

# Rule of Law under the *Pancasila*<sup>1</sup>

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## Introduction

In the discourse on rule of law, the *Pancasila* has long been a hot topic amongst academic fora. In the midst of unending debate, the one thing that is widely agreed upon is that the concept of *negara hukum* (rule of law) in Indonesia is different from the concept of *rechtsstaat* or rule of law more broadly. *Negara hukum* in Indonesia is founded in the spirit of the nation (*volkgeist*), namely the *Pancasila*.

Although the characteristics of an Indonesian rule of law based on *Pancasila* have been well formulated, its implementation and institutionalisation has yet to be fully realised. Therefore, there needs to be a systematic, structured, and massive<sup>3</sup> effort to internalise the *Pancasila* influenced rule of law into aspects of public and state life, especially in the formation of national law.

This raises the question of how Indonesian law can be developed as a vehicle for realising the goals of the state, namely the realisation of a just and prosperous society. Historically, there have been different schools of thought based on perspectives and viewpoints derived from the discourse of the early 20th century (during the time of the Dutch East

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<sup>1</sup> Delivered during “*Peningkatan Pemahaman Hak Konstitusional Warga Negara Bagi Guru Pendidikan Pancasila dan Kewarganegaraan Berprestasi Tingkat Nasional* (Raising Awareness of Constitutional Rights of Citizens for Teachers of the Pancasila and Citizenship)” on 14 November 2019 at the Grand Sahid Hotel, Jakarta. The same speech was given on a seminar at the National Law Faculty Week 2017 event at Atmajaya University, Yogyakarta on 9 September 2017 in the Bonavetura Building.

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<sup>3</sup> Efforts to internalise the concept of rule of law blended with the Pancasila in public and state life, particularly in the form of national law, must be systematic, structured and massive, as defined below:

Systematic means that a comprehensive and holistic design and plan must be in place;

Structured means that efforts should be made by state administrators and organisations of the state, whether political infrastructure or superstructure;

Massive means that the concept should be implemented at the national scale and cover formal, nonformal and informal sectors of the state, the public and the family unit.

Indies) between Nederburgh and Nollst Trenite<sup>4</sup> and Cornelis Van Vollenhoven. On the one hand, Nederburgh and Nollst Trenite wanted a unification and codification of law in the Dutch East Indies territory concordant with Dutch law, while Van Vollenhoven wanted legal pluralism in the Dutch East Indies with the implementation of “*Adat Rechtsbringer*” (Customary Law).

The debate lives on amongst scholars of independence to this day. Some figures who endorse customary law as the primary foundation for formulating state law are Prof. Djodjodigoeno, Prof. Koesnoe, and Prof. Malikoel Saleh. Meanwhile Prof. Bustanil Arifin and Prof. Hazairin are exponents for Islamic law taking the place of national law, at least for the Muslim population. Those who want a unification and codification of national law include Prof. Djoko Soetono, Prof. Sudiman Kartohadi Prodjo, Prof. Soenaryo, and Prof. Subekti. Whereas, Prof. Mochtar Kusumaatmadja has a slightly different opinion, proposing what he calls partial unification and codification,<sup>5</sup> whereby less sensitive fields of law are unified and codified, while more sensitive areas of law are allowed to grow first until they rise to the level jurisprudence or are made into law, and as such are a part of national law.

### **Rule of Law and the Pancasila**

As stated in the Elucidation of the 1945 Constitution, the Indonesian state is guided by law (*Rechtsstaat*) not mere power (*Machtsstaat*). In the Amendment to the 1945 Constitution, it is explained that Indonesia is a constitutional state with very high constitutional values, which is further confirmed in Article 1 paragraph (3) of The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), which states that "Indonesia is a constitutional state". In this Amendment to the 1945 Constitution, it is no longer stated that Indonesia adheres to the concept of *Rechtsstaat*, translating the concept to refer more to rule of law.

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<sup>4</sup> A Dutch state official who was tasked with formulating a new law for the Dutch East Indies

<sup>5</sup> Soenaryati Hartanto, *Bhineka Tunggal Ika Sebagai Asas Hukum Bagi Pembangunan Hukum Nasional*, Bandung, Citra Aditya Bhakti, 2006, pg. 23–25

The question is whether Indonesia's concept of *negara hukum* following the Amendment to the 1945 Constitution is more aligned with *Rechtsstaat* or Rule of Law. It is also equally important to ask whether Indonesia prior to the Amendment to the 1945 Constitution did indeed adhere strictly to the concept of *Rechtsstaat*.

In order to find out whether the rule of law has actually been adopted by Indonesia, we can look to the Preamble and the Articles of the 1945 Constitution as the ultimate source of legal politics in Indonesia. Together, they contain the objectives, legal ideals and fundamental norms of the Indonesian state, which represent both the foundation and the goal of Indonesian legal politics. Furthermore, the Preamble and Articles of the 1945 Constitution contain distinctive values that come from the views and culture of the Indonesian people as inherited from the ancestors of the Indonesian nation.<sup>6</sup>

From these two parameters, it is clear to see that the concept of *negara hukum* adopted by Indonesia from independence to the present is not the concept of *Rechtsstaat* nor the concept of rule of law, but rather a new variation based on the views and philosophy of the Indonesian people. This new concept manifests as a constitutional state based on the *Pancasila*, a crystallisation of the views and philosophy of the noble, ethical and moral values of the Indonesian people, as stated in the Preamble to the 1945 Constitution and further implied in its Articles. It can be understood that the *Pancasila* provides both the foundation of the norms of the Indonesian state (*grundnorm*) and also the ideals of Indonesian law (*rechtsidee*) as a normative and constitutive framework of belief. It is normative because it functions as a basis and prerequisite that underlies any positive law, and it is constitutive because it directs the law towards established ideals. With its inclusion in the Preamble to the 1945 Constitution, the *Pancasila* stands as the primary basis for the fundamental principles of the state, *staatsfundamentalnorm*.

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<sup>6</sup> Moh. Mahfud M.D., *Membangun Politik Hukum Menegakkan Konstitusi*, LP3ES Library, Jakarta, 2006, pg. 23

This concept of a constitutional state of *Pancasila* is the main characteristic that distinguishes the Indonesian legal system from other legal systems, which, according to the literature on combining social values, is referred to as a prismatic choice or, in the context of law, prismatic law.<sup>7</sup> Prismatic laws are laws that integrate the good elements contained in various laws (legal systems) so that a new and complete law is formed.

The characteristics of the Pancasila–constitutional state are as follows:<sup>8</sup>

First, Indonesia is a familial state. In a family state, while there is recognition of human rights or individual rights (including property rights), the priority is placed on common interests over individual interests. On the one hand, this is in line with the traditional values of the Indonesian society, which are familial in nature (*gemeinschaft*), but it also aligns with the more modern shift towards a society based on group identity (*gesellschaft*). This is in stark contrast to the concept of a western rule of law, which emphasizes the widest possible range of individual freedom and is at the same time contrary to communist–socialist legal states, which emphasise communal or collective interests. In the *Pancasila*–constitutional state, efforts are made to create harmony and balance between the interests of the individual and the interests of society by giving the state the possibility to intervene where necessary for the creation or maintenance of order in national and state life, in accordance with the principles of the *Pancasila*.

Second, Indonesia observes a rule of law with legal certainty and justice. With its prismatic nature, the concept of the Pancasila–constitutional state, both in the process of its formation and in its implementation, is a combination of various positive aspects taken from both *Rechtsstaat* and Rule of Law. One example, a combination of the principles of legal certainty and justice, creates a prerequisite that legal certainty must be established in order to uphold justice in society in accordance with the principles of the *Pancasila*.

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, pg. 23–30

Third, Indonesia is a religious state. Assessing the relationship between state and religion, the concept of the *Pancasila* rule of law is not based in secularism, but it also does not establish a theocracy nor an Islamic Nomocracy. Specifically, the state under the *Pancasila* and rule of law is a divine state, in the sense that life in the Indonesian nation and state is based on a belief in God Almighty, thus opening a freedom for citizens to embrace religion and faith according to their respective beliefs. The logical consequence of this prismatic choice is that atheism as well as communism are prohibited because they contradict belief in God Almighty.

Fourth, integrating law as a means of change in society and as a mirror to the culture of the people. By combining these two concepts, the *Negara Hukum Pancasila* aims to maintain and reflect the values of society and the living law in an attempt to encourage and direct society towards positive progress in accordance with the principles of the *Pancasila*. I don't agree with the principle of pluralism or multiculturalism in Indonesia. My view is that Indonesia, in building a national legal system, should adhere to the principles of *Bhinneka Tunggal Ika* or “unity in diversity”. So even though we need to embrace to the principle of legal unification to achieve the nation’s ideals, we must do so with careful attention to the varied views of the people, as is promoted under the principle of “unity for all”.

Fifth, the formulation of national laws must be based on legal principles that are neutral and universal. These principles include the *Pancasila* as the fundamental ideal; equality amongst groups and reference to shared values that do not prioritise any groups over others; mutual cooperation and tolerance; a shared vision and mission; and a mutual trust underlying all of the above.

### **Grounding the Concept of *Negara Hukum Pancasila***

Philosophically speaking, the Preamble to the 1945 Constitution is a mode of *vivendi* (noble agreement) for the Indonesian people to live together in the bonds of one diverse nation. It can also be seen as a certificate of birth, which contains a proclamation of

independence as well as self-identity and steps to achieve national ideals. From a legal point of view, the Preamble to the 1945 Constitution, which contains within it the *Pancasila*, is the basis of the state philosophy, giving birth to legal ideals (*rechtsidee*) and the basis for a separate legal system in accordance with the spirit of the Indonesian nation itself. The *Pancasila* is the supreme source of law, providing legal guidance and taking precedence over all laws and regulations. As such, the Preamble to the 1945 Constitution and the *Pancasila* within it are fundamental norms or principles and cannot be overruled by legal means without altering the very identity of Indonesia, the nation that was born in 1945.

To fully understand the function of the *Negara Hukum Pancasila*, we must begin by considering the objectives of the state and state administration, because these objectives must always be the driving force behind all implementation. The objectives of the Indonesian state are definitively stated in the fourth paragraph of the Preamble to the 1945 Constitution, namely:

1. Protect the entire nation and all its people;
2. Promote general welfare;
3. Enrich the life of the nation;
4. Contribute to the endeavor for world peace, based on freedom, eternal peace and social justice.

The realisation of the nation's goals is the obligation of the state as the highest organisation of the Indonesian nation and must be based upon the *Pancasila*. From this it can be understood that the *Pancasila* is the main guide for activities of state administration, which must adhere to the principles of faith in almighty God, just and civilized humanity, Indonesian unity, democracy led by wisdom in deliberation and representation, and social justice for all Indonesian people.

Every state policy made by state administrators in their effort to carry out a constitutional state of *Pancasila* including developing a national legal system, must comply with the four legal ideals (*rechtsidee*), namely:<sup>9</sup>

1. Maintaining the integration of the nation and state both ideologically and territorially;
2. Realising the sovereignty of the people (democracy) and the rule of law (nomocracy) at the same time, as an inseparable unit;
3. Realizing general welfare and social justice for all Indonesian people;
4. Creating tolerance on the basis of humanity and civilization in religious life.

Therefore, in the implementation of *Negara Hukum Pancasila*, the national legal system that is established must:<sup>10</sup>

1. Be designed with the intention of maintaining the integration of the nation and state both ideologically and territorially;
2. Be based upon the agreement of the people, whether through deliberation or voting, the result of which shall be for juridical consistency with the *rechtsidee*;
3. Be designed with the intention of general welfare and social justice for all Indonesian people;
4. Be designed with the intention of creating tolerance on the basis of humanity and civilization in religious life, meaning there must be no discrimination against any group.

The national legal system described above is derived from two sources of material law, namely pre-independence material law and post-independence material law. Sources of pre-independence material law consist of (1) traditional customary law, as a living law that has developed amongst Indonesian society; (2) religious law, both Islamic law and other religious laws; (3) Dutch law; (4) Japanese law. Meanwhile, sources of post-independence

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<sup>9</sup> *Ibid.*, pg. 18 and Arief Hidayat, *Empat Kaidah Penuntun*, Legal Politics Lecture Material delivered as part of the Master's in Law at Diponegoro University, 2011, pg. 2

<sup>10</sup> Moh. Mafhud M.D., *Op. Cit.*, pg. 19 and Arief Hidayat, *Op. Cit.*, pg. 3

material law consist of: (1) international legal instruments; (2) legal developments in the civil law system; (3) legal developments in the common law system.

From these sources of pre- and post-independence material law was born an attempt to reform the national legal system. The development of the new national legal system commenced with the Proclamation of Independence of the Republic of Indonesia as its starting point and was based on the preamble and articles of the 1945 Constitution, which contain the objectives, basis, legal ideals and fundamental norms of the Indonesian state—the objectives and the foundations of the national legal system.

It is hoped that by basing the Indonesian legal system on the *Pancasila* and its prismatic nature, it will realise the goals of the Indonesian state as stated in the Preamble of the 1945 Constitution.

Today's post-reform development of the national legal system is inseparable from various obstacles, both internal and external. Internal obstacles include the culture, which tends towards feudalism and paternalism and causes elitism and corruption in the law.

Furthermore, the lack of political awareness amongst the state administrators leads to a law based not in the national interest but only on the interests of certain groups.

Meanwhile, external obstacles include the influence of globalisation, which brings other ideologies contrary to the *Pancasila* into Indonesia, affecting the people's understanding of the *Pancasila* and clouding the collective mentality. Additionally, pressure from foreign superpowers affects foreign policy, resulting in conflicts between national interests and foreign interests and impacting greatly on the development of the national legal system.

It is hoped that a national legal system can be created that 1) can guarantee the integration of the nation and state both ideologically and territorially; (2) is based on the people's agreement, whether reached through deliberation or by vote, the results of which can be tested for juridical consistency with *rechtsidee*; (3) can achieve general welfare and



social justice; (4) can create civilised religious tolerance, in the sense of not discriminating or allowing discrimination against certain groups. In addition, in accordance with Article 6 paragraph (1) of Law 12/2011 concerning the Formation of Legislative Regulations, the formation of national laws needs to be based on the principles of protection, humanity, nationality, kinship, nationalism, diversity, justice, equality in law and government, order and legal certainty, balance and harmony—principles derived from the noble values of the *Pancasila* as a legal ideal (*rechtsidee*). Thus, *Pancasila* is the soul and spirit that animates the law.

Part 1: Developing a National Legal System

Sources of Material Law

Pre Independence

Law based on Indonesian customs

Islamic law  
Dutch law  
Japanese law

17.8.1945  
Proclamation

Preamble to 1945  
Constitution

1945 Constitution

Post Independence

International legal instruments

Common law influences  
Civil law influences

Development of National Law

Amendments to the national legal system

Renewal of the national legal system

PSII/AP

Pre Reformation

Indonesian National Law

Old  
New

Part 2: The Concept of Negara Hukum Pancasila

Negara Hukum Pancasila

Creation of Laws

Four guides for developing the legal system

Implementation of the law

Aligned with state objectives

## **The Role and Function of the Constitutional Court in Building a Legal System upon the Foundations of the *Pancasila***

According to Hamid Attamimi, the *Pancasila* as legal ideals (*rechtsidee*) serves two functions, namely a constitutive function and a regulative function towards the consistency and continuity of the Indonesian legal normative system. Consequently, the *Pancasila* is positioned as the supreme norm, such that all legal norms under it must be formed in accordance with and not in conflict with the *Pancasila*.<sup>12</sup>

However, in our legal system there is no mechanism for those cases where the amended and ratified constitution turns out to be incoherent, inconsistent or even contrary to the articles and spirit of the Constitution—in particular the preamble to the 1945 Constitution, which in paragraph IV includes the *Pancasila*—other than altering the Constitution itself through the mechanism stipulated in Article 37, the authority for which belongs to The People's Consultative Assembly (*Majelis Permusyawaratan Rakyat, MPR*).

Meanwhile, the Constitutional Court was conceived not only to guard and protect the constitution as the supreme law of the land, but also to guard the *Pancasila* as the state ideology. This can be seen in the authority of the Constitutional Court to decide on the dissolution of political parties. In Article 68 of the Constitutional Court Act, it is stated that political parties can be dissolved if the ideology, principles, objectives, programmes and activities of said political parties are contrary to the 1945 Constitution. Since the *Pancasila* is the spirit of the 1945 Constitution, it is a necessity that the *Pancasila* also be a point of reference in the dissolution of political parties.

Furthermore, in examining, adjudicating, and deciding on a constitutional case, apart from basing decisions on the articles of the 1945 Constitution, the court must also refer to the *Pancasila* as a touchstone in every constitutional case. The abstract noble values of the

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<sup>12</sup> Kaelan, "Negara Kebangsaan Pancasila: Kultural, Historis, Filosofis, Yuridis, dan Aktualisasinya" Yogyakarta, Paradigma, 2013, pg. 518

*Pancasila* have been used as a standard for evaluating the constitutionality of legal norms, in this case laws, which are then embodied and reflected in every decision of the Constitutional Court. Not only that, but as guardian of the constitution, the Court sees as important every effort to uphold the *Pancasila* as the fundamental norm and at the same time the soul of the 1945 Constitution. This is consistent with the vision of the Constitutional Court, namely for the constitution to be upheld by an independent, impartial and fair constitutional court. It is in this context that the constitutional duties of the Court as the guardian of the constitution also include the task of guarding the *Pancasila* as the foundation and ideology of the state. To that end, the Constitutional Court has taken the active step, with a view to grounding both the *Pancasila* and the Constitution, of establishing the *Pancasila and Constitution Education Center*.

This was motivated by the results of the meeting of the leaders of state institutions on May 24, 2011 at the Constitutional Court Building, which among others agreed on the need for efforts to revitalise, actualise, and reinternalise the values of the *Pancasila* through systematic, structured and massive collective movements involving all elements of the nation, such that the spirit of the *Pancasila* might enter the marrow and pulse of the society and the state administration and become a code of conduct in the life of the nation, state and constitution.

During the meeting it was also agreed that efforts to ground the *Pancasila* are not to be monopolised by one institution, but that all state institutions should play a role according to their duties, functions and respective authorities. Although, there has since been established the Presidential Work Unit for the Stabilisation of the *Pancasila* Ideology (*UKP-PIP*), led by Yudi Latif.

If Indonesian legal theory is a tree, then I would like to suggest that the *Pancasila* is its roots. Its boughs and branches are the various fields of law— Civil Law, Criminal Law, Constitutional Law, Customary Law, International Law and so on—informed by and

analogous to the various domains of science, such as Sociology, Politics, Culture, Anthropology, Economics and Psychology; indeed, new areas of legal study have been born in a similar vein, namely legal sociology, legal politics, legal language and more. The resulting policies and their implementation are the leaves of the tree.

Situating the *Pancasila* as the fundamental norms or principles of the state requires the ideology to live in reality, not only in concept. Not mere rhetoric but also in the actions of the people, strengthening its position as the basis of the state philosophy, pervading the scientific discourse, ensuring consistency with legislative products, maintaining coherence between precepts, corresponding with social reality, and promoting the work of, pride in and shared commitment to the *Pancasila* not only as a unifier and adhesive of the national spirit, but also as the nation's philosophy. However, what needs to be remembered is that the *Pancasila* is not static, but rather an operationalised and actualised guideline that is responsive and adaptive to the dynamics of the times. This means that the *Pancasila* is always open to new processes and interpretations that take into account its basic spirit as well as the internal relationships between its individual precepts.

Thus the *Pancasila* must be the spirit that underlies the formation of national law and of every action of society and the state administration, such that the divine principle and all of its moral nuances become the core foundation that illuminates the principles of humanity, unity, democracy and social justice, giving rise to a religious welfare state as envisioned by the founding fathers.

RAW MATERIAL

**Customary Law**  
**Religious Law**  
**Colonial Law**  
**1. Dutch**  
**2. English**  
**3. Japanese Gov't**  
**Common Law**  
**Civil Law**  
**International Legal**  
**Instrumnts**

INPUT

*PANCASILA*  
1945 Constitution

LEGISLATIVE PROCESS  
JUDICIAL PROCESS

STRATEGIC ENVIRONMENT  
- NATIONAL  
- INTERNATIONAL

THROUGHPUT

*PANCASILA* LEGAL  
SYSTEM

OUTPUT

INDONESIAN VALUES-  
BASED LEGAL SYSTEM

OUTCOME

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