

Implementation of State Theory of Law in The Country Based on Pancasila

Faridy

Nurul Jadid University

Jl. PP Nurul Jadid, Karanganyar, Paiton Probolinggo, Jawa Timur

email: faridy123.ach@gmail.com

Mushafi Miftah

Nurul Jadid University

Jl. PP Nurul Jadid, Karanganyar, Paiton Probolinggo, Jawa Timur

email: cak.mushaf@gmail.com

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ABSTRACT

This article discusses the concept of the rule of law in the Pancasila State. In the rule of law theory, law has a very high position. It is above all. Indonesia as a state of law, as stipulated in the 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3), has an obligation to carry out its state functions so that it is always based on applicable legal norms. Basing on this legal norm is a form of actualization of the values of Pancasila which are the ideals of national law. In the fifth precept, it is stated that justice is intended for the benefit of all levels of society regardless of social classes, so that law enforcement in Indonesia cannot be selective but must adhere to the principle of equality before the law.

Keywords: *State, Law, And Pancasila State*

ABSTRAK

Artikel ini membahas tentang konsep negara hukum dalam Negara Pancasila. Dalam teori negara hukum, hukum memiliki posisi yang sangat tinggi. Ia berada di atas segala-galanya. Indonesia sebagai negara hukum, sebagaimana termaktub dalam UUD Negara Republik Indonesia 1945 pasal 1 ayat (3), memiliki kewajiban dalam menjalankan fungsi kenegaraannya agar selalu berdasarkan pada norma-norma hukum yang berlaku. Pendasaran pada norma hukum ini sebagai bentuk aktualisasi dari nilai-nilai Pancasila yang menjadi cita hukum nasional. Dalam sila kelima disebutkan bahwa, keadilan diperuntukkan untuk kepentingan semua lapisan masyarakat tanpa melihat klas-klas sosial kemasyarakatan, sehingga penegakan hukum di Indonesia tidak boleh tebang pilih tapi harus menganut prinsip *equality before the law*.

Kata Kunci: *Negara, Hukum, dan Negara Pancasila*

Introduction

As it is known that Indonesia was initiated by its founders as *Rechtsstaat* (State of Law) based on Pancasila and the 1945 Constitution. This is because in human history in the world, there is no known concept of an Economic State or a Political State, but what is known is State law.

In the Constitution (UUD 1945) Article 1 paragraph (3) it is stated that Indonesia is a state of law and not a state of power (*machtsstaat*) or a corporatocracy. That is, Indonesia as a state of law makes the law as the holder of the main sovereignty in solving problems related to law. According to Mohtar Kusumaatmadja, that the meaning or substance of a state that adheres to a state of law is that power is subject to the law and everyone is equal before the law.¹

The term rule of law as proposed by Mohtar Kusumaatmadja above, will have the consequence that every step or behavior by both the people and the government must be legally accountable without exception.² However, the main problem is; embodiment of the ideals of the rule of law itself. In reality, the realization of the ideals of the Indonesian legal state is still far from real implementation. In fact, it tends to be inconsistent with the concept of the rule of law itself which places the rule of law as the supreme commander.

Indonesia as based on law, the government's steps must refer to the provisions of the law and the constitution (basic law).³ This is because the function of the constitution determines or

regulates the limits of power, so that all state activities, in this case the government, must refer to the law. In other terms, Rukmana Amanwinata states that in a state based on law, every power must be limited and all policies taken by power must refer to applicable legal norms.⁴

The legal problem that arises is the "non-functioning of the law" in various social and constitutional issues. There are many problems that can be described how the law works ineffectively in a Pancasila state like Indonesia. Social inequality and law enforcement are still unequal and tend to be selective. In fact, as a state of law, Indonesia should further strengthen law enforcement and judicial institutions. Evaluation of the performance of law enforcement agencies and the judiciary is urgently needed in the midst of social problems that are increasingly dynamic and complex. This is a support for the implementation of Indonesia as a state of law.

Methodology

The research used in writing this article is normative law and library research. The data used in this normative legal research paradigm and library research are secondary data extracted from relevant laws and regulations, books, journals and other scientific papers. This data is then processed, described and analyzed in depth to find a complete and correct conclusion.

The approach used in this study is the statutory approach and the concept approach. Both approaches are used to explore the legal bases for using Pancasila

¹ Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan - Fungsi Dan Perkembangan Hukum Dalam Pembangunan Nasional, Teori Hukum Pembangunan*, 1st ed. (Bandung: Alumi, 2002).

² Kusumaatmadja. pg.12

³ Imam Subechi, "Mewujudkan Negara Hukum Indonesia," *Jurnal Hukum*

Dan Peradilan, 2012, <https://doi.org/10.25216/jhp.1.3.2012.339-358>.

⁴ Rukmana Amanwinata, "Regulations and Limits on the Implementation of Freedom of Association and Assembly in Article 28 of the 1945 Constitution" (Universitas Padjajaran, 1996).

as the basic norm for the formation of laws and regulations and explore the concepts of a rule of law. Through these two approaches it is expected to be able to find correct and complete conclusions.

The focus of this research study is the implementation of the rule of law theory in a Pancasila-based state. In Indonesia, Pancasila is the grand norm which is made into the soul of every national legal product. Through this research, it is expected to find a complete answer on how to implement the rule of law theory in Indonesia as a state based on Pancasila.

Discussion

1. The Concept of The Rule of Law

Historically, the dynamics of the rule of law have actually been around for a very long time, it can even be called older than the age of state science or state science. The conception or theory of the rule of law was historically first conceived by Plato, which was further clarified by his student named Aristotle.⁵

In initiating this rule of law, Plato said "that a good state administration is one based on good (law) arrangements". Plato's theory of the rule of law is hereinafter known as *Nomoi* (customs or regulations). The idea of a rule of law became increasingly popular in the 17th century after political events in Europe were dominated by absolutism.⁶

Aristotle through his work entitled *Politica* book IV, has initiated the importance of the existence of a constitution and the rule of law (*recht*

souvereniteit) in a country. As quoted by Azhari, Aristotle said: "The constitution is a guide in the preparation of structures and positions in a country, and determines what is meant by the governing body, and what is the end of every society, the constitution is the rules, and the ruler must govern the country according to the rules." these rules.⁷

According to Aristotle, the rule of law is a state that stands above the provisions of the law and guarantees justice to every citizen.⁸ The purpose of justice here is related to every state or government policy, both in the context of carrying out state functions or in drafting laws and regulations, must pay attention to social phenomena and the conditions of the people so as not to get out of the dimension of justice itself.⁹

According to Julius Stahl as in his book Miriam Budihardjo¹⁰ a country will be called a legal state if it has fulfilled four elements, namely; a) the recognition of the human rights of citizens; b) there is a separation or division of state power to guarantee human rights, which is commonly known as the *Trias Politica*; c) government based on regulations (*wetmatigheid van bestuur*), and; d) the existence of administrative justice in disputes.¹¹

Julius Stahl's conception of the rule of law above, in principle, can be elaborated with the theory of the rule of law in the common law tradition as proposed by A.V. Dicey that the rule of law must have three characteristics which include; upholding the rule of law,

⁵ Ni'matul Huda, *State of Law, Democracy and Judicial Review* (Yogyakarta: UII Press, 2005).

⁶ Tutik Quarterly Point, *Civil Law in the National Legal System* (Bandung: Prenada Media Group, 2008).

⁷ Azhari, *Indonesian State of Law, Normative Juridical Analysis of Its Elements* (Jakarta: UI Press, 1995).

⁸ Muhammad Tahir Azhary, *The Rule of Law Is a Study of Its Principles Seen from the*

Viewpoint of Islamic Law, Its Implementation in the Period of the State of Medina and the Present (Jakarta: Bulan Bintang, 1992).

⁹ Azhary.

¹⁰ Nany Suryawati, *Women's Political Rights* (Gorontalo: Publishing Ideas, 2020).

¹¹ Miriam Budiardjo, *Fundamentals of Political Science* (Jakarta: Gramedia Publisher, 1988).

equality before the law, and guarantees of justice and protection of the rights of citizens.

In relation to the conception of the rule of law developed by Julius Stahl above, Imanuel Kant through the concept of a formal state law or *nachtwakerstaat* asserts that, the state as a dual society institution must guarantee individual freedom as members of society, the state is not allowed to interfere in the affairs of its citizens. Therefore, such a legal concept is referred to as a liberal law state.¹²

Scheltema as in Arief Sidharta, suggests that the principles and elements of the rule of law include; recognition of human rights, enforce legal certainty, apply the principle of equality before the law (equality in the eyes of the law). Thus, in a state of law, the supreme commander in managing the social life of society is the law. That is, all problems that occur in the midst of society must refer to the applicable legal rules.¹³

This is in line with what was stated by Muhammad Tahir Azhary¹⁴, that the characteristics of a rule of law are to have several principles including; the principle of power as a mandate, the principle of deliberation, the principle of justice, the principle of equality, the principle of recognition and protection of human rights, the principle of a free judiciary, the principle of peace, the principle of welfare, and the principle of people's obedience.

Apart from all the developments in the definition or understanding above,

in essence the rule of law is a constitutional conception that places the law as commander in chief of all problems. The placement of law as commander in chief can be realized through the existence of a state constitution, guarantees of security and protection of people's rights and the guarantee of values of justice in the midst of society.

2. Pancasila as the Basic Norm of Indonesian Law

Pancasila in the Indonesian national legal system is the Grundnorm or basic norm. As a basic norm, Pancasila is used as the goal or ideal and inspiration of national law. The ideals of law (*recht idee*) here have the meaning that law is a means or tool to regulate human behavior which originates from the ideas, feelings, intentions and thoughts of the community itself which are collected in Pancasila. Because, Pancasila is in accordance with the view that the meaning of law consists of three elements, namely; justice, results of use (*doelmatigheid*) and legal certainty.¹⁵

As the basis of the state, Pancasila has become a legal ideal as the embodiment and actualization of the ideals of the Indonesian state¹⁶, which has become a guiding star in the policy-making process and national law development. In Law No. 12 of 2011 concerning the formation of legislation Article 2 stipulates that Pancasila must be the source of all sources in every formation of legislation.

¹² Suryawati, *Women's Political Rights*.

¹³ Arief Sidharta, Barda, "Philosophical Studies on the State of Law," *Jentera Jurnal Hukum by Center for Law and Policy Studies (PSHK)* 3, no. 2 (2004): 124.

¹⁴ Azhary, *The Rule of Law Is a Study of Its Principles Seen from the Viewpoint of Islamic Law, Its Implementation in the Period of the State of Medina and the Present*. pg.64

¹⁵ Dedy Nursamsi, "The Nation's Legal Ideals Framework (Recht Idee) as a

Basis for the Authority of the Constitutional Court to Examine Government Regulations in Lieu of Law," *Jurnal Cita Hukum* 2, no. 1 (2014).

¹⁶ Max Boli Sabon, "Aspek Epistemologi Filsafat Hukum Indonesia," *Jurnal Masalah-Masalah Hukum* 41, no. 3 (2012): 425, <https://doi.org/https://doi.org/10.14710/mmh.41.3.2012.423-431>.

The meaning of Pancasila as a source of law is; First, every content of the legislation must not be outside the values of Pancasila. That is, Pancasila in the formation of legislation becomes the standard to determine whether the content of the law is correct or not and contains elements of the values of justice or vice versa, and Second, as a rule in the national legal system.

As a value system that lives in Indonesia, Pancasila must be placed as ideals, both political ideals, economic ideals, educational ideals, and legal ideals, and others. As a legal ideal, it is hoped that it will give birth to the values of the precepts in Pancasila such as religious morals, humanistic, nationalistic, democratic, and social justice.¹⁷ Because actually the legal ideals of Pancasila have a core¹⁸: Belief in the One and Only God, respect for human dignity, national insight and insight into the archipelago, equality and worthiness, noble morals and character, and participation and transparency in the public decision-making process.¹⁹

It is in this context that the national legal system that develops in Indonesia must be in accordance with the distinctive character and rooted in the culture of each citizen. Because the law is in charge of protecting and serving the community, the substance of the law must not come out of the soul of a developing nation which has long been practiced by the Indonesian people.²⁰

Therefore, every existing legal product must make Pancasila as its spirit. This means that the national legal system

that is expected in the future is a legal system that is extracted from the Indonesian people's view of life contained in Pancasila.

3. The Relevance of the State of Law and the State of Pancasila

As explained above, that Indonesia is a State of Law. In the Preamble of the 1945 Constitution, paragraph IV, it is explicitly explained that "therefore, the independence of the Indonesian nation was drawn up in a Law of the State of Indonesia." This implies that it is imperative that the State of Indonesia be established based on the Constitution of the State.

In the General Elucidation of the 1945 Constitution, point I regarding the Government System, it is also stated that: "Indonesia is a country based on law (*rechtstaat*) and not based on mere power (*machtstaat*)". The mention of the term *rechtstaat* in this explanation, indirectly negates that the concept of the rule of law has inspired or inspired the establishment of the Indonesian state even though substantively it cannot be equated between the concept of *rechtstaat* and the concept of the rule of law in Indonesia, because the philosophy is different.

As a state of law, Indonesia is based on the constitution of the 1945 Constitution as the highest legal umbrella or as basic law. The legal ideal that the Indonesian people want is the legal ideal

¹⁷ Irwan Hamzani, Mukhidin Achmad, and Havis Aravik, "The Ideals of Pancasila Law Among the Plurality of National Laws, Proceedings of the National Seminar on Transcendental Law" (University of Muhammadiyah Surakarta, 2019).

¹⁸ Sidharta, Barda, "Philosophical Studies on the State of Law."

¹⁹ Nursamsi, "The Nation's Legal Ideals Framework (Recht Idee) as a Basis for

the Authority of the Constitutional Court to Examine Government Regulations in Lieu of Law."

²⁰ Dwiwana Hartanto, Achmad, "Implementation of the Philosophical Values of Pancasila and Islam in Countering Radicalism in Indonesia," *Jurnal Fikri* 2, no. 1 (2017): 314, <https://doi.org/https://doi.org/10.25217/jf.v2i2.157>.

of Pancasila²¹, The ideal of Pancasila law is a law that encapsulates all values, concepts, interests that eclectically take the best elements of the legal awareness of the Indonesian people. At a macro level, the legal ideals of Pancasila must also pay attention to the dynamics of global law, especially international conventions, while still filtering them first.

In that context, it can be seen that Indonesia is not a state of law as understood in the theories of the rule of law originating in the west. Because the conception of the rule of law developed and adopted by Indonesia has its own characteristics, which are based on the philosophy of life of the Indonesian people.²² The concept of a state of law Pancasila developed in Indonesia as the actualization of the crystallization of the values and characteristics of the noble life of the Indonesian nation, as stated in the Preamble to the 1945 Constitution and implied in the Articles of the 1945 Constitution of the Republic of Indonesia.

In the Indonesian legal system, Pancasila is the basic norm (*grundnorm*) of the Indonesian state which is sourced and inspired by all laws and regulations in Indonesia. This is because Pancasila is the ideal of the law itself or what is to be achieved, so that the development of law or the formation of legislation should not be outside the framework and paradigm of Pancasila. In that context, Pancasila can be called the fundamental rule of the state "*staatsfundamentalnorm*" by being included in the Preamble to the 1945 Constitution (UUD 1945).²³

As a step to realize the idea and conception of the rule of law, the main foundation must be the principle at the

level of implementation. According to Jimly Asshiddiqie, the pillars supporting the rule of law are:²⁴

- 1) Supremacy of Law: the meaning of the rule of law here is that the highest leader in a country is not the President but the constitution which is the basic law.
- 2) Independent Mixed Organs: Arrangements for 'independent' government institutions, such as the central bank, TNI organizations, and the police. In addition, there are independent institutions such as the Human Rights Commission (KOMNASHAM), the General Election Commission (KPU), the National Ombudsman Commission, the Indonesian Broadcasting Commission (KPI), and others.
- 3) Free and Impartial Justice: In a state of law, the existence of an independent and impartial judiciary is urgent. In carrying out his judicial function, a judge must not be influenced by anyone, especially the interests of political positions and economic interests. This means that in carrying out their duties, a judge may not be intervened by anyone.

Even though Indonesia adheres to a rule of law, it is different from other countries in general. Indonesia as a constitutional state has characteristics and characteristics that are rooted in the character of its nation. That is, the Indonesian rule of law was born not as a reaction from liberalists against absolute

²¹ Hamzani, Achmad, and Aravik, "The Ideals of Pancasila Law Among the Plurality of National Laws, Proceedings of the National Seminar on Transcendental Law."

²² Arief Hidayat, "State of Law with Pancasila Character" (Grand Sahid Hotel, Jakarta, 2019).

²³ Hidayat.

²⁴ Jimly Asshiddiqie, *Teori Hans Kelsen Tentang Hukum* (Jakarta: Konstitusi Press, 2012).

government, but on the desire of the Indonesian people to foster a better life for the state and society in order to achieve the stated goals, according to agreed ways.²⁵

For this reason, the Indonesian nation in the formation of its legal state was based on the legal ideals (*rechtsidee*) of Pancasila. In order to realize the ideals of a Pancasila legal state, life in a legal state must be regulated in the Constitution. The Constitution and the rule of law are things that cannot be separated from one another. A constitution is the main guarantee to protect citizens from arbitrary treatment. It is on this basis that the concept of a constitutional state was born, in which the Constitution is considered the most effective institution for protecting its citizens through the concept of rule of law or *rechtsstaat*.²⁶

Indonesia as a state based on Pancasila has an obligation to carry out its state functions so that it is always based on applicable legal norms. This is a form of actualization of the values of Pancasila which are the ideals of national law. In the fifth precept, it is stated that justice is intended for all levels of society regardless of social classes. This means that law enforcement in Indonesia should not be indiscriminate as the principle of equality before the law.

In a more practical way, Indonesia as a state based on Pancasila law must make a constitution or legal norms a way out in solving problems relating to individuals and groups, both society and the state. Legal norms are not the only rules that regulate humans in their relationships with fellow humans. Laws are not made but live, grow and develop with society. The law must still contain ideal values and must also be upheld by all elements of society.

Conclusions

Based on the explanation above, it can be concluded that the implementation of the theory of a rule of law in a state based on Pancasila is different from a rule of law in general. The rule of law in the Indonesian context has its own meaning and characteristics. The statutory regulations or laws that are enforced in Indonesia are explored from the philosophy of life of the Indonesian nation which is accumulated in Pancasila. This concept is in line with the ideals of Indonesian law which makes Pancasila a source of values for the life of the nation and state. The Indonesian rule of law was born not as a reaction from liberalists against absolute government, but because of the desire of the Indonesian people to build a better life for the state and society in order to achieve predetermined goals, according to agreed methods.

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²⁵ Arumanadi Bambang and Sunarto, *Konsepsi Negara Hukum Menurut UUD 1945* (Semarang: IKIP Semarang Press, 1990).

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