



EXAMINING THE REFERENCE OF PERSONAL DATA INTERPRETATION IN INDONESIAN CONSTITUTION

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ABSTRACT

The discourse on personal data protection has been developed for a long time, even before the advent of internet technology. In the Indonesian context, issues relating to personal data protection have begun to develop in recent years, responding to the increasingly rapid development of digital technology. Currently, the Personal Data Protection Bill is again included in the 2021 Priority National Legislation Program in response to the importance of regulations relating to personal data protection in Indonesia. The fundamental thing that often escapes the discourse on personal data protection in Indonesia is related to how personal data is positioned in a constitutional perspective based on the 1945 Constitution of the Republic of Indonesia if personal data is considered as something that must be protected. This research specifically answered the questions: (a) how is the conceptual interpretation of personal data? (b) how is personal data positioned in the perspective of the Indonesian constitution? This research is normative legal research, conducted by analyzing secondary data obtained through literature review. The results of this research indicated that the conceptual interpretation of personal data is still a growing discourse. As for personal data in the perspective of the Indonesian constitution, it can be seen by looking at the legal-historical aspect in the discussion of the amendments to the 1945 Constitution, especially in Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia which is hypothesized as a reference for personal data protection.

Keywords: interpretation; personal data; constitution; Indonesia

INTRODUCTION

The discourse on personal data protection has been developing for quite a long time, even before internet technology emerged. Historically, the discourse on personal data protection cannot be separated from the development of the concept of privacy.¹ Since the 1960s, the issue of the relationship between privacy and data use has become increasingly prominent.² One of the reasons is the potential for supervision carried out using a computer system.³ This further encouraged

the emergence of special regulations regarding the collection and use of personal information.⁴

Reflecting on this matter, in 1970, the first Personal Data Protection Law was promulgated in the State of Hesse in Germany, followed by the legislation at the national level in 1977.⁵ Several other countries at that time which enacted Personal Data Protection Laws at the national level are Sweden in 1973, the United States in 1974, and France in 1978.⁶

The issue of privacy of personal information is increasingly emerging at regional and international levels, one of which is marked by the issuance of the 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data⁷ In addition, in

¹ Alan Westin generally defines privacy as an "individual claim" for [...] determining when, how, and to what extent information regarding themselves communicated to others". Alan F. Westin, *Privacy and Freedom* (New York: Athenum, 1967).

² Jan Holvast, "History of Privacy," in *The Future of Identity in the Information Society*, IFIP Advances in Information and Communication Technology Vol. 298 (German: Federation for Information Processing, 2009), 30.

³ David Benisar and Simon Davies, "Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and

Development," *Journal of Computer & Information Law* 18, no. 1 (1999): 10.

⁴ Ibid.

⁵ Holvast, *Op.cit.*, 28.

⁶ Benisar and Davies, *Loc.cit.*

⁷ See Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data,

the same year, the Organization for Economic Cooperation and Development (OECD) also issued guidelines on protecting the privacy and limiting the cross-border flow of personal data.⁸ The discourse on the relationship between privacy and personal data is growing in this digital era. This is because, in the digital era, everything is connected and without boundaries.

In Indonesia itself, the issue of personal data protection has only begun to develop in recent years,⁹ responding to the increasingly rapid development of digital technology. However, the juridical terminology of “personal data” can be traced back to 2006, namely in Law No. 23 of 2006 on Population Administration (PA Act). In this Law, personal data is defined as “certain personal data that is stored, maintained, and kept true and its confidentiality is protected”.¹⁰ This definition is then used in various other laws and regulations, such as Government Regulation No. 82 of 2012 on the Implementation of Electronic Systems and Transactions (GR ESTI 2012) and the Regulation of the Minister of Communication and Information No. 20 of 2016 on Personal Data Protection in Electronic Systems (MOCIR PDPSE 2016).

The two examples of laws and regulations above were used as a legal basis in efforts to protect personal data in Indonesia. Although later in its development the definition of personal data in Government Regulation No. 71 of 2019 on Implementation of Electronic Systems and

Transactions (GR ESTI 2019) which revoked GR ESTI 2012 has changed into “any data about a person either identified and/or identifiable separately or in combination with other information either directly or indirectly through Electronic and/or non-electronic Systems”.¹¹

Nevertheless, something that is fundamental but often missed in the discourse on personal data protection in Indonesia is related to how this personal data is positioned in a constitutional perspective based on the 1945 Constitution of the Republic of Indonesia. If personal data is considered as something that must be protected, in the perspective of the Indonesian constitution, how should personal data be positioned?

Based on the Authors’ search, in several scholarly works, it is stated that personal data is positioned as a part of human rights that must be protected based on the provision of Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia,¹² that, “Everyone has the right to protection of oneself, family, honor, dignity, and property under their control, as well as the right to a sense of security and protection from the threat of fear to do or not to do something which is a human right”. However, there are various meanings regarding which elements in the aforesaid Article are the constitutional justification for the protection of personal data in Indonesia, whether as part of the protection of an individual or as protection of property under one’s control.¹³ In

1981.

⁸ Organization for Economic Cooperation and Development, *Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data*, ed. OECD (Paris, 1981). Pedomannya telah diperbarui pada tahun 2013 dengan publikasi berjudul *The OECD Privacy Framework*.

⁹ One of the issues that continues to emerge today, for instance, relates to the case of online lending companies by disseminating customers’s personal data. In that article, the author also emphasizes that data protection is also a fundamental right. Therefore, provisions on the protection of personal data are important. See Rodes Ober Adi Guna Pardosi and Yuliana Primawardani, “Perlindungan Hak Pengguna Layanan Pinjaman Online Dalam Perspektif Hak Asasi Manusia,” *Jurnal HAM* 11, no. 3 (2020): 354–355, 363–364.

¹⁰ Law No. 23 of 2006 on Population Administration (Undang-Undang Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan) (Republik Indonesia, 2006).

¹¹ Government Regulation No. 71 of 2019 on Implementation of Electronic Systems and Transactions (Peraturan Pemerintah Nomor 71 Tahun 2019 Tentang Penyelenggaraan Sistem dan Transaksi Elektronik) (Republik Indonesia, 2019).

¹² However, it does not close the opportunities that constitutional basis of personal data protection in Indonesia could be based on other constitutional Articles.

¹³ For instance, Upik Mutiara and Romi Maulana, “Perlindungan Data Pribadi Sebagai Bagian Dari Hak Asasi Manusia Atas Perlindungan Diri Pribadi,” *Indonesian Journal of Law and Policy Studies* 1, no. 1 (2020): 44, in which positioned the rights of personal data protection as part of Article 28G of the 1945 Constitution of the Republic of Indonesia. Another article that discusses constitutional basis of personal data, for instance, Setyawati Fitri Anggraeni, “Polemik Pengaturan Kepemilikan Data Pribadi: Urgensi Untuk Harmonisasi Dan Reformasi Hukum Di Indonesia,” *Jurnal Hukum & Pembangunan* 48, no. 4 (2018): 816–817. In that article, the author refers to Article 28G of the 1945 Constitution. However, the author did not specify which part of the article that become

another article, it is also stated that the protection of personal data is a mandate from Article 28G of the 1945 Constitution of the Republic of Indonesia because it is in accordance with Warren and Brandeis's interpretation of privacy, but does not explain which element of the article indicates that interpretation.¹⁴ These variations in interpretation can certainly lead to different legal implications, especially in the context of protection.

The discourse on the position of personal data as an inherent part of human beings (in the context of personal rights) and as part of objects owned by individuals (in the context of material rights) has also appeared in several international scholarly works. For example, Paul M. Schwartz in 2004 analyzed personal data from the perspective of material rights, especially property rights and information privacy rights.¹⁵ Another literature, for example, Nadezhda Purtova's 2015 work, discusses property rights in personal data, and states that personal data as a system resource does not only consist of fragments or pieces of information about identifiable individuals, but as an ecosystem consisting of various interrelated elements.¹⁶

Some of the examples of literature above can at least show how the discourse on the interpretation of personal data is still developing. However, as the Authors stated above, it is important to understand how personal data is positioned from the perspective of the Indonesian constitution. Some of the literature above, especially those that discuss the Indonesian context, has not been able to explain in-depth how the true reference to the interpretation of personal data in the Indonesian constitution is. This is important because how

the constitutional basis of personal data protection, whether protection of personal self, or protection of their property. Furthermore, the author used the term "ownership" of personal data.

¹⁴ Muhammad Hasan Rumulus and Hanif Hartadi, "Kebijakan Penanggulangan Pencurian Data Pribadi Dalam Media Elektronik," *Jurnal HAM* 11, no. 2 (2020): 293.

¹⁵ See Paul M. Schwartz, "Property, Privacy, and Personal Data," *Harvard Law Review* 117, no. 7 (2004): 2056-2057. In this article, Schwartz classified five critical elements of a model of propertized personal information, which according to him could justify the use of personal data as a "commodity" in the digital economy context.

¹⁶ See Nadezhda Purtova, "The Illusion of Personal Data as No. One's Property," *Law, Innovation and Technology* 7, no. 1 (2015): 109.

this personal data is protected will be specifically regulated in the Personal Data Protection Law.¹⁷ Thus, how personal data is interpreted is important in efforts to protect personal data. Therefore, this research is intended to fill the current literature gap, by providing clarity and elaborating more deeply on the interpretation of personal data based on the 1945 Constitution of the Republic of Indonesia.

Based on the aforesaid matter, there are two problems raised by the author. First, how is the conceptual interpretation of personal data? Second, how is personal data positioned in the perspective of the Indonesian constitution? The existence of a constitutional justification in the effort to protect personal data is an important thing considering the position of the constitution as the highest law based on the hierarchy of laws and regulations in Indonesia. Thus, all provisions at lower levels must be in line with the constitution.

RESEARCH METHOD

This research is normative legal research that emphasizes research on secondary data.¹⁸ In this research, the secondary data which were used are: (a) primary legal materials, in the form of the 1945 Constitution of the Republic of Indonesia and related laws and regulations; (b) secondary legal materials, in the form of journal articles, books, and other scientific articles relating to personal data; and (c) tertiary legal materials, in the form of the Great Dictionary of the Indonesian Language of the Language Center (KBBI), and legal dictionary such as the Cambridge Dictionary.

Furthermore, all legal materials that have been collected were compiled systematically and analyzed qualitatively.¹⁹ Then, in conducting the analysis, three research approaches were used, namely the statutory approach, the conceptual approach, and the historical approach. The statutory approach was used in the framework of reviewing laws and regulations relating to or regulating

¹⁷ To date, PDP Bill has been discussed in the First Phase of Discussion in the DPR. See Dewan Perwakilan Rakyat Republik Indonesia, "Paripurna DPR Sepakati 33 RUU Prolegnas Prioritas 2021," accessed March 31, 2021, <https://www.dpr.go.id/berita/detail/id/32239/t/Paripurna+DPR+Sepakati+33+RUU+Prolegnas+Prioritas+2021>.

¹⁸ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: Universitas Indonesia Press, 2006), 9.

¹⁹ *Ibid.*

personal data. The conceptual approach was used to obtain scientific justification concerning personal data according to the developing concepts. Finally, the historical approach was used to understand the history or background of the issues raised.

DISCUSSION AND ANALYSIS

A. Conceptual Interpretation of Personal Data

1. Historical Perspective on the Relation of Privacy and Personal Data

As described above, the discourse on personal data cannot be separated from the development of the conception of privacy. This is because efforts to protect personal data have a close historical relationship with the development of privacy. Therefore, it is important to understand what privacy is first before entering into the discussion about the conception of personal data.

Privacy is not a concept that has just been discovered in the modern era. Linguistically, privacy itself is interpreted as a situation or condition where a person is alone, or has freedom over himself,²⁰ in other words, it is private. The word is also used to show the opposite of something public. However, the discourse on the interpretation of privacy, especially in the legal context, only developed around 1890. One of the monumental works relating to the discourse on the right to privacy can be found in the work of Warren and Brandeis in an article entitled *The Right to Privacy*.

In the aforesaid article, it is stated that full protection of oneself and human property is one of the principles that has existed since a long time ago.²¹ However, from time to time, there has been an impetus for the need to redefine the nature and level of appropriate protection of such matter.²² At that time, the law provided protection and settlement against physical disturbances to one's life and property. Along with political, social, and economic developments, the scope of a person's

personal legal rights is gradually expanding, so that the recognition of these new rights is needed.²³ This conception then developed into what is interpreted as privacy.

In principle, Warren and Brandeis interpret privacy as the right to be let alone, which in principle is based on the right to enjoy life.²⁴ The term 'the right to be let alone' itself was inspired by the same term as mentioned by a judge named Thomas Coley, but in a different context. The conception of this right is basically a form of manifestation of recognition of the spiritual nature, feelings, and intelligence of humans,²⁵ in which humans have enjoyment and control over their thoughts, feelings, situations, actions, and things relating to themselves. According to them, this right must be protected by applicable law as one of the human rights.²⁶

The discourse on what is referred to as privacy is developing, for example in 1967, Alan Westin explicitly defined what is called privacy. In his paper, Westin describes privacy as the claim of individuals, groups, or institutions to determine when, how, and to what extent information about themselves shall be communicated to other people or parties.²⁷ This definition was then widely used by academicians in that era.²⁸ In another work, Banisar and Davies state that generally privacy itself can be classified into four categories, namely .²⁹

1. Information privacy, relating to the establishment of rules regarding the collection and use of personal data such as credit information and medical records;
2. Bodily privacy, relating to the protection of the human body from violations of body invasion such as drug testing and dental examinations;
3. Privacy of communication, including the security and privacy of letters, telephones, e-mails, and other forms of communication;
4. Territorial privacy, relating to the determination of boundaries against disturbances into the household and other

²⁰ See e.g., Cambridge Dictionary, "Privacy," accessed March 20, 2021, <https://dictionary.cambridge.org/dictionary/english/privacy>; Kamus Besar Bahasa Indonesia (daring), "Privasi," accessed March 20, 2021, <https://kbbi.web.id/privasi>.

²¹ Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890): 193.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Westin, *Op.cit.*, 24.

²⁸ Holvast, *Op.cit.*, 16.

²⁹ Benisar and Davies, *Op.cit.*, 6.

environments such as workplaces or public spaces.

Another categorization is presented by Clayton and Tomlinson as follows:³⁰

1. Misuse of personal information. The right to restrict the use of information about individuals that is “personal” or “private” is central to the right to privacy.
2. Intrusion into the home. The right of individuals to be respected for their residence and domestic life is an important cornerstone of the idea of privacy. Unfounded searches or seizures lead to privacy issues.
3. Photography, surveillance, and telephone tapping. The “private environment” is invaded not only in the form of physical disturbances into the residence.
4. Other privacy rights. Various other privacy rights cover any disturbance in the “private environment” including the confiscation of one’s image, interference with one’s sexual behavior, and so on.

Then, Hovast states that from the various works studied, there are at least two dimensions of privacy, namely relation and information. In connection to relation, it can be stated that privacy is related to how a person relates to other people, for example, who can communicate with us, enter our personal environment (e.g., home), or touch our bodies.³¹ Moreover, the dimension of information is closely related to the collection, storage, and processing of personal data.³²

At the international level, privacy has been recognized as a human right, as stated in several conventions both at the international level, such as the International Covenant on Civil and Political Rights, and at the regional level, namely the European Convention on Human Rights.³³ Although it has been granted status as a human right, there is no clear definition or interpretation of privacy at the international level. In fact, in the General Comment of Article 17 of ICCPR,³⁴ it is

³⁰ Robert Walters, Leon Trakman, and Bruno Zeller, *Data Protection Law* (Singapore: Springer, 2019), 10.

³¹ Holvast, *Op.cit.*, 16.

³² *Ibid.*

³³ See Article 17 International Covenant on Civil and Political Rights; and Article 8 European Convention on Human Rights.

³⁴ Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), 1982.

not explained what is meant by privacy. Privacy is arguably the most difficult human right to define.³⁵

The explanation above can at least show how complex the interpretation of privacy and the right to privacy is. Even today there is no concrete and definite definition of what privacy is. Privacy itself basically can be interpreted differently by different people at different times or in different cultures.³⁶ This is inseparable from technological, political, social, and economic developments in society which indirectly encourage the development of the conception and protection of one’s legal rights, including the protection of privacy.

The term privacy itself has many interpretations and has been defined in many ways over the last few hundred years,³⁷ and is likely to continue to evolve in the future as information technology develops. Especially in today’s digital era, it can be said that it is increasingly blurring the boundaries between what is called privacy and what is not.

In its development, the discourse on privacy, especially since the 19th century, began to move towards personal information, one of the issues of which is related to control over personal information.³⁸ One of the reasons was the rapid development of technology at that time through computerization and informatization, both carried out by the government and other parties.

As explained above, this matter has great potential to be used in the context of monitoring individuals. The presence of a computer system at that time was considered as one of the causes of violation of privacy.³⁹ This shift in the privacy discourse towards personal information can be reflected in the definition of privacy as presented by Westin above, which in principle relates to control over the publication of information about

³⁵ Benisar and Davies, *Loc.cit.*; James Reed Michael, *Privacy and Human Rights: An International and Comparative Study, With Special Reference to Developments in Information Technology* (UNESCO, 1994), 1.

³⁶ David Rolph, Matt Vitins, and Judith Bannister, *Media Law: Cases, Materials and Commentary* (London: Oxford University Press, 2010), 509.

³⁷ Ruth Gavison, “Privacy and the Limits of Law,” *The Yale Law Journal* 89, no. 3 (1980): 424; Adam Moore, “Defining Privacy,” *Journal of Social Philosophy* 39, no. 3 (2008): 412.

³⁸ Holvast, *Op.cit.*, 15.

³⁹ *Ibid.*

oneself to other parties.

Previously, Warren and Brandeis have also provided examples relating to the privacy of personal information. In their paper, it is stated that the principle that protects personal writing (information) from all forms of publication is not a principle of private property but is an inviolate personality.⁴⁰

However, if we reflect on some of the above conceptions, “control over information” as a privacy theory has many shortcomings, considering that the focus on information excludes other non-information aspects that are considered as the basis of privacy, such as the ability to make fundamental decisions about the body, reproduction, and family.⁴¹ Furthermore, the conception of privacy as control over information is considered by Solove as failing to define what is meant by “control” over information.⁴² Solove concludes that conceptualizing privacy as control over personal information can be too vague, too broad, even too narrow.⁴³ This discourse about control over personal information is one of the things that then encourages efforts to protect personal data.

2. The Development of Conceptual Interpretation of Personal Data

Departing from the explanation above, it can be said that efforts to protect personal data are principally a development of the conception of privacy protection that has developed along with technological advances. This can be reflected, for example, from Warren and Brandeis’s explanation above which states that the protection of physical information (personal writings in books, for example) is a form of protection of privacy. Likewise, the definition of privacy as presented by Wetsin above is related to when, how, and to what extent information about oneself is communicated to other parties. Thus, the change in the form of “information”, which was previously physical into electronic, has direct implications for the legal protection provided.

Furthermore, when referring to the privacy classifications by Banisar and Davies as well as

Clayton and Tomlinson, one of them refers to the privacy of personal information, although with a different emphasis. Banisar and Davies place great emphasis on how personal data is collected and used. Meanwhile, Clayton and Tomlinson emphasize the restriction on the use of personal information as one of the central things in the right to privacy.

Despite the debate over the right to privacy as presented earlier, there are significant steps towards an integrated approach to data protection.⁴⁴ Although the terms privacy and data protection may seem interchangeable, data protection can be said to be a narrower concept than privacy.⁴⁵ Another difference is that if the right to privacy conceptually limits the state from intervening in a person’s private life, then the data protection is intended to expand the role of the state to monitor the compliance of the government and related parties in collecting, using, and disclosing personal data.⁴⁶

Nevertheless, to date, there is still complexity in interpreting what personal data really is, and on what kind of subject or object classification is included. This difference in the interpretation of personal data will also have an impact on how the law treats personal data, including its protection efforts.

Efforts to define personal data can be traced back to 1973 and 1974 through two resolutions issued by the Council of Europe, namely Resolution (73) 22 on the Protection of the Privacy of Individuals vis-a-vis Electronic Data Banks in the Private Sector (Resolution 73) and Resolution (74) 29 on the Protection of the Privacy of Individuals vis-a-vis Electronic Data Banks in the Public Sector (Resolution 74). These two resolutions were also based on Resolution No. 3 on the Protection of Privacy in view of the Increasing Compilation of Personal Data into Computers which was adopted at the Seventh Conference of European Ministers of Justice. However, the Authors could not find the resolution document.

⁴⁰ Warren and Brandeis, *Op.cit.*, 205.

⁴¹ Daniel J. Solove, “Conceptualizing Privacy,” *California Law Review* 90, no. 4 (2002): 1110.

⁴² *Ibid.*, 1112.

⁴³ *Ibid.*, 1115.

⁴⁴ Simon Chesterman, “After Privacy: The Rise of Facebook, The Fall of Wikileaks, and Singapore’s Personal Data Protection Act 2012,” *Singapore Journal of Legal Studies* (2012): 400.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

Referring to Resolution 73, one of the grounds for issuing the resolution is the increasingly widespread use of electronic data processing systems for personal data records from individuals.⁴⁷ Furthermore, to prevent misuse in storing, processing, and disseminating personal information using electronic data banks in the private sector, legislative steps need to be taken to protect individuals.⁴⁸

From this explanation, there are two terms used, namely personal data and personal information. However, in the aforesaid Resolution, only personal information is defined, that is as information relating to certain individuals (physical persons), [...].⁴⁹ The same definition is also found in the Annex of Resolution 74. Observing the definition, personal information here has a broad scope, so that all kinds of information relating to certain individuals can be classified as personal information.

After the issuance of the two resolutions above, as development took place, in 1981 the Council of Europe issued the Convention for the Protection of Individuals regarding Automatic Processing of Personal Data (Convention 81). The convention is the first binding international instrument that protects individuals against misuse in the collection and processing of personal data and simultaneously aims to regulate the transborder flow of personal data.⁵⁰

The convention no longer uses the term personal information, but personal data. The term personal data is defined as any information relating to an identified or identifiable individual (data subject).⁵¹ Furthermore, in the Explanatory Report of Resolution 81, it is stated that an identifiable person is someone who can be easily identified through the data.⁵² Moreover, data

subject is defined as the idea that a person has a subjective right to information about himself, even though the information is collected by other parties.⁵³

Even though in Convention 81 the term used is personal data, but when juxtaposed with the term personal information in Resolution 73 and Resolution 74, then the true meaning of the definition of personal data is the development of the definition of personal information in Resolution 73 and Resolution 74. In both resolutions, it is stated that personal information includes all information relating to individuals, while Convention 81 adds a variable relating to the identification of individuals, either directly identified or easily identifiable through the personal data.

This definition was later supplemented in the European Parliament and the Council of European Union issued Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and on the free movement of such data (Directive 95). Through Directive 95, personal data is defined as follows:⁵⁴

[...] 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, or social identity; [...]

The above definition is in principle the same as that contained in Convention 81 and its explanation. However, in Directive 95, it is added by another variable which relates to what can be used to identify a person either directly

⁴⁷ Council of Europe Committee of Ministers, Resolution (73) 22 on the Protection of the Privacy of Individuals Vis-a-Vis Electronic Data Banks in the Private Sector, 1973.

⁴⁸ Ibid.

⁴⁹ Annex to Resolution (73) 22 on the Protection of the Privacy of Individuals Vis-a-Vis Electronic Data Banks in the Private Sector, 1974.

⁵⁰ Council of Europe, "Details of Treaty No. 108."

⁵¹ "Personal data" means any information relating to an identified or identifiable individual ("data subject"). See Article 2 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.

⁵² "Identifiable persons" means a person who can be easily

identified: it does not cover identification of persons by means of very sophisticated methods. See Council of Europe, Explanatory Report to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 1981.

⁵³ The notion of "data subject" expresses the idea that a person has a subjective right with regard to information about himself, even where this is gathered by others. See Ibid.

⁵⁴ See Article 2(a) and Recital 26 Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995.

or indirectly, such as National Identity Number, physical, psychological, mental, economic identity, and so on

In subsequent developments, the definition of personal data can be found in the General Data Protection Regulation (GDPR), which is as follows:⁵⁵

[...] any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person; [...]

Broadly speaking, the definition of personal data in the GDPR is not much different from what is already in Convention 81 and Directive 95 as described above. The definition in GDPR expands the meaning of personal data, by mentioning location data and online identifiers. Thus, the IP address as an online identifier can be categorized as personal data.

However, a broad but clear definition is considered important. This is because the absence of such a broad and clear definition can significantly limit the ability of data subjects to identify what personal data is protected on the internet.⁵⁶ Furthermore, with various technologies currently available, personal data in digital form can be obtained from various software and hardware in various forms including numbers, characters, symbols, images, electromagnetic waves, sensor information, and even sound.⁵⁷ The explanation above can at least illustrate how the rapid development of technology can expand the interpretation of something, including personal data.

Furthermore, the interpretation of personal data cannot be separated from its historical aspect.

Efforts to protect personal data at the beginning of its development can be said to be carried out within the framework of protecting the right to privacy of individuals. It is undeniable that the definition of personal data, as contained in Resolution 73, Resolution 74, and Convention 81 as several documents at the beginning of the development of information privacy and data protection, was later adopted by various countries in various applicable laws.

Some examples of countries that have laws that define personal data are France (1978),⁵⁸ Australia (1988),⁵⁹ Japan (2003),⁶⁰ and Malaysia (2010).⁶¹ From these Acts, it shows that the terms used may be different, such as Australia and Japan that use the term personal information, while France and Malaysia use the term personal data. However, if one examines the formulation of the definition, there is a similarity in the element, that is data/information regarding certain individuals that are identifiable or identified by data/information or by a combination of several data/information.

In addition, the focus of personal data regulation can also differ from one country to another, depending on the conditions and needs of the country. For example, it can be seen in Malaysia's Personal Data Protection Act 2010

⁵⁵ See Article 4(1) and Recital 26 Regulation (EU) 2016/679 (General Data Protection Principles) (Uni Eropa, 2016).

⁵⁶ Walters, Trakman, and Zeller, Op.cit., 56.

⁵⁷ Luci Pangrazio and Neil Selwyn, "Personal Data Literacies: A Critical Literacies Approach to Enhancing Understandings of Personal Digital Data," *New Media & Society* 21, no. 2 (2019): 421.

⁵⁸ Personal data means any information relating to a natural person who is or can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to them. See Article 2 Act No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties (Prancis, 1978).

⁵⁹ Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not. See Section 6 Privacy Act 1988 (Act No. 119, 1988) (Australia, 1988).

⁶⁰ "Personal information" in this Act means that information relating to a living individual which falls under any of each following item: [...]. See Article 2(1) Act on the Protection of Personal Information (Act No. 57 of May 30, 2003 (Jepang, 2003).

⁶¹ "personal data" means any information in respect of commercial transactions, [...] that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data user, including any sensitive personal data and expression of opinion about the data subject; [...]. See Article 4 Personal Data Protection Act 2010 (Act 709) (Malaysia, 2010).

which defines personal data as all information relating to commercial transactions that are directly or indirectly related to the data subject.⁶² Likewise, Japan defines that personal information as information relating to living individuals that fall into the category as regulated in Japan's Personal Information Protection Act 2003.⁶³

Furthermore, as technology develops, the issue of personal data is also increasingly complex. Although some definitions above show the similarity of the element, personal data can be interpreted differently when using different perspectives. From an economic perspective, for example, personal data can be interpreted as a valuable commodity that can be commercialized.⁶⁴ Even from a legal perspective, there is an ongoing debate.

As previously explained, the discourse that has been developing for a long time concerning personal data is related to property rights in personal data.⁶⁵ The debate over the property of personal data has emerged since the 1970s, both in the United States and in Europe. One of the dominant arguments against the propertization of personal data relates to the characteristics of the privacy of information which is the public interest, while the propertization, which is considered to facilitate the existence of trade cannot protect it.⁶⁶ On the other hand, other academicians offer a consistent model of objectification and encourage privacy of information.⁶⁷ The different interpretations of personal data can certainly lead to different legal implications, from handling to protection.

Alan F. Westin, for example, states that personal information which is considered as the right to make decisions on a person's personality, must be defined as a property right with all limitations on the intervention of public or private authorities and legal processes that can guarantee the property right.⁶⁸ In a more abstract context, Solove states that personal information as a

property can be justified by seeing it as an extension of personality.⁶⁹ He states that as writers of our own lives, we produce information as we develop personality.⁷⁰ The development of individualism gave rise to "the belief that a person's actions and histories are 'property' to them and can be shared with those we wish to share".⁷¹

Furthermore, the different interpretations of personal data have different legal implications, including in the context of what rights are attached to personal data. This is because different rights are intended to protect different interests. For example, the property of an object is intended to protect the economic interests of the concerned.⁷² On the other hand, personal rights such as the right to life are intended to protect the personal safety of the right holder, or the right to health which is intended to protect a person's psychological or mental health.⁷³

Reflecting on the entire explanation above, although up to now there has been a general definition of what is referred to as personal data, the interpretation of personal data is apparently still a growing discourse. Therefore, positioning personal data in the perspective of the Indonesian constitution is important. In addition to knowing how personal data is interpreted based on the 1945 Constitution of the Republic of Indonesia, it is also intended to clarify Indonesia's constitutional position in the discourse on personal data protection.

B. Positioning Personal Data in the Context of the Indonesian Constitution

As has been elaborated in the previous section regarding the discourse on the conceptual development of the interpretation of personal data, in the context of positive law in Indonesia, the legal construction of personal data is still a discourse. Especially in the latest developments, the Personal Data Protection Bill (PDP Bill) is again included in the 2021 Priority National Legislation Program (Prolegnas),⁷⁴ as a follow-up to the discussion at

⁶² See Article 4 Personal Data Protection Act 2010 (Act 709) (Malaysia, 2010).

⁶³ See Article 2(1) Act on the Protection of Personal Information (Act No. 57 of May 30, 2003) (Jepang, 2003).

⁶⁴ This discourse is discussed in Schwartz, *Loc.cit.*; Purtova, *Loc.cit.*; Solove, *Op.cit.*, 113.

⁶⁵ See e.g., Purtova, *Ibid.*, 84-85.

⁶⁶ *Ibid.*, 84.

⁶⁷ *Ibid.*

⁶⁸ Westin, *Op.cit.*, 222.

⁶⁹ Solove, *Op.cit.*, 1112.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 1112-1113.

⁷² Cheng Xiao, "Personal Data Rights in the Era of Big Data," *Social Science in China* 90, no. 4 (2002): 180.

⁷³ *Ibid.*, 180-181.

⁷⁴ Dewan Perwakilan Rakyat Republik Indonesia, "Paripurna DPR Sepakati 33 RUU Prolegnas Prioritas 2021."

the Level I Discussion which was held in 2020.⁷⁵

Before further reviewing the substance of the regulation in the PDP Bill, it is important to look at personal data in the context of the Indonesian constitution, the 1945 Constitution of the Republic of Indonesia. As stated in the Introduction section, most of the literature in Indonesia, even the PDP Bill in its legal basis used Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia as the basis for formulating provisions regarding personal data protection. However, there is no literature that provides a specific analysis on which phrases in Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia are used as references in qualifying personal data in the context of the Indonesian constitution. Is personal data positioned as part of personal protection? Or is personal data positioned as part of the protection of property under one's control? Or maybe personal data is positioned cumulatively as part of personal protection and property protection simultaneously?

To answer this question, it is important to explore the legal-historical aspect relating to the formulation of norms in Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia. When referring to the Comprehensive Text of Amendment to the 1945 Constitution, historical facts state that the original formulation as the forerunner of Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia which was discussed by the Ad Hoc Committee of the People's Consultative Assembly of the Republic of Indonesia was, "Everyone has the right to protection of themselves, family, honor, dignity, and property"⁷⁶, in which one of the members of the Ad Hoc Committee of the People's Consultative Assembly of the Republic of Indonesia emphasizes the difference between the right to protection of themselves, family, honor, and dignity (*hifzhun nasl*) and the right to protection of personal property (*hifzhul mâl*).⁷⁷ This personal property

in the development of the discussion of the formulation, changed into "property under their control"⁷⁸, which incidentally is in accordance with the formulation in Article 8 of the 1949 Constitution of the Republic of the United States of Indonesia, namely "All people who are in the territory of the same State have the right to claim protection for themselves and their property".

Specifically, regarding personal data whose protection is argued to refer to Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it must be reviewed whether personal data is included in the qualification for personal protection or protection of property under one's control. When referring to the positive law that regulates the definition of personal data, namely Article 1 number 29 of GR ESTI 2019, which defines personal data as, "any data about a person either identified and/ or identifiable separately or in combination with other information either directly or indirectly through electronic and/or non-electronic systems", where this formulation is also the same as the formulation in the PDP Bill.

The use of the phrase "any data about a person" based on reasonable reasoning has a closer association with the phrase "oneself" than the phrase "property" in the formulation of Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Therefore, with a legal-historical understanding of the dichotomy of the right to personal protection which is different from the right to personal property protection, personal data protection should be interpreted as the embodiment of personal protection, *mutatis mutandis* personal data must be interpreted as part of human being. By this mind frame, it becomes natural that the protection of personal data is also qualified as part of the protection of human rights.⁷⁹

Furthermore, by using a conceptual approach, the conception of the right to personal data protection as a human right can be equated with the conception of the right to privacy. This matter is inseparable from the historical framework of the development of the right to personal data protection which is in line with the right to privacy. With such a construction, the right to personal data protection can be classified as a qualified right,

⁷⁵ Dewan Perwakilan Rakyat Republik Indonesia, "RUU Tentang Pelindungan Data Pribadi."

⁷⁶ Tim Penyusun, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, Dan Hasil Pembahasan 1999-2002* Buku VIII Warga Negara Dan Penduduk, Hak Asasi Manusia, Dan Agama (Edisi Revisi) (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 62, 72, 170, and 298.

⁷⁷ *Ibid.*, 286.

⁷⁸ *Ibid.*, 335, 360.

⁷⁹ Mutiara and Maulana, *Loc.cit.*

that is human right which is not absolute and can be limited in certain circumstances, or by using another classification, this right can be classified as a derogable right.

For example, the provision in Article 8 of the European Convention on Human Rights (ECHR) in paragraph (1) states that everyone has the right to respect for his personal and family life, home, and correspondence. However, in the provision of paragraph (2) it is stated that this right can be limited by law and as long as it is deemed necessary in a democratic society in accordance with the national interest, public security and economic interests of a country, prevention of crime, protection of health or morals, or protection of the rights and freedom of others.⁸⁰ This shows that basically this right can be deviated in certain circumstances as long as it is in accordance with legal provisions based on the things above, including in the framework of protecting other human rights.

Another example can be seen in the ICCPR, which shows that the right to privacy as regulated in Article 17 is not included in the classification of non-derogable rights as regulated in Article 4 paragraph (2) of the ICCPR. Furthermore, in the provision of Article 17 paragraph (2) of the ICCPR it is also stated that everyone has the right to legal protection against arbitrary or unlawful interference or attacks on their privacy.⁸¹ With the reading of the provision of Article 17, the role of the state becomes important to provide laws that can prevent such arbitrary or unlawful interference or attacks. The above provision is quite relevant in the context of personal data protection, considering that the active role of the state is needed to provide laws that can prevent arbitrary or unlawful interference or attacks on the personal data of its citizens.

The juridical implications in interpreting personal data as part of human being have a fundamental impact on how the law treats personal data. If personal data is “personified” or fictionalized by law as part of a human being (*natuurlijk persoon*), *mutatis mutandis* personal data will lose its property nature. Therefore, how the law should regulate personal data will be fundamentally different if personal data is

⁸⁰ See Article 8 ayat (2) European Convention on Human Rights.

⁸¹ See Article 17 ayat (1) and ayat (2) International Covenant on Civil and Political Rights.

interpreted as an embodiment of property. A concrete example of the fundamental difference is, for example, the transfer of ownership. If personal data is part of a human being, then the ownership of personal data cannot be transferred like human organs whose ownership cannot be transferred to other humans, except for humanitarian purposes and is prohibited from being commercialized. Of course, it is different; if personal data is interpreted as property, then personal data can certainly be transferred, exchanged, and even traded commercially.

So, how does the PDP Bill choose legal construction in interpreting personal data? On the legal basis, considering that the PDP Bill does not only refer to Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, but also to Article 28H paragraph (4) of the 1945 Constitution of the Republic of Indonesia, which reads, “Everyone has the right to have personal property and this property cannot be taken over arbitrarily by anyone”. Whereas in the legal-historical context it can be found that the meaning of property in the formulation of the aforesaid Article refers to material rights.⁸² This raises a further question whether the PDP Bill positions personal data as part of oneself or as part of property? However, if we take a closer look at the content material of the PDP Bill, basically the substance of the PDP Bill indicates that personal data is positioned as part of oneself, for example by prohibiting the sale or purchase of personal data.

CONCLUSION

Based on the elaboration, discussion, and analysis above, it can be concluded that the conceptual interpretation of personal data is still a growing discourse. The difference in the interpretation of personal data has different legal implications, including in the context of what rights are attached to personal data. Furthermore, personal data in the perspective of the Indonesian constitution can be identified by looking at the legal-historical aspect in the discussion of the amendments to the 1945 Constitution, particularly in Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which is hypothesized as a reference for personal

⁸² Tim Penyusun, *Op.cit.*, 38, 73, 286, and 327.

data protection. Referring to the discussion of the Ad Hoc Committee of the People's Consultative Assembly of the Republic of Indonesia, we can find the original formulation of the forerunner of Article 28G paragraph (1) and the dichotomy of rights referred to in the Article. With a legal-historical understanding that is juxtaposed with the interpretation of personal data in positive law, legal construction can be obtained in qualifying personal data as part of personal protection, *mutatis mutandis* personal data must be interpreted as part of a human being.

SUGGESTION

Based on the elaboration, discussion, and analysis above, the researchers suggest that the inclusion of the legal basis in view of Article 28H paragraph (4) of the 1945 Constitution of the Republic of Indonesia in the PDP Bill needs to be reviewed considering that personal property in the Article refers to the aspect of material property. In addition, it is necessary to emphasize in the PDP Bill that personal data is not property, thus providing legal certainty for implementing regulations in regulating personal data as part of the protection of human rights.

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