

## PANCASILA AS THE IDEAL OF LAW IN INDONESIAN NATIONAL LEGAL AND RULE OF LAW SYSTEMS

**Suroto**  
[suroto7@yahoo.com](mailto:suroto7@yahoo.com).

### ABSTRACT

*Pancasila serves as an ideology foundation, a way of life, and the one that unites the nation in achieving the ideals of the nation. The position of Pancasila is very important for the life of society, nation, and state so that the status is firmly and clearly stated in the fourth paragraph of the preamble of the 1945 Constitution.*

*The ideal of law of Pancasila in the Indonesian National Legal System (SHNI) is constitutive and regulative in its function to the Indonesian National Legal Rule System (SAHNI) with the norm of State Fundamental. Pancasila establishes the legal norms under it in stages. Lower legal norms are formed based on and derived from higher legal norm. Consequently, there is no conflict between higher and lower legal norms, and vice versa. Pancasila is the source of all sources of law, and should not be broader than the other sources of law. When the Indonesian people interpret it broader than that in their society, nation and state, it is not true.*

**Keywords:** *Pancasila, Ideal of Law, SHNI, SAHNI*

## I. Introduction

The prologue of Pancasila was initiated by Ir. Sukarno, and it was proposed as the basis of the Unitary State of the Republic of Indonesia. It is clearly stated in the third precept of Pancasila formulated in the preamble of the 1945 Constitution of the Republic of Indonesia. Besides, the founding fathers of the country wanted Pancasila to be used as the basis for the management of social, cultural, and national life to realize the community which is independent, united, just, prosperous, and sovereign.

Pancasila was first presented by Ir. Sukarno before the session of BPUPKI on June 1, 1945. Pancasila is the *philosophis grondlog*, the fundamental philosophy derived from the Greek of Phile (story) and Sophia (wisdom) which means the story of wisdom. The definition is the science of anything by seeking the deepest causes with our own mind power. (Soeprapto, 2013)

Pancasila also serves as the foundation for a firm nation and serves as a guiding star (Leistar), ideology, way of life, and the one to unite the nation in achieving the ideals of the nation. The position of Pancasila is so important for the people in social and state life of the nation that the status was firmly and clearly stated in fourth paragraph of the preamble of the 1945 Constitution on 18 August 1945 in the session of PPKI.

The position of legal ideals that control the state laws both the written form including the 1945 Constitution and the unwritten law within the Indonesian national legal system. The major thoughts produced Pancasila as the ideal of law or *rechtsidee* of Indonesia. (Oetojo Usman dan Alfian 1991)

The legal system in question is the legal system within more limited scope system. Written legal system is a system of law, both written laws in terms of the making process and the laws in terms of the products in the form of rules of law (*Wetgeving Sregels*) or laws of policy (*Beleid Sregels*). The unwritten legal systems of Indonesia are customary laws (adat law). In addition to considering the process of the making of unwritten laws and their products which are different in the characters from the making process of written law products and the words of the Indonesian people to give an explanation. We had recognized that Pancasila is only present in the life of Indonesian nation.

## II. Problem Formulation

- A. The laws and their positions in the Unitary State of the Republic of Indonesia, the 1945 Constitution, and Pancasila.
- B. The roles of the ideal of law of Pancasila in unwritten and written legal systems.
- C. The implementation of Pancasila and the fundamental norm of Pancasila in law making.

## III. Research Methods

This research is normative juridical, that is by doing study to legal norms, in particular certain laws or laws written. Normative research is research conducted by researching library materials or secondary data only. Normative thinking is based on research that includes: 1) legal principles; 2) systematic law; 3) level vertical and horizontal sync; 4) comparative law; 5) legal history. This research is also called non-doctrinal legal research.

#### IV. Result and Discussion

- A. The laws and their positions in the Unitary State of the Republic of Indonesia, the 1945 Constitution, and Pancasila.

In the fourth paragraph of the 1945 Constitution, it has the distinguishing words which are not found in the Preamble of the 1945 Constitution and the Preamble of the 1950 Provisional Constitution. It reads "Then, the Indonesian independence is arranged in an arrangement of the Republic of Indonesia (the preamble of the constitution of the Republic of Indonesian States only mentions "Then, herewith we arranged our independence in a state charter in the form of the Federal Republic.....) ( Hendramin, 2007).

The concept of the preamble of the Provisional Constitution of the Republic of Indonesia in 1945 prior to its acceptance by PPKI on August 18, 1945 had the words which reads: Then, the Indonesian independence was arranged in a basic law of Indonesia. With the formulation, it is necessary to explore the meaning of the paragraphs in the preamble of 1945 Constitution. The first paragraph of the preamble of the 1945 Constitution reads: that actually freedom is the right of every nation ..... It describes the sequence that the nation of Indonesia is not only determined to be independent, but they will remain stand in the front row to oppose and abolish colonialism over the world. It is clear that such principle listed in the preamble of the 1945 Constitution will remain a fundamental cornerstone in the control of our foreign policy.

The second paragraph of the preamble of the 1945 Constitution reads: "And the Indonesian independence struggle has reached. .... which is independent, united, sovereign, just and prosperous". The values always animate the entire Indonesian nation and they keep trying to make it happen.

- That the struggle movement in Indonesia has reached a decisive level.
- That the momentum that has been achieved should be used to proclaim independence.
- That the independence is not an end goal, but it still has to be used by creating the state of Indonesia which is independence, united, sovereign, just and prosperous ( Soegito.dkk, 2002).

The third paragraph states that "By the grace of Almighty God ..... .. hereby declared their independence". This paragraph shows the devotion of the people of Indonesia to the Almighty God for the blessings to the Indonesian people to succeed in the struggle for independence.

The fourth paragraph reads "Then, afterward, to form a government of the state of Indonesia ..... .. and the realization of social justice for all Indonesian people. Therefore, the end of this paragraph confirms that the Indonesian nation embodied in the rule of law was drafted into the into the basic law and poured from basic law to the law in question by drafting or pouring the sovereign independence of a nation into a law.

According to the introduction to the science of state (Staatslehre), George Jelineck, as pointed out in his *Allgemeine Staatslehre*, states that sovereignty

(*Souverantat*) is the interpretation or rescission to the attitude of the delivery of restrictions within a country against any other power. Jelineck (Inu Kenjana, 2012) elaborates that sovereignty contains three features of a national with no higher power. Sovereignty is an absolute power. No power can limit it, even one's self. Therefore, in order that the power owned by sovereign does not take place arbitrarily, it must be arranged in an order of law. In law, it means that the rule of law is prioritized. Many claimed to be in a state of law, but the rules were made by men. The men were confined to a group in the parliament appointed by the 1945 Constitution. In addition, the ruling government often made the laws that tackled demonstrations and protests. They were handled by the government, if necessary, by the accusation of terrorism although the accused ones were those who defended the poor people. Therefore, there are states with the sovereign state based on law. The test tool is the extent to which the law is made by the representatives of the people to govern and manage the relationship of the people with the government properly and correctly. It is necessary to find the relation of moral. Although Indonesia is not an Islamic state, but the influence of Islam adhered by the majority in Indonesia clearly contributes in the development of law in Indonesia (Esmi Warasih, 2016).

The 1945 Constitution and Pancasila are related to the laws that apply to the nation and state of Indonesia. The position of Pancasila is stated by the founding fathers of this country. They confirmed that Pancasila is the ideal of law (*rechtsidee*) that controls the state's basic law both written and unwritten basic laws. The ideal of law (*rechtsidee*) is not translated with the goals of law given that ideal is an idea, sense, or thought. In other hand, goal is desire, will, or hope that is always in mind or heart. Ideal of law (*rechtsidee*) should be distinguished from the understanding of our concept of law (*Rechtsberef*) in our sense, while the understanding of the concept of law is a fact of life with regard to the value we want to achieve (*Eine Wertezndinen*); contemplative legal thinking based on the spiritual values which are highly plural and the values of Pancasila emerged as another alternative which is highly comprehensive in this country (Esmi Warasih, 2016). Rudolf Stammler, a legal philosopher, states that ideal of law is a mind construction which is a must to direct laws to the ideals wanted by the public. Ideal of law serves as a guiding star (*Leistar*) for the achievement of the ideals of society, but the ideals of law benefit in two sides: First, with the ideals of the law, we can test applicable positive laws and we can direct positive laws as an attempt at a solution to justice. Justice is actually a relative concept (Mahmutarom, 2009). On the other hand, justice is the result of the interaction between expectations and realities with the formulation that can serve as the guidelines in the lives of individuals or groups. From the aspect of etymological linguistic, the word "*adil*" (just) comes from the Arabian "*Adala*" having the synonym with *wasth* that derives the word *wasith* which means arbitrator or a person standing in the middle which implies an attitude of justice.

Gustav Rodbruch, a legal philosopher, asserts that the ideal of law does not only serve as a regulative benchmark to test whether a positive law is fair or not, but it also serves as a constitutive basis which determine that without the ideal of law the law will lose its meaning as a law. Because of its school trying to bridge the dualism of *das sein* and *das sollen* by constructing the culture, it allows law to form and apply the objects of cultural studies (Esmi Warasih, 2010).

The 1945 Constitution outlines that the main ideas contained in the preamble realize the ideals of law (*rechtsidee*). The key point in the preamble is unity by realizing social justice. The practice of the precepts of social justice for all Indonesian people includes the efforts to develop quite high economic growth associated with the beginning of the development and the results leading to the creation of equitable prosperity for all Indonesian people in the economic system structured as a joint effort based on family principles (Teguh Prasetyo, 2013).

The position of Pancasila as the highest legal norm, in this regard, is as the main ideas. The preamble of the basic law creates the articles of the basic law that determine the content and form of lower laws because the structure of legal norm does not allow the contradiction between lower norm of law and the higher one. In Hans Kelsen's *Stufen*, it just points out that, at the peak of "*Stufenbau*", there is a fundamental rule called *grund norm* which is abstract in nature set as a hanger for lower norms (Widayati, 2015). Thus, the 1945 Constitution loads the rule of law that applies to Indonesian people. Pancasila is in two positions as the ideal law (*rechtsidee*). Pancasila as the Indonesian legal structure lies out of Indonesian legal system which comes from the main ideas contained in the preamble of the 1945 Constitution in its articles. The main points include the psychological atmosphere of the 1945 Constitution. The main points embody the ideals of law that controls the basic laws, both written and unwritten.

#### B. The Roles of the Ideal of Law of Pancasila in Written and Unwritten Legal Systems.

In the formation of unwritten and written laws, ideal of law plays a role in different ways. First, ideal of law directly affects individual morality and public decency, in turn, to generate public decency and way as well as customary behavioral patterns and legal customs. With a different understanding in the formation of unwritten law, the stages from habitual way to code of conduct, from the code of conduct to customs, then to law, everything goes through deposits. The tiered values occur under the guidance of the ideal of moral and law existing in a society, while, in the formation of written laws, the stages that form value deposits do not occur. Therefore, ideal of law is not found to directly oversee the formation of law, even more the ideal of moral.

In Indonesian legal norms, A. Hamid S. Atami has grouped that *Staatsfundamental norm* (State Fundamental Norm) consists of Pancasila and the Preamble of the 1945 Constitution. *Staats grundgesetz* (state's basic rules) consists of the articles of transitional rules and additional rules of the 1945 Constitution, the Decree of the People's Consultative Assembly (MPR) and the constitutional convention, and *Farmellgesetz* (formal laws) which are the laws of *Verordnungand autonome satzung* hierarchically ranging from government regulations to the decisions of regent or mayor (Widayati, 2015).

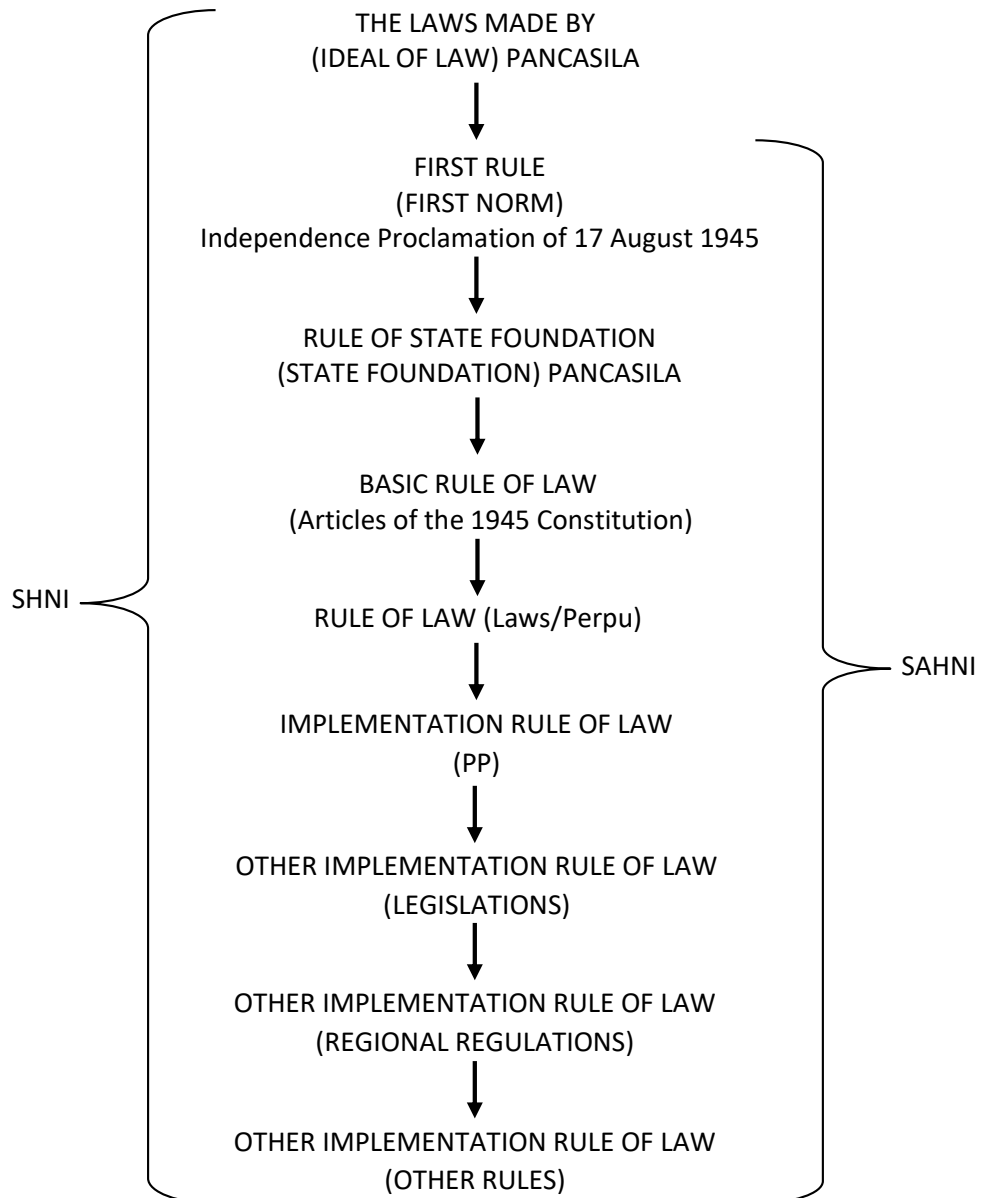
#### The Arrangement of Indonesian Regulation Hierarchy

The Decree of MPRS No.XX/MPRS/1966	The Decree of MPR No.III/MPR/2000
1. The 1945 Constitution	1. The 1945 Constitution
2. The Decree of MPR RI	2. The Decree of MPR RI

3. Laws/ Government Regulation as the Replacement of Laws 4. Government Regulation 5. Presidential Decree 6. Other Implementing Regulations: - Minister Regulation - Minister Instruction and others	3. Laws 4. Government Regulation as the Replacement of Laws 5. Government Regulation 6. Presidential Decree 7. Regional Regulation
Act No. 10 of 2004	Act No.12 of 2011
1. The 1945 Constitution 2. Laws/ Government Regulation as the Replacement of Laws 3. Government Regulation 4. Presidential Regulation 5. Provincial, District/ City Regulation	1. The 1945 Constitution 2. The Decree of MPR RI 3. Laws/ Government Regulation as the Replacement of Laws 4. Government Regulation 5. Presidential Regulation 6. Provincial Regulation 7. District/ City Regulation

Concerning the formation of unwritten law, the relationship between ideal of law and legal norm system is integrated because legal system is formed from the deposits of the values filtered by people's behavior through the acceptance of individuals in the families and tribes in the communities in the country. Different from the formation of written law and norm system, they are established by individuals or groups as both officials and people's representatives. The relations of ideal of law with legal norm system depend on the awareness and appreciation of the officials and representatives on the existing ideal of law in a society that does have regulatory and constitutive functions in the formation of law. Since the establishment of written law does not take place through the stages of the value deposits, the disintegration between ideal of law and norm system can not be avoided. *Grund norm* in Indonesian legal system is Pancasila which is the source of all sources of law. It can be seen in the scheme of: Indonesian National Legal Systems (SHNI) and Indonesian National Rule of Law System (SAHNI) as follows:

Scheme: Indonesian National Legal System (SHNI) and Indonesian National Rule of Law System (SAHNI)



C. Implementation of Pancasila and the State Fundamental Norm of Pancasila in Law Making.

The formation of public legal norms depends on the state officials in a political superstructure. On the other hand, the establishment of civil law norms and law of obligations depends on the people who are the political infrastructure in the formation of public legal norms by state and government officials. It may be less important for the country with totalitarian system. Hierarchy and the level of importance of superstructure depend on the location of the governance system of a country against the two poles of liberal and totalitarian. A government with



totalitarian systems is possible to be as close as possible to the pattern of infrastructure participation in law making. The formation of written laws is made by state and local government officials as well as the representatives of the people, even though the state government has the links with liberal or totalitarian.

The written law of the Unitary State of the Republic of Indonesia states that laws are made by political superstructure and infrastructure. Although the legal norm system of the state government does not approach the totalitarian system, written and unwritten legal norm system can also cause the position of state officials, government officials, and the representatives of the people as a political superstructure in the legal life of society to be very important. In the making of laws in Indonesia with its ideal of law of Pancasila, the constitutive and regulative functions, and state fundamental norm of Pancasila, Pancasila is believed by the officials of political superstructure who make laws. It means that the level of awareness about the ideal of law is higher and the making is getting closer to the values contained in Pancasila (Widayati, 2015).

## V. Closing

- A. Remembering the founding fathers of the Republic of Indonesia and the drafters of the 1945 Constitution, we can not let go of the main ideas contained in the preamble of the 1945 Constitution which are really of all the Indonesian people's life in society, nation, and state.
- B. In Indonesian National Legal System (SHNI), there are the ideal of law of Pancasila having constitutive and regulative functions against Indonesian National Rule of Law System (SAHNI) with the state fundamental norm of Pancasila. Pancasila forms the legal norms under it in stages. Lower legal norms are made based on and derived from higher legal norms. Therefore, there is no contradiction between the higher and lower legal norms, and vice versa.
- C. The feature of the legal system in Indonesia is accompanied with the ideal of law because it is a condition or characteristic of the people's life in the society, nation state. Interpreting Pancasila as the source of all sources of law should not be wider than the sources of Indonesian people's laws in their life in the society, nation, and state. Interpreting it more than is not true.



## REFERENCES

### 1. Books

- Anwar. (2011). *Teori dan Hukum Kontitusi, Paradigma Kedaulatan dalam UUD 1945 (Pasca Perubahan), Implikasi dan Implementasi pada Lembaga Negara (Theory and Law of Constitution, Sovereignty Paradigm in the 1945 Constitution (Post-Amendment), Implication and Implementation in State Institutions)*. Malang: Intrans Publishing.
- Azhari, A. F. (2005). *Menentukan Demokrasi (Setting Democracy)*. Surakarta: Muhammadiyah University Press.
- Azhari, A. F. (2010). *Demokrasi & Autokrasi, Gagasan, Model, Rekontruksi (Democracy and Autocracy, Idea, Model, Reconstruction)*. Solo: Solo Institut.
- Esmi. (2010). *Dalam Pemikiran Hukum Spritual Pluralistik Sisi Lain Hukum yang Terlupakan (In Pluralistic Spiritual Legal Thinking, Another Side of Law Forgotten)*. Yogyakarta: Thafa Media.
- Mahmutarom. (2009). *Rekontruksi Konsep Keadilan (Reconstruction of Justice Concept)*, Undip. Dalam T. J. Hopkins, *Majjid Khodduri The Islamic Conseption Of Justiee Boltimore and London*. Semarang.
- Manan, B. (2003). *DPR,DPD dan MPR dalam UUD 1945 Baru (DPR, DPD, and MPR in the New Constitution)*. Yogyakarta: FH-UUI Press.
- Manan, B. (2003). *Teori dan Politik Konstitusi (Theory and Politics of Constitution)*. Yogyakarta: FH UII Pres.
- Prof. Drs.H.A.T.Soegito, S. M. (2002). *Pendidikan Pancasila (Pancasila Education)*. Semarang: UPT MKU UNNES.
- Prof.DR Teguh Prasetyo, S. (2013). *Hukum dan Sistem Hukum Berdasarkan Pancasila (Law and Legal System Based on Pancasila)*. Yogyakarta: Media Perkasa.
- Prof. DR. Esmi Warasih P., S. ( 2016). *Pemikiran Hukum Spritual Pluralistik Sisi lain Hukum yang di lupakan (Pluralistic Spiritual Legal Thinking, Another Side of Law Forgotten)*. Yogyakarta: Thafa Media.
- Prof. DR. H. Inu Kenjana Syafiie., M. (2012). *Ilmu Negara Kajian Ilmiah dan Kajian Keagamaan (Science of State: Scientific and Religious Studies)*. Bandung: Pustaka Rekacipta .

Ranadirareksa, H. (2007). *Dinamika Konstitusi Indonesia (Dynamics of Indonesian Constitution)*. Bandung: Fokus Media Bandung.

Soeprapto. (2013). *Pancasila*. Penerbit LPPKP.

Usman, O., & Alfian. (1991). *Pancasila sebagai Ideologi (Pancasila as an Ideology)*. Jakarta: Perum Percetakan RI.

W.Friedmann. (1990). *Teori dan Filsafat Hukum Idealisme Filosofis dan Problema keadilan (Theory and Philosophy of Law: Philosophical Idealism and Justice Problems)*. Jakarta: Radar Jaya Offset.

Widayati. (2015). *Rekontruksi Kedudukan Ketetapan MPR dalam Sistem Ketatanegaraan Indonesia (Reconstruction of MPR Decree Position In Indonesian Constitutional System)*. Yogyakarta: Genta Publishing.

## **2. Laws and Decrees**

The 1945 Constitution

The 1949 Constitution of the Republic of Indonesian States

The 1950 Provisional Constitution

The Decree of MPRS No.XX/MPRS/1966 on the Memorandum of DPR.GR Concerning the Legal Sources of the Republic of Indonesia and the Law Structures of the Republic of Indonesia

The Decree of MPR No.III/MPR/2000 on the Legal Sources and the Structures of Law

Act No. 10 of 2004 on Law Making

Act No. 12 of 2011 on Law Making