesia, must now be regarded as not having its origin anymore in its previous source, the Kingdom of the Netherlands. It could be justifiably said, that since the previous source of laws is not the source of laws of the people of Indonesia but was the source of laws of the people of the Kingdom of Netherlands. The existing and now binding laws for the nation state of Indonesia and its people, is derived from its ultimate source of laws in the Indonesian legal system. It is not derived from its former ruler, the Kingdom of the Netherlands (the Dutch Government).

As previously stated, the legal system of the nation state of Indonesia, 'Pancasila' has been established as the source of all sources of laws in the independent and sovereign Indonesian nation state. Therefore, for such a reason one can certainly manage to find and unearth from the Pancasila Legal System, that it is an obligation for the Indonesian jurist to stop looking for the geneology of Indonesia's laws in the Dutch Legal System. The Indonesian laws in this paper include the Philosophy of law, theories of law, doctrines and also legal practices in the Pancasila Legal System. The Indonesian jurists must stop looking for any legal justifications in the development of the foreign legal system or any system outside the Pancasila Legal System.

It is also a must for Indonesian jurists to give thought to the idea that now is the time to stop making any effort searching other legal sources, including a history of the law, in any other law system. Indonesian jurist must stop making any reference to their system by pointing to sources such as: *common law*, *civil law*, *socialist law*, *roman law*, canonical law, *hamurabi* law or religious law which was in force in the past or is currently. However, as the character of Pancasila Legal System is inclusive, reference to the legal systems of any civilised nation can still be made in order to absolve the legal ideas in the other legal system.

Ubi societas ibi ius. Where there is a society, there must be laws that are relevant as a point of reference and if there is a nation state, there must also be laws in that nation state. This is a dictate of the law, which has the absolute truth in it. If jurists in a nation state (in this case, Indonesia) are still looking for sources of laws outside its own jurisdiction, this would mean that the legal maxim *ubi societas ibi ius* as mentioned above, would loose its 'absolute truth'.

By maxim or an axiom, the writer means an absolute truth. It is just like we see the Sun which always rises in the East and sets in the West. What the writer has elaborated on above, is the background of this article. What follows, is a description and further elaborations and explanations, in order to understand Pancasila as the ultimate source of law in the nation state of Indonesia's legal system. A theoretical perspective used as a navigator in giving the description and also analysis of Pancasila as the source of all sources of laws in the Indonesian legal system, is called by the writer as the 'Dignified Justice Theory'.

Apart from the introduction as previously explained above, this article also contains a description of the postulate of the Dignified Justice Theory. Postulation is the truth that is used for navigating the analysis of Pancasila as the ultimate source or the source of all other sources of all laws in the Indonesian legal system. The next part of this article containins the ontology or the nature of the concept i.e. source of law. In describing the nature of the source of law, in this part of this article the writer also proposes to define the sources of laws. A very short analysis is also given concerning the notion of the ultimate source of all legal sources within a legal system.

Before the conclusion of this article, it is necessary to describe briefly and discuss the status of the speech given by Ir. Soekarno, the late President of Indonesia, who put before the Committee of the Preparatory for the Independence of Indonesia on the 1st of June 1945, the title of Pancasila. As it had been considered as a general truth in Indonesia, people would think that that Soekarno Speech at the 1st of June 1945 on Pancasila, is the speech which gave birth to the name 'Pancasila', or the five tenets. This assumption is probably true if the Pancasila which was referred to in his speech, is considered as an ideology, as some people regarded Soekarno as their panteon. However, one could almost be sure that the assumption as such could have risen from a mistaken juridical perspective and other legal implications. The writer would suggest that the mistaken believer as such, could furthermore weaken the status of Pancasila as the ultimate sources of all sources of laws in the Indonesian legal system.

2. Postulates in the Dignified Justice Theory

Here are two examples of the many postulates in the Dignified Justice Theory which could be used as guidelines to examine Pancasila as the ultimate source or the source of all sources of laws in the nation state of Indonesia¹. The first postulate is that any rules or norms, legal principles, and any other ideas about laws including the notion that Pancasila is the ultimate source of law or the source of all sources of laws in the Indonesian legal system can only be found or distilled and at the end of the day, be known from the ‘spirit of the people’ (*Volksgeist*). The searching of all of them by legal scientist of jurists is in progress.

However it must be noted here that the legal idea of the ‘spirit of the people’ is only a metaphor, and therefore one would think that the idea of law is too abstract. In this article, the meaning of the phrase ‘the spirit of the people’ has been concretely understood. The meaning of the phrase “the spirit of the people” or (*Volksgeist*) is manifested concretely and apparently shows itself empirically in two forms. The first form of the manifestation of the Indonesian spirit of law is through all of the existing legislations. The second form of the manifestation of the Indonesian spirit of law is through judge-made-laws, i.e. all the final and binding court decisions, are issued by the Courts of Law in the Indonesian nation state jurisdiction. It is to be submitted here that the two forms of the spirit of laws are the product or the output of the Pancasila Legal System. And this is one of the reasons underlining the preposition suggested by the writer of this article, is that Pancasila is the source of all sources of laws in the Indonesian legal system².

The second basic postulate of the Dignified Justice Theory is that the purpose of the law is justice. However justice in the Pancasila is slightly different from the idea proposed by Aristotle. By justice, the Dignified Justice Theory means a justice that promotes the dignity of human being and is synonymous with the development of law or law reform. The law has been considered by the theory as a big project in the creation and maintenance of a dignified justice society.

Accordingly, the writer has defined the Dignified Justice Theory as follows:

that the existing laws, i.e. those laws that treat and uphold all the values of humanity according to his/her nature and life purposes. This is because humans, both men and women, are the precious creatures of the One God Almighty as mentioned in the basic principle of the second tenet of the Pancasila, that is the just and civilised humanity. In the second tenet of the Pancasila it has been acknowledged that human dignity and all human rights and obligations, require just treatment of one human being by another and also by society. The treatment as such is addressed to humanity, to his or herself, to the environment and also for the glory of the Lord³.

3. The Ontology or Nature of the Concept of a Source of Law

Source in relation to the phrase “source of law”, is etimologically derived from the English word “source”, or in Dutch, the word “source” is similar or synonymous to the word *bron*. There have been many meanings given by legal experts or jurists to the concept “sources of laws”. Each meaning is accompanied by each of its consequences created. Pointing to the Dignified Justice Theory which contains the argument that the law, in this case, includes in it the meaning or nature of the source of law, which according to the law, can only be found in what has already been mentioned above: “the spirit of the people” or the German word *Volksgeist*.

With this idea in mind, the definition of the source of law proposed by Professor Sudikno Mertokusumo as suggested below, might be seen as a ‘law dogma’ in the spirit of the law of Indonesia (*Volksgeist*), one empirical source in the Pancasila Legal System. According to Professor Sudikno “it is its nature, and can therefore ontologically be described that by the phrase “source of law” is to mean the place where we can find and obtain the law”⁴. Perhaps with the purpose to enrich its ontology or bring deeply that nature of the concept “the source of law” described in the definition mention above, Professor Soedikno Mertokusumo would then elaborate

¹ The description and discussion on the Dignified Justice theory could be seen in Teguh Prasetyo, *Keadilan Bermartabat, Perspektif Teori Hukum*, Cetakan Pertama, Nusa Media, Bandung, 2015. By postulate is to mean a statement or a basic concept that is accepted as true, that forms the basis of a theory; in this particular case is the Dignified Justice Theory.

² A comprehensive description on the Pancasila Legal System can be found in Teguh Prasetyo, *Sistem Hukum Pancasila (Sistem, Sistem Hukum dan Pembentukan Peraturan Perundang-Undangan di Indonesia): Perspektif Teori Keadilan Bermartabat*, Cetakan Kesatu, Nusa Media, Bandung, 2016.

³ Teguh Prasetyo, *Hukum dan Sistem Hukum Berdasarkan Pancasila*, Cetakan Pertama, Media Perkasa, Yogyakarta, 2013, p., 93.

⁴ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, Edisi Keempat, Cetakan Kedua, Liberty, Yogyakarta, 1999, p., 76.

further on the other meaning of it and it could be used as a guidance every time one is mentioning the concept “source of law”.

According to Professor Sudikno, the phrase “source of law” was also given as the meaning of the principle of law. The nature of the phrase “source of law” with the meaning as the principle of law as such, would then by Professor Sudikno placed in line with, or was placed in a linear line with wordings or phraseology such as: “as something which appears to be the beginning of the law”. The phraseology “as something which appears to be the beginning of the law”, which by Professor Sudikno would most likely give similar meaning with the principle of law as such as would then be elaborated further in several examples.

Now follows examples of the meaning of the phrase “source of law” given by Professor Mertokusumo. As previously mentioned, the examples listed could be understood as examples or forms of the so called “something which appears to be the beginning of the law”. According to Professor Sudikno Mertokusumo, the meaning of the phrase “as something which appears to be the beginning of the law” could be seen in the form of: (1) the will of God, (2) human reason, (3) the spirit of the people¹. For the third form or example of the “source of law” this has been understood by Professor Mertokusumo “as something which appears to be the beginning of the law”, and as “the spirit of a people” and as mentioned, is almost similar to the German term of *Volksgesit*. If we compare it to the English term, as stated above, the German ‘*Volksgesit*’ with its narrower meaning, is almost similar to the English concept ‘*the spirit of the people*’.

As for the meaning of the phrase “the ultimate source of law” or “the source of all sources of laws” of a particular legal system which has been described and discussed in this article, is not similar to the mere concept of “source of law”, just like its meaning quoted by Professor Mertokusumo. With reference to the meaning of the phrase “source of law” given above, the writer would rather argue that the nature of the ultimate source of law or the source of all sources of law, existed much earlier than the existence of the source of law. It means that “the source of all sources of laws” has a much deeper notion compared to the notion of “source of law”, the meaning of which as mentioned above, was given by Professor Sudikno. What the writer means by much deeper meaning, is that if one has found the deeper source of law, one would not go into any further investigation.. Once the deeper notion of the source of law has been found, automatically one has already found the beginning of all sources of laws existing in a particular legal system. It is also necessary to state, that the effort to search for the beginning of a law as mentioned above, is a philosophical activity, in particular the philosophy of law. Therefore, the activity to find a much deeper source of law could be fairly named as the philosophical activity. This has been defined by this writer as;

Thinking philosophically is characterised by thinking radically. Radical is derived from a Greek word, *radix*. This Greek word means root of everything. To think radically is thinking down to the root of something. It means thinking on the nature, the essence, or down to reach the substance of something considered. Humans who undertake philosophy would not get satisfaction simply by using the five senses, since they are unstable and changing. Humans undertake philosophical activities by using reason in an effort to catch the fundamental knowledge, that is the knowledge which is at the base of all knowledge acquired by experiences using the senses².

In relation to the philosophical meaning of the phrase “source of law”, O. Notohamidjojo has also given a meaning to the phrase “source of all sources of laws”. Among other things, the meaning given to it was; the binding power of a rule of law. By source of law, in terms of the binding power of a rule of law, is the answer given to the question “why do we have to obey the law?”. According to Notohamidjojo, the law has its power to bind a people if the law accommodates three substantial aspects. The first aspect is that the law has a philosophical foundation. The second is that the law has a juridical reason, and the third is that the law is based on a sociological aspect³.

Looking at the definition given to the phrase “source of law” by Notohamidjojo as mentioned above, the writer would argue that the concept source of all sources of law or the ultimate source of law would not be simply pointing at the place where we can find the laws. It does not simply mean power to bind a people. Deeper than those elementary meanings, the notion of the ultimate source of law is to mean everything, including the place,

¹ *Ibid. Cf.*, the meaning of the source of law has also been given by this writer in, Teguh Prasetyo, 2013, *Op. Cit.*, p., 4.

² Teguh Prasetyo dan Abdul Halim Berkatullah, *Filsafat, Teori, & Ilmu Hukum: Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermartabat*, Cetakan Kesatu, RajaGrafindo Persada, Jakarta, 2012, p., 1-2.

³ O. Notohamidjojo, *Soal-Soal Pokok Filsafat Hukum*, Badan Penerbit Kristen, Jakarta, 1975., p., 30.

the binding power, the will of the state, the history of the system itself, all which contribute to the existence of a law, such as legislations, case laws, doctrines and the theories of laws, international agreements and many more. All of the aforementioned sources of laws can be found in Pancasila. It is therefore reasonable to call Pancasila the source of all sources of law of the Indonesian legal system. One could further argue that the Pancasila legal system is a self sufficient system of law. It means that the nation state of Indonesia would not find its laws in the existing legislation and all the final and binding judges decisions, would be derived from Pancasila. Pancasila should be the cornerstone or parameter to construct and evaluate and also reform all the public policies containing rules, norms and principles of laws in the Indonesian legal system.

Although the writer has argued that the ultimate source or the source of all sources of law is about everything which is simply related to the source of law, in the legal science or jurisprudence, lawyers or jurists are controlled by law and their business, in particular research activities. This principle also applies to Pancasila as the source of all sources of laws. From the perspective of the Dignified Justice Theory, the legal limit in searching the source of laws has been established and the lawyers are to be directed to look only at the legislations and judge made laws existing in the Indonesian jurisdiction.

It must be upheld as a principle of law in the Pancasila Legal System that from the pure law perspective, Pancasila as the ultimate source of laws is one of legislation, but its place is at the heart of the system and jurisdiction. Some people prefer to associate Pancasila with the head or the supreme thing in the structure of the Indonesian legal system. The writer would also like to remind that Pancasila in this article is the Pancasila that has been stipulated or formulated in the Preamble of the Indonesian Constitution, i.e., *Pembukaan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. With the idea of Pancasila as the ultimate source of laws, consequently all of the legislations and final and binding Indonesian courts decisions existing in the Indonesian legal system, are derived and must certainly match with the Pancasila formulated in the Preamble of the Indonesian Constitution.

It has been said, since Pancasila in the Preamble of the Indonesian Constitution including all its derivatives, has already become the place where Indonesians and everyone else may find the place to know the laws including the source of the binding power of all the laws of this jurisdiction, the will of the state, the history of its legal system, and any other causes forming the laws of the country such as the legislations, judge-made laws and any other rules, doctrines, international agreements, customary and Adat and many more have all has been regarded as Pancasila.

Referring to what the writer described in another work, that Pancasila is called the 'First Agreement', therefore in order to understand Pancasila as the ultimate source of law or the source of all sources of laws, one would be reminded about the legal idea of an agreement or a contract. Including in a process of making an agreement or what in the Indonesian legal culture, people call a deliberations to reach a consensus (*musyawarah mufakat*). The process of making the contract or agreement and the what so called '*musyawarah mufakat*' Indonesian people have reached a final and ultimate result.

The result of the process in making the agreement is the Pancasila that the writer has called it the 'Indonesian First Principle' (*Kesepakatan Pertama*) or First Agreement¹. In that idea of Pancasila as the Indonesian First Agreement, it is a must that one will find all the necessary conditions for a concept to be called the ultimate source of laws; i.e. the place that one can find a rule of law, but also the binding force of a legal system, things which have formed the laws, regulations, case laws, doctrines, theories of laws, the legitimacy of any international agreements, customary laws and Adat, and many more.

4. The Status of Pancasila in the Soekarno's Speech

After considering the description and analysis mentioned above, those who are familiar with the Indonesian legal system will find a problem. The problem as such is related to the legal status of Mr. Soekarno's Speech on the Pancasila addressed to a committee for the preparation of the Independence of Indonesia, suggested by a Japanese Military Mandarin at that time. Mr. Soekarno's Speech was delivered one month before the Proclamation of the Independence of Indonesia. It was delivered on the 1st of June 1945².

¹ *Ibid.*, p., 367.

² An authentic manuscript of this Speech has been provided in Muhono, Prajurit Tentara Nasional Indonesia, *Himpunan Ketetapan MPRS dan Peraturan Negara Yang Penting Bagi Anggota Angkatan Bersenjata*, tanpa Penerbit, Jakarta, 1966, p., 2-19.

The problem would have arisen if one believed that Pancasila is the ultimate source of all sources of laws in the Indonesian legal system and the Pancasila becoming an essential element in the structure of legislations while its formulation can be found in the Preamble of the Indonesian Constitution. As the Ultimate source of all laws in the Indonesian legal system it has been said that all the legislations and case laws must be derived from Pancasila, but which Pancasila? Is it the Pancasila that is mentioned in the Mr. Soekarno's Speech or the Pancasila in the Constitution? One might have been misunderstood by arguing that the ultimate source of all laws in Indonesia is the Pancasila mentioned in Mr. Soekarno's Speech. This is certainly wrong. It is wrong because if we agreed with the argument, we will be trapped in the argument made by the dogma of O. Notohamidjojo and Professor Sudikno as previously mentioned, that an ideology could be used as the ultimate source of law.

The writer would rather argue that the Pancasila which has been considered as the ultimate source of Indonesian laws, is the Pancasila known as the First Agreement of the Indonesian people, formulated in the Indonesian Constitution. The Pancasila that has been formulated in the Indonesian Constitution is not a ideology, it is the First Agreement of the independent and sovereign Nation State of Indonesia. The Pancasila mentioned in Mr. Soekarno's Speech was an ideology. Every jurist will agree that there must be no law based on ideology¹. Bear in mind that Pancasila is the First Agreement and is similar to the idea of a contract *Mengingat sebagai Kesepakatan Pertama*, therefore Pancasila in the Preamble of the Indonesian Constitution including all the existing legislations and also all the final and binding courts decisions, which are the derivatives of Pancasila, is also having the binding power as law. As a consequence of their status as laws, the breaking of them will bring about punishment to the party who has broken them and that is justice².

Meanwhile, Pancasila which is mentioned in the speech of Soekarno on the 1st of June 1945 must be considered as Pancasila, which only has the ideological power but lacks the legal requirement in order to have legal power. The status of the Speech is not a legal document, but only an ideological sign. From the perspective of Dignified Justice Theory, one may call Pancasila mentioned by Soekarno in his Speech as having a legal status of a precontractual document. Every lawyer would agree that a pre-contractual document does not have any legal power whatsoever. The status of the speech of Ir. Soekarno in legal terms would only be a sign that a process of an agreement has been preceded by a battle of forms.

If we care to make a comparative analysis with the English or common law system, and make the comparative study as a mere inspiration to understand the speech of Soekarno, we may call the speech of Soekarno an offer in the making of a contract. In law, an offer to create a contract must be accompanied by an acceptance. It may happen to be that before an acceptance has been given a party may give a correction to the offer and this is what is called a battle of forms. These forms do not have any legal powers. If we take a closer look, Pancasila in the speech of Soekarno also contained substances or formulation of Pancasila which have no equal to the formulation of Pancasila in the Indonesian Constitution of 1945. In other words, the Pancasila mention in the Soekarno Speech does not have any equal to the Pancasila in all the legislations or court decision derived from Pancasila in the Indonesian Constitution of 1945.

5. Conclusion

From the perspective of the Dignified Justice Theory, the writer will conclude that Pancasila as the ultimate source of laws or the source of all sources of laws in the Indonesian system of law, has a broader meaning than simply meaning a source of law. Pancasila as the ultimate source of laws is similar to a document of an agreement, and in this article the writer has mentioned that in terms of that, Pancasila could be called the First Agreement of the Indonesian People. Pancasila as the ultimate source of laws in Indonesia, has been formulated in the Introduction or Preamble of the Indonesian Constitution.

¹ It is necessary to mention here that in The Speech of Mr Soekarno on Pancasila delivered on the 1st of June 1945 the name Pancasila was for the first time proposed there. Mr. Soekarno made his point concerning it: "... myself would name it according to a direction given by our friend an expert in linguistic—the name is Panca Sila—. Sila means principle..."a. *Ibid.*, p., 16 – 17.

² The People Deliberation Assembly of the Republic of Indonesia' Decree No. III/MPR/2000. This Decree has been issued to replace the People Deliberation Assembly of the Republic of Indonesia' Decree No. XX/MPRS/1966. It has been stipulated there that Pancasila formulated in the Preamble of the Constitution of 1945 is the national basic source. Teguh Prasetyo & Arie Purnomosidi, *Membangun Hukum Berdasarkan Pancasila*, Cetakan Kesatu, Nusa Media, Bandung, 2014, hlm., 24. In this Article, Pancasila that was formulated in the Preamble of the 1945 Constitution was not simply a national basic source, but more that that the First Agreement, the source of all sources of laws for the Indonesian legal system.

This Pancasila is definitely different to the Pancasila stated in the speech of Mr. Soekarno delivered at the 1st of June 1945. Pancasila as the ultimate source of laws in the Indonesian legal system mentioned in the Constitution must be regarded as one with all the existing laws and regulations, particularly legislations and final and binding courts decisions in the Pancasila Legal System. This is the necessary and absolute conditions for all laws in the system to have their legal legitimacy and legal force. If one is against the Pancasila as such, the implementation of it could be made by using force for its enforcement provided in the Pancasila Legal System. This is different with the Pancasila mentioned outside the Constitution because it is only an ideology.

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