

## Indonesian State of Law is an Aspired Concept

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### ABSTRACT

*The state of law is the concept of a state based on applicable law. In the development of the state, there are two concepts of state of law used by countries in the world, namely rechtstaat and rule of law. These two concepts also inspired the Indonesian state of law but were not followed absolutely. Indonesia is still building a legal system with a culture of society. Therefore, this study aims to describe the development of the state of law in Indonesia. This study uses a normative juridical method by using secondary data and is narrated with scientific logic. Conceptually, Indonesia does not follow the concept of rechtstaat or the rule of law because it is different from national identity. The social condition of the community consisting of various ethnic groups forced Indonesia to develop its own concept of a state of law. There is hope in the formation of laws carried out by the state, which is not only to realize the rule of law but must provide benefits to the community. Pancasila as a crystallization of the values of people's lives can actually fulfill this goal, but until now it has not been realized properly. In law enforcement, community justice must be formulated as a mandatory thing to be implemented. Every individual in society must be protected every right he has. So that the concept of the state of law in Indonesia must be correlated with the formation of useful laws and fair law enforcement. If this has been formed and is running well, then the Indonesian state of law that is beneficial to the community is not just wishful thinking.*

**Keyword:** *State of Law, Law, Expediency*

## **ABSTRAK**

Negara Hukum merupakan suatu konsep bernegara yang dilandaskan atas hukum yang berlaku. Dalam perkembangan ketatanegaraan terdapat dua konsep Negara Hukum yang digunakan oleh negara-negara di dunia yaitu *rechtstaat*, dan *the rule of law*. Kedua konsep tersebut juga mengilhami pembentukan Negara Hukum Indonesia namun tidak diikuti secara mutlak. Saat ini Indonesia masih membangun negara hukum yang berkebudayaan masyarakat. Oleh karena itu, penelitian ini bertujuan untuk menjabarkan pembangunan negara hukum Indonesia. Penelitian ini menggunakan metode yuridis normatif dengan menggunakan data sekunder yang dinarasikan menggunakan logika ilmiah. Secara konseptual Indonesia tidak mengikuti konsep *rechtstaat* maupun *rule of law* karena berbeda dengan jati diri bangsa. Keadaan sosial masyarakat yang terdiri dari berbagai macam suku memaksa Indonesia untuk mengembangkan konsep negara hukumnya sendiri. Terdapat pengharapan dalam pembentukan hukum yang dilakukan oleh negara yaitu bukan hanya untuk mewujudkan tertib hukum tetapi harus memberikan kemanfaatan bagi masyarakat. Pancasila sebagai kristalisasi nilai kehidupan masyarakat sejatinya dapat memenuhi tujuan tersebut tetapi hingga saat ini masih belum terealisasi dengan baik. Dalam penegakan hukum harus dirumuskan keadilan masyarakat sebagai hal yang wajib untuk dilaksanakan. Setiap individu didalam masyarakat harus dilindungi setiap hak yang dimilikinya. Sehingga konsep negara hukum Indonesia harus berkorelasi dengan pembentukan hukum yang berkemanfaatan dan penegakan hukum yang berkeadilan. Apabila hal tersebut sudah terbentuk dan berjalan dengan baik maka negara hukum Indonesia yang berkemanfaatan bagi masyarakat bukan hanya menjadi angan-angan.

**Kata Kunci:** *Negara Hukum, Hukum, Kemanfaatan*

## A. INTRODUCTION

The concept of state of law in the world is constantly evolving. There are two concepts that underlie the formation of a state of law in every country, namely *rechtstaat* and the rule of law. *Rechtstaat* developed in a country with a continental European legal system<sup>1</sup> while the rule of law developed in a country with an Anglo Saxon legal system.<sup>2</sup> There are two figures who describe the elements of the state of law, namely, Friedrich Julius Stahl and Albert Venn Dicey.<sup>3</sup> Friedrich Julius Stahl, representing the continental European legal system, argues that there are 4 elements of the state of law, namely:

1. Protection of human rights;
2. Separation/distribution of power;
3. Every government action must be based on existing laws and regulations; and
4. There is an independent administrative court.

Elements of the state of law put forward by Albert Venn Dicey representing the Anglo Saxon legal system, there are three main characteristics put forward, namely:

1. Rule of law;

2. Everyone has an equal position before the law; and
3. Guaranteed human rights by law and court decisions.

So from these two opinions it can be concluded that *rechtstaat* is based on the existence of an administrative court while the rule of law emphasizes more on the judicial character.

The development of the state of law in the world has also inspired the formation of Indonesia state of law. In its formation, it did not fully follow the existing concept of *rechtstaat* or the rule of law which had a liberal individualistic view. This is to accommodate the social conditions of the Indonesian people. The main characteristics of the ideals of the Indonesian state of law, namely:<sup>4</sup>

1. Power has limits, which means that power is subject to law; and
2. Everyone is equal before the law. The law treats all people equally without distinction based on ancestry, religion, social society and wealth.

The concept of the state of law in Indonesia is still developing. Currently Indonesia adheres to positivism, which is based on written law. This is to achieve the goal of legal certainty that can provide justice and benefit to the community. Apart from written regulations, Indonesia also recognizes the existence of unwritten laws in the form of customary law. The Indonesian state was formed based on indigenous peoples who declared themselves to be part of the Republic of Indonesia. Indonesian state of law also recognizes the existence of judges' jurisprudence in courts but this is only used as a complement to law enforcement in Indonesia. The development of an Indonesian legal system must be based on the principle of mutual benefit so that later the law made will provide justice

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<sup>1</sup> The Continental European Legal System is used by several countries, including Germany, Netherlands, Austria, and others. The distinctive feature of this legal system is that it prioritizes written law as the basis of its legal system. See also in Rokilah Rokilah, "Dinamika Negara Hukum Indonesia: Antara Rechtsstaat Dan Rule Of Law", *Nurani Hukum*, Vol. 2 No. 1, June 2019, p. 14.

<sup>2</sup> The Anglo Saxon Legal System developed from England and spread to America, Canada, North America, and others. The main source of law in this system is the judge/court's decision (jurisprudence). See also in Rokilah..., loc.cit.

<sup>3</sup> Badan Pengkajian MPR RI and Lembaga Penelitian dan Pengabdian Masyarakat Universitas Jember Soedirman, 2018, *SURVEI NASIONAL Evaluasi Pelaksanaan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Badan Pengkajian MPR RI, p. 9.

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<sup>4</sup> Rokilah..., op.cit, p. 20.

and benefits to the community. Lawmaking that understands the social conditions of the community is desirable. Law is a social phenomenon that moves dynamically following developments in society and is influenced by its era.<sup>5</sup> Problems in the development of the legal system must be answered immediately in order to realize the aspired state of law in Indonesia.

the unclear direction of the concept of the state of law in Indonesia is a problem that must be resolved. There are community interests that are accommodated in a country. The state must be able to provide justice and benefits in implementing the conception of the state of law. When building an independent concept that is different from other countries, it takes hard work and joint efforts to make it happen. This is not just talking about the concept but a desire to affirm the identity of the Indonesian nation. With the condition of society consisting of various tribes, the ideals of implementing the Indonesian state of law that are beneficial to society are expected to be realized.

In this article, author will answer the main issues regarding Indonesian state of law is an aspired concept. In understanding the dynamics that occur, the author tries to narrate the ideas in this study. The issue will be elaborated into three parts starting from the concept of the state of law, fair and useful legal certainty, and the aspired Indonesia state of law.

## B. METHODS

This research uses normative legal method and uses secondary data obtained from various sources with appropriate and relevant topics,<sup>6</sup> so that

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<sup>5</sup> R. Soeroro, 2009, *Pengantar Ilmu Hukum*, Jakarta: Sinar Grafika, p. 23.

<sup>6</sup> Soerjono Soekanto, and Sri Mamuji, 2003, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta: Rajawali Pers, p. 33-37.

it becomes a mess in discussing the concept of the state of law. Focus of this research is on the state of law in Indonesia and the hope that its implementation will benefit the community. The nature of this research is analytical descriptive, which describes the data that has been obtained by describing it using words with scientific logic.

## C. RESULTS AND DISCUSSION

### The Concept of the State of Law

The Greek philosopher Socrates explained that the task of the state is to create laws and must be carried out by leaders who are carefully chosen by society.<sup>7</sup> Furthermore, Plato and his student Aristotle introduced the state of law as a state governed by justice. Both of them allude to human dreams that correspond to the absolute world, which has the goal of attaining truth, decency, beauty, and justice.<sup>8</sup> Good law must be able to realize human dreams as the opinion of Plato and Aristotle. If this is done, it will provide great benefits and also law order in the community. Hans Kelsen stated that the state is a legal order. There is a legal order because of the making of regulations that determine which people in society or the state must be responsible for their actions.<sup>9</sup> Legal order is a consequence of legal development.

Michel Rosenfeld literally distinguishes the terms from rule of law (UK), *rechtsstaat* (Germany), and *etat de droit* (France). The term *etat de droit* (French) is a literal translation of the term *rechtsstaat* (German) which is more accurately translated as *ethat legal* (French) or state rule through law (UK),

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<sup>7</sup> Soehino, 2005, *Ilmu Negara*, Yogyakarta: Liberty Yogyakarta, p. 14.

<sup>8</sup> Badan Pengkajian MPR RI and Lembaga Penelitian dan Pengabdian Masyarakat Universitas Jenderal Soedirman..., op.cit, p. 7.

<sup>9</sup> Soehino..., op.cit, p. 140.

while the term *Ethas Legal* is more accurately translated as state rule through democratically enacted law (English). The concept of rule of law, *rechtsstaat*, or *etat de droit* implies that every person is bound by law, including the government, not only because the law was made by those authorized to make it and has been promulgated but the law itself must be good and fair.<sup>10</sup>

The concept of state of law is often identified with the *rechtstaat* and the rule of law. However, there are differences between the two because the concept of state of law emphasizes the existing legal system in a country. The legal system originates from continental European which is commonly referred to as civil law. Meanwhile, the concept of rule of law is a concept that was born in a country that adheres to the Anglo-Saxon system.<sup>11</sup> In addition, there are similarities between the two, namely an emphasis on ensuring the rights of everyone and there is no distinction between them. In running the government, it must be based on the applicable law and there should be no arbitrariness from the government apparatus to the community. As well as human rights are absolute and inviolable things in order to create a good and fair.

The essence of the state of law according to Jeremy Waldron is that all areas of life are regulated by law so that laws are made at any time. There are things that must be considered by lawmakers (*wetgever*) or legal formers

(*rechtsvormer*), namely the Law must be a good law and meet the demands of a sense of justice (*het recht moet, om goed recht te zijn, aan de eis van rechtvaardigheid voldoen*).<sup>12</sup> This legal aspect is the main thing that must be considered in the state of law. Lawmaking must not injure the principle of justice and must provide benefits to the community. Every component in a law must put forward absolute truth.<sup>13</sup>

Richard H. Fallon divides 4 ideal types of the concept of the rule of Law which can also be conceptualized in *rechtstaat*, including:<sup>14</sup> a) historicist concept; b) formalist concept; c) the concept of procedural law (legal process); and d) the concept of the substantive. Further explanations of Richard H. Fallon's thoughts are as follows:

1. Historical Rule of Law Concept; This concept emphasizes the meaning of the law as intended by the lawmaker;
2. The concept of the formalist rule of law; This concept is based on the statement of judge Antonin Scalia who said "The Rule of Law as a Law of Rules". The concept of a formal rule of law is based on the enforcement of written legal rules and has the aim of obtaining legal certainty;
3. Procedural rule of law concept; This concept outlines several conditions that must be met in the rule of law, namely:

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<sup>10</sup> I Dewa Gede Palguna, 2013, *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Jakarta: Sinar Grafika, p. 23-24.

<sup>11</sup> Philipus M. Hadjon, as quoted in Majda El-Muhtaj. (2012). *Hak Asasi Manusia Dalam Konstitusi Indonesia*. Jakarta: Kencana, p. 21. See also in Jeffrey Alexander Ch. Likadja, "Memaknai 'Hukum Negara (Law Through State)' Dalam Bingkai 'Negara Hukum (Rechtstaat)'" , *Hasanuddin Law Review*, Vol. 1 No. 1, April 2015, p. 79-80.

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<sup>12</sup> Retno Mawarini Sukmariningsih, "Penataan Lembaga Negara Mandiri Dalam Struktur Ketatanegaraan Indonesia", *Mimbar Hukum*, Vol. 26 No. 2, June 2014, p. 197-198.

<sup>13</sup> A. Ubaedillah, 2015, *Pancasila Demokrasi Dan Pencegahan Korupsi*, Jakarta: Prenadamedia, p. 92.

<sup>14</sup> Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review*, Vol. 97 No. 1, 1997, p. 10-21.

- a. Procedural justice in the development and application of legal norms;
  - b. The internal relationship between legal understanding and fairness;
  - c. A reasonable explanation of the relationship between recognized and preexisting sources of legal authority and the determination of rights and responsibilities in certain cases; and
  - d. Judicial review as a guarantor of procedural justice and rational considerations by legislative, executive and administrative decision makers.
4. Substantive Rule of Law Concept;  
This concept defines the rule of law not solely on the basis of the intent of forming the law, enforcing written rules, or rational application of law that can fulfill the rule of law, but rather ethical or morality aspects of law, such as justice and human rights.

In general, if Richard H. Fallon's opinion is conceptualized with the Indonesian state of law, some shortcomings can be seen. In the concept of a historical legal state, in fact, if the law that is formed can provide benefits, its application can be carried out as intended by its founder. The tendency that occurs is that the law seems to be a tool to accommodate personal and group interests while society tends to be ignored. In the concept of a formalist legal state that requires legal certainty, it will be very difficult to provide justice for the community if the law that is formed does not accommodate the rights of the community. Meanwhile, the concept of a procedural legal state is one of the best if every condition in this concept can be fulfilled. lastly, the concept of a substantive rule of law is actually the best concept because it accommodates the three previous concepts. Its implementation necessitates the elimination of any of the

aforementioned problems. Furthermore, understanding human rights cannot fully follow the concepts developed in other countries. If you look at the concepts contained in the constitution, there are restrictions on human rights if a person violates the rights of another person.<sup>15</sup> Apart from all that, Indonesia must develop its own concept of the state of law by accommodating every plurality in people's lives.

In the concept of a state of law that is in accordance with the principle of the rule of law and not of man, a law is formed as the holder of the highest command in the administration of the state. Laws cannot be made, stipulated, and enforced by mere power (*machtstaat*).<sup>16</sup> This concept, apart from meaning that it is not a power state (*Machtstaat*), also recognizes the principle of the rule of law and the constitution. Adherence to the principle of separation and limitation of power as regulated in the constitution so that there are guarantees of human rights, the principle of free and impartial justice that guarantees equality of every citizen in law, and guarantees justice for everyone, including against abuse of authority by the ruling party.<sup>17</sup> It is a must in the development of law to put forward the principles of expediency and justice so that later the tendency of the state of law that is formed is not a state of power but a state of justice.

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<sup>15</sup> The fulfillment of human rights is accommodated in the Indonesian constitution in Article 28A-28I the 1945 Constitution of the State of the Republic of Indonesia, but there are restrictions on these human rights which are stated in Article 28J the 1945 Constitution of the State of the Republic of Indonesia.

<sup>16</sup> H. Alwi Wahyudi, 2014, *Ilmu Negara Dan Tipologi Kepemimpinan Negara*, Yogyakarta: Pustaka Pelajar, p. 237.

<sup>17</sup> Zulkarnain Ridlwan, "Negara Hukum Indonesia Kebalikan Nachtwachterstaat", *Fiat Justitia: Jurnal Ilmu Hukum*, Vol. 5 No. 2, May-August 2012, p. 143.

### Fair and Useful Legal Certainty

The existence of law is very important in society even though there are norms that are generally accepted. This is because there are deficiencies in each of these norms. J. Van Khan and J. H. Beekhuis said the reason for the existence of law is because other norms (norms of decency, morality and religious norms) are insufficient and provide protection for the interests of the community.<sup>18</sup> The existence of law has the aim of providing security and order as well as ensuring the welfare that people get from the state. The state of law in addition to the interests of humans against the dangers that threaten them, also regulates relationships between humans.<sup>19</sup> If the law is good, it will create good legal certainty too. The legal certainty that is owned in these regulations will create order and be obeyed by the community. In a state of law (*rechtsstaat* or rule of law), the state provides legal protection for citizens through the institutionalization of a free and impartial judiciary and guarantees human rights and equality before the law.<sup>20</sup>

Law is a standard of human behavior in attitude and has a goal for every society to follow. the formation of the law functions as a means of manifesting society for a better order, as a tool to check whether or not an individual's behavior is in society, and as a tool to control human actions so as not to violate legal norms. This is the legal position that is enforced in order to

maintain the law towards legal certainty.<sup>21</sup> There is the adage "*summum ius, summa injuria, summa lex, summa crux*" which means that a harsh law can injure unless justice can help it. so that certainty is not the sole purpose of law but the most substantive goal of law is justice.<sup>22</sup> The legal objectives that are closer to realistic are legal certainty and legal usefulness. Estuary of law is not only justice and legal certainty, but also aspects of benefit must be fulfilled.<sup>23</sup>

Legal certainty can be interpreted as normative law based on the prevailing laws and regulations. Legal certainty does not cause doubts (multi-interpretation), is logical, and does not clash or create a conflict of norms resulting from uncertainty. Legal certainty is based on clear, permanent, consistent and consistent law enforcement whose implementation cannot be relied on by subjective circumstances, court certainty and crisis, moral errors, but factually characterizes the law. A law that is uncertain and does not want to be fair is a bad law.<sup>24</sup> According to Satjipto Rahardjo, laws are not made in a vacuum. Law is born from the provisions that live in society (*ibi societas ibi ius*).<sup>25</sup> Justice and legal certainty must be considered because legal certainty must be maintained for

<sup>21</sup> Suparman Usman, 2008, *Etika Dan Tanggung Jawab Profesi Hukum Di Indonesia*, Jakarta: Gaya Media Pratama, p. 53.

<sup>22</sup> Dominikus Rato, 2010, *Pengantar Filsafat Hukum (Mencari, Menemukan Dan Memahami Hukum)*, Yogyakarta: Laksbang Pressindo, p. 59.

<sup>23</sup> Shidarta, *Pokok-pokok filsafat hukum*, p. 160. See also in Suwardi Sagama..., op.cit, p. 34.

<sup>24</sup> C.S.T Kansil, et al., 2009, *Kamus Istilah Aneka Hukum*, Jakarta: Jala Permata, p. 385.

<sup>25</sup> Satjipto Rahardjo, "Hukum Progresif (Penjelajahan Suatu Gagasan)", *Law Magazine Newsletter Number 59*, (Jakarta, 2004). See also in Edi Hudiata, "Rekonstruksi Hukum Penyelesaian Sengketa Pasar Modal Syariah: Penguatan Aspek Regulasi Untuk Memberikan Kepastian Hukum", *Jurnal Hukum Dan Peradilan*, Vol. 6 No. 2, July 2017, p. 301.

<sup>18</sup> Donal Albert Rumokoy & Frans Maramis, 2014, *Pengantar Ilmu Hukum*, Jakarta: Raja Grafindo Persada, p. 48.

<sup>19</sup> Sudikno Mertokusumo, 2011, *Teori Hukum*, Yogyakarta: Universitas Atma Jaya, p. 16. See also in Suwardi Sagama, "Analisis Konsep Keadilan, Kepastian Hukum Dan Kemanfaatan Dalam Pengelolaan Lingkungan", *MAZAHIB*, Vol. 15 No. 1, June 2016, p. 33.

<sup>20</sup> A. Ubaedillah..., *loc.cit*.

the security and order of a country. In the end, positive law must always be obeyed based on legal certainty and the value to be achieved, namely the value of justice and happiness.<sup>26</sup>

According to Sudikno Mertokusumo, legal certainty is a legal guarantee that is enforced, those who are entitled according to law can obtain their rights and decisions can be implemented. Although legal certainty is closely related to justice, law is not synonymous with justice. Law is general, binding everyone, generalizing, while justice is subjective, individualistic, and not generalizing.<sup>27</sup> The opinion regarding legal certainty put forward by Jan M. Otto as quoted by Sidharta, namely that legal certainty in certain situations requires 5 things, including the following:<sup>28</sup>

1. There are clear, consistent and accessible legal rules issued by the state power;
2. the government applies these legal rules consistently and also obeys them;
3. the majority of citizens in principle agree with the content and accordingly adapt their behavior to the rules;
4. there are judges (judiciary) who are independent and do not take sides to apply these legal rules consistently when they resolve legal disputes; and

5. That the judicial decisions are concretely implemented.

Based on the above opinion, substantially legal certainty must be adapted to the needs of the community. The laws that are made must be based on the culture of the community. Legal certainty requires harmonization between the state and the people with the aim of making the people prosperous. the law is made not only for legal order but also to provide justice and benefit to the community.

### The aspired Indonesian State of Law

The conception of the state of law in Indonesia is contained in the constitution.<sup>29</sup> The basic principle of a state of law is that there is regulation in state life, so that every action taken whether in the fields of Economics, Education, Politics, and others is regulated based on legal products. Tahir Azhari explained that although in the explanation of the 1945 Constitution of the Republic of Indonesia the term *rechtsstaat* is used. However, what is adopted by the Indonesian state is neither the *rechtsstaat* concept nor the rule of law. The concept of rule of law and *rechtstaat* is not a concept that was born from Indonesian culture but from the western world.<sup>30</sup> The view of the state of law from Sadjipto Rahardjo stated:<sup>31</sup>

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<sup>26</sup> Achmad Ali, 2002, *Menguak Tabir Hukum (Suatu Kajian Filosofis Dan Sosiologis)*, Jakarta: Gunung Agung, p. 95.

<sup>27</sup> Amgasussari Anugrahni Sangalang, "Kajian Terhadap Ganti Rugi Atas Tanah Dalam Pengadaan Tanah Bagi Pembangunan Hukum Untuk Kepentingan Umum Guna Mewujudkan Kepastian Hukum, Perlindungan Hukum, Dan Keadilan Berdasarkan Peraturan Presiden Nomor 36 Tahun 2005 Dan Peraturan Presiden Nomor 65", Thesis Master, (Yogyakarta: Atma Jaya University), p. 53.

<sup>28</sup> Amgasussari Anugrahni Sangalang..., *ibid*, p. 52.

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<sup>29</sup> "The State of Indonesia shall be a state based on the rule of law." as stated in Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia.

<sup>30</sup> Bobi Aswandi and Kholis Roisah, "Negara Hukum Dan Demokrasi Pancasila Dalam Kaitannya Dengan Hak Asasi Manusia (HAM)", *Jurnal Pembangunan Hukum Indonesia*, Vol. 1 No. 1, 2019, p. 133.

<sup>31</sup> Yance Arizona, 2010, "Negara Hukum Bernurani, Gagasan Sadjipto Rahardjo Tentang Negara Hukum Indonesia", International Indonesian Law Society (IILS) Conference, Senggigi, Lombok. p. 19. See also in Made Wijaya, "Karakteristik Konsep Negara Hukum Pancasila",



"The state of law is a modern concept that does not arise from within Indonesian society itself, but is "imported". The process of becoming a state of law is not a part of the past socio-political history of our nation, as happened in Europe. The state of law is a building that is "imposed from outside". Thus, building a state of law is to develop a rule of law behavior, building a new law. It's a giant project"

Based on Sadjipto Rahardjo's thoughts, there is a strong desire to form a national legal system and not only stick to systems that have been established in other countries. This departs from the identity of the Indonesian nation which consists of various ethnicities, customs, the personalities of the people in each region as well as the customary laws and norms that apply. If continue to impose the concept of a state of law as in other countries, it will not be in accordance with the life of the Indonesian nation. The development of the state of law in Indonesia must be carried out with diligence and patience because the challenges that arise are enormous. Therefore, every element and component of the Indonesian nation must unite to form a national law and reflect every side of the life of the Indonesian people..

Philipus M. Hadjon said that the State of Law of Indonesia wants a harmonious relationship between the government and the people that prioritizes the principle of harmony. By reflecting the concept of the state of law, all elements in society in exercising legal protection can be directed according to the principle of harmony based on Pancasila and the 1945 Constitution.<sup>32</sup> It is hoped that justice and legal certainty can run within the Indonesian state of law. The national philosophy has provided legal protection principles in

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*Jurnal Advokasi*, Vol. 5 No. 2, September 2015, p. 211.

<sup>32</sup> Philipus M. Hadjon, 1987, *Perlindungan Hukum Bagi Rakyat Di Indonesia*, Surabaya: Bina Ilmu, p. 2.

the formation of national law. Pancasila has at least four guiding principles that must be used as guidelines in the formation and enforcement of law in Indonesia. The four principles include:<sup>33</sup>

1. The law must protect the entire nation and guarantee the integrity of the nation and therefore disintegration laws are not allowed;
2. The law must be able to guarantee social justice by providing special protection for weak communities so that they are not exploited in free competition against strong groups.;
3. Laws must be developed democratically while building democracy in line with democracy; and
4. Law should not be discriminatory based on any primordial ties and must encourage the creation of religious tolerance based on humanity and civility.

Law functions as a protection for human interests. In enforcing the law, as stated by Gustav Radbruch, there are three elements that must be considered, namely legal certainty (*rechtssicherheit*), justice (*gerechtigkeit*), and benefit (*zweckmassigkeit*).<sup>34</sup> Legal certainty aims to guarantee the public from the arbitrariness of the government. Justice is a basic right that is accepted by society regardless of ethnicity, race, religion, position, and so on. As well as benefits as noble ideals that must be realized. benefit is the manifestation of human goals as individuals who form a group called the state. In Indonesia, law enforcement is based on legal certainty, as stated in the articles in written law.

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<sup>33</sup> Mahfud M.D, 2006, *Membangun Politik Hukum, Menegakkan Konstitusi*, Jakarta: Pustaka LP3ES, p. 56.

<sup>34</sup> Winda Wijayanti, "Eksistensi Undang-Undang Sebagai Produk Hukum Dalam Pemenuhan Keadilan Bagi Rakyat (Analisis Putusan Mahkamah Konstitusi Nomor 50/PUU-X/2012)", *Jurnal Konstitusi*, Vol. 10 No. 1, March 2019, p. 186-187.

This has the aim of providing justice and benefit in every legal issue. In addition, it also aims to avoid discrimination in law enforcement.

Indonesia as a state of law has formulated a basic concept in the national legal system in the form of a legal hierarchy. To accommodate every law that applies in the community, all regulations that are not included in the legal hierarchy are still recognized as binding. This is an advancement in thinking in which written and unwritten laws are still recognized by the state. Indonesia does not only use the concept of *rechtstaat* and the rule of law but tries to form its own state of law order with an Indonesian personality. National laws are trying to be developed and harmonized with customary laws that apply in various regions in Indonesia. In addition, religious law is accommodated in the formation of existing laws.

The state of law with a national personality is still being developed in order to create a concept that benefits society. The concept of the Indonesian state of law is a noble ideal. However, there are several problems and challenges that cannot be answered in order to be able to run the Indonesian state of law as expected. These problems include:

1. Pancasila as the nation's philosophy has not been used as a reference in the formation of statutory regulations;
2. Currently Pancasila as "the source of all sources of law" is only used as a slogan. In reality, none of the legal products made are based on Pancasila. This can be seen in the preamble of each of the Prevailing Laws which does not include Pancasila in it.
3. Legal products that have been made have no future prospects for the benefit of the community;
4. The formation of the law is still unable to keep up with

developments in society. So that requires the formation of a forward-looking law. However, at this time the futuristic law formation has not yet been fully implemented.

5. In the formation of the law, there are many interests that want to be forced into; This is inseparable from the development of politics in Indonesia which has intersections in the formation of law. Increasingly, the formation of laws is only oriented towards interests, no longer aimed at providing benefits to the community.
6. There are still many overlapping and unconstitutional legal products;
7. This can be seen from the number of petitions for judicial review of the 1945 Constitution of the Republic of Indonesia at the Constitutional Court and the judicial review of laws in the Supreme Court.
8. Rigid law enforcement, only based on what is contained in the article in a law;
9. The law should exist to provide justice and benefit to the community. if it is only based on what is written in a regulation without seeing the context of an incident, then the law will only become a tool not for welfare.
10. Public Legal Awareness and Legal Officials still do not go hand in hand.<sup>35</sup>

Apart from that, neither the public nor legal officials have implemented the existing legal provisions.

There are still many challenges in building a state of law of Indonesia. Every component of society and government in this country must come together to solve this problem. To

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<sup>35</sup> Atang Hermawan Usman, "Kesadaran Hukum Masyarakat Dan Pemerintah Sebagai Faktor Tegaknya Negara Hukum Di Indonesia", *Jurnal Wawasan Yuridika*, Vol. 30 No. 1, February 2014, p. 28-29.

answer these various problems, it is necessary to make efforts to overcome them, including:

- a. By clarifying the position of Pancasila in the Indonesian Laws and Regulations. If it is said that Pancasila is the source of all sources of law, it should be in the formation of existing laws based on Pancasila;
- b. In the formation of the law, we must look ahead and not just look at the problems at the moment. In the course of the formation of the law, it has not been able to keep up with the rapid developments in society. Therefore, efforts must be made to form laws that not only see the current reality but also include the possibilities that will occur in the future;
- c. Eliminating personal interests for the benefit of the community. Good law is not only a mere rule but also provides benefits to the entire community;
- d. Law enforcement must be oriented towards justice and the welfare of the community. In the consensus of forming a state, people form a state to protect their personal rights so that they are not disturbed by other individuals. So that the state must guarantee that these rights can be protected completely and in a fair and beneficial manner; and
- e. Providing serious education to the public and legal officials in order to raise their legal awareness and implement existing legal provisions.

#### D. CONCLUSION

The state exists as a response to human desire to form a wider social sphere. The aim is that there is an arrangement to protect personal rights so that they are not taken by other humans. Plato argued that good state administration was based on good governance as well. So that each country

begins to form a state of law order that can protect each individual and society. Every state of law that exists has the same to provide justice to every individual and there should be no violation of rights, whether committed by other individuals or by state officials. Indonesia is trying to create a legal state with a national personality. So that the affirmation of the concept is very necessary to support the direction of future legal development.

The concept of the Indonesian state of law is an ideal of the nation to be realized. In every system that is formed, it is based on legal certainty which aims to provide justice and benefit to the community. If you look at the various concepts that already exist, Indonesia is currently forming a legal state that is different from other countries. The conception of Indonesian state of law can be formulated into 5 elements, such as: a) Pancasila as the basis of national life is applied in every state life, including in the formation of law; b) Protection of Constitutional Rights for every citizen; c) Establishment of laws that are beneficial to the community; d) law enforcement that is not only normative but provides justice for the wider community; and e) the state represents the wishes of the people and realizes the needs of the people.

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