

EDUCATION INSTITUTIONS BASED ON INDONESIAN LEGAL COUNTRY PERSPECTIVE

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Abstarck

The concept of the rule of law (*rechtstaats*) in Indonesia must be in accordance with the values reflected in Pancasila. A complete understanding of the concept of the rule of law based on Pancasila can be seen from the process and background of the birth of the formulation of the Opening of the 1945 Constitution which is a statement of the will of the birth of the Indonesian state, as well as a philosophical basis and state goal. The elements of the Indonesian rule of law constitute values derived from the whole process of the birth of the state of Indonesia, the basis of the philosophy and ideals of the Indonesian state law. Therefore, the opening position of the 1945 Constitution which also contains the formulation of the Pancasila, became the highest source of law for the Indonesian law state. The Preamble to the 1945 Constitution is the highest abstraction value and the value contained in the preamble is the guiding method for the preparation of the articles in the 1945 Constitution so as not to deviate from the values that form the basis of the country's philosophy and ideals

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1. INTRODACTION

The nature of the rule of law is based on the concept of the theory of State Sovereignty(Soeverignty) which in principle states the highest power within a country is a law. All state equipment this name, including citizens must submit and obey and uphold high law without exception.¹ The concept of the rule of law is like this actually it can be seen from the beginning of the emergence of the rule of law theory from the XIX century to the XX century. Usep Ranawijaya stated that the state is the creator and enforcer the law in all its activities must comply with applicable law. In this sense the law carries the state. Based on this understanding, law comes from people's legal awareness, so law has authority that is not related to someone (impersonal).

Theoretically the concept of the rule of law was initially known in countries Continental Europe with the term *Rechtstaat* means country based on law whose efforts to limit and regulate power. This understanding is flowers in the Anglo-Saxon countries, especially in the United Kingdom The Rule of Law or a state whose authority is limited by law. Law become one of the important elements in state life as such Sri Soemantri Martosoewigno stated, that a country categorized as a rule of law must have the following elements: The government in carrying out its duties and obligations must be based on laws or regulations; There are guarantees of human rights (citizens); The distribution of power within the state; and There is supervision from the judiciary bodies (*rechtterlijke controle*). The rule of law according to Friedrich Julius Stahl must

meet the main elements of the rule of law, namely: Since that is one of the most important elements in the rule of law is the attachment of state organs to laws and laws, then statutory regulations or in a broader context is law, must be clearly formulated, not multiple interpretations, and able to realize legal certainty. This is consistent with the opinion of Arif Hidayat, who said It is true that in general the concept of the rule of law includes four basic demands, namely: (1) legal certainty; (2) the law applies equally to entire population; (3) democratic legitimacy in law making; and (4) upholds human dignity.¹⁰ Similarly, according to Hans Kelsen who in his view said that the concept of rule of law (rule of law) which means law enforcement, then: (1) law is enforced for the sake of legal certainty; (2) the law is used as the main source for internal judges decide on a case; (3) the law is not based on internal wisdom its implementation; and (4) the law must be dogmatic.

The above view is in accordance with Gustav Radbruchs opinions say that: The notion of law is a cultural idea that cannot be formal, meaning it is directed at the ideals of law (*rechtsidee*), namely justice. To fill the goal of justice with concrete content, it must be seen from the side of its finality, and to complete the legal ideals and finality, certainty is needed. Therefore, law has three important aspects, namely: justice, certainty and finality. The aspect of justice shows the equality of rights before the law, the aspect of finality shows the purpose of justice which is promoting goodness in human life, means determining the content of the law, while the aspect of certainty shows the guarantee

that the law (which contains justice and norms that promote the good), and actually functions as a rule that must be obeyed. The aspect of justice is the ideal framework of the law, while the certainty aspect is the operational framework of the law.

The term rule of law was only popular in the XIX Century, but in theory. The rule of law actually has long existed and developed in accordance with demanding circumstances. Starting from the time of Plato until now, the conception of the state the law underwent many changes which inspired philosophers and experts law to formulate a theory of the rule of law and things that must exist in the concept of the rule of law. Plato and Aristotle for example, have formulated that the rule of law is a state governed by the state government fair. In his philosophy, alluded to the dreams (ideals) of human beings. Corresponds to the absolute world called: ideals to pursue truth (*idée der waarheid*), ideals to pursue decency (*idée der zedelijkheid*), ideals to pursue beauty (*idée der schoonheid*), and ideals for the pursuit of justice (*idée der gerechtigheid*). The concept of the rule of law was born as a result of an individual's struggle to free himself from the attachment and arbitrary actions of the authorities. On this basis, the authorities are not allowed to carry out arbitrary actions towards individuals and their power must also be limited. The limitation of power can be done through laws or regulations and according to Rukmana Amanwinata is called the principle of legality of the rule of law. Looking at the development of the rule of law theory, it can be seen that in terms of *rechtstaat* it is often associated with the notion of democracy, so the ideal understanding of the rule of law is "democratic rule of law". According to Padmo Wahjono, that the core of the formulation of law in a rule of law must be formulated democratically, that is, desired by the people, because the highest sovereignty is in the hands of the people (without any restrictions), will lead to absolute-democratic, which does not differ in nature from.

Power is not limited to one dictator or to a group dictator (proletarian dictatorship). Therefore, according to Padmo Wahjono that the formulation contained in the fourth paragraph of the Preamble of the 1945 Constitution (containing the precepts of the Pancasila), is a guarantee of limitations for possibilities the emergence of absolute democracy, this guarantee is even more stringent when compared to right with the formulation of a democratic rule of law or vice versa democracy that is limited by the pattern of the rule of law. According to Scheltema as quoted by B. Arief Sidharta, he has formulated views on the

elements and principles of the rule of law, covering 5 (five) matters as follows:

1. Recognition, respect and protection of human rights rooted in respect for human dignity (human dignity).
2. The validity of the principle of legal certainty, because the rule of law aims to ensure the realization of legal certainty in society. The law aims to realize legal certainty and high predictability, so that the dynamics of shared life in society are "predictable". The principles contained in or related to the principle of legal certainty are:
 - a. principles of legality, constitutionality and rule of law;
 - b. the principle of the law establishes various sets of regulations regarding the way the government and its officials carry out government actions;
 - c. the principle of non-retroactive legislation, before binding the law must first be promulgated and announced appropriately; the principles of justice are free, independent, impartial and objective, rational, fair and humane;
 - d. the principle of non-liquet, the judge may not reject the case because the reasons for the law are absent or unclear; and human rights must be formulated and guaranteed protection in the law or the Constitution.

The validity of equality (*similia similibus* or equality before the law), because in the rule of law, the government must not privilege certain people or groups of people or discriminate against certain people or groups of people. This principle contains equality guarantees for all people before the law and government and the availability of mechanisms to demand equal treatment for all citizens.

The principle of democracy, that everyone has the same rights and opportunities to participate in government or to influence government actions. The principle of democracy is realized through several principles as follows: (a) the existence of a mechanism for electing certain public officials that are of direct, public, free, confidential, honest and fair nature which is held periodically; (b) the government is responsible and can be held accountable by the people's representative body; (c) all citizens have the same possibilities and opportunities to participate in the process of making political decisions and controlling the government; (d) all

government actions are open to criticism and rational study by all parties; (e) freedom of opinion / belief and expression of opinion; (f) freedom of the press and information traffic; and (g) the bill must be published to enable effective people's participation.

The government and officials carry out the mandate as a public servant in order to realize the welfare of the community in accordance with the objectives of the state concerned. This principle contains the following things: (a) general principles of proper governance; (b) fundamental conditions for the existence of human beings with human dignity are guaranteed and formulated in legislation, especially in the constitution; (c) the government must rationally arrange its actions, have clear and effective goals (*doelmatig*), meaning that the government must be carried out effectively and efficiently.

2. RESEARCH METHOD

Pancasila Perspective of the Indonesian rule of law

The term rule of law in Indonesia is often referred to as *rechtstaats* or the rule of law. *Rechtstaats* understand basically relies on the legal system Continental Europe and although in the 1945 Constitution the term state law is called *rechtstaats*, but normatively must be distinguished from state understanding law in the Continental European legal system or the concept of the rule of law in the Anglo Saxon legal system. The concept of rule of law (*rechtstaats*) at Indonesia must be in accordance with the values reflected in Pancasila. A complete understanding of the concept of the rule of law based on Pancasila can be seen from the process and background of the birth of the formulation of the Preamble of the Constitution. 1945 which is a statement of the will of the birth of the Indonesian state, as well as a philosophical basis and state goal. From this study and understanding, it will come to a conclusion that in the concept of the rule of law based on Pancasila, besides having similarities, it also has differences with the concept of the rule of law developed in other countries. The Indonesian legal state which can also be termed the Pancasila legal state has a different birth background to the concept of the rule of law known in the west, although the rule of law as a genus of the form contained in the Explanation of the 1945 Constitution is inspired by the concept of the rule of law known in the west and when read and understand what Soepomo imagined when writing the Explanation of the 1945 Constitution clearly refers to the concept of *rechtstaat*, because the rule of law is understood as a western concept. Inspired by the concept of the western law state in this case *rechtstaat*, the 1945

Constitution requires elements of *rechtstaat* and rule of law to be part from the principles of the Indonesian rule of law.

The rule of law is not a type and character of the state that comes naturally. The realization of the rule of law must be fought for, because even though it is stipulated by state regulations, that absolute supremacy must be recognized from the law, material and formal-organizational aspects, imperative or normative aspects and operative aspects, none of this guarantees the realization of the rule of law if it is not supported by the soul of the rule of law from legal officials and the government and citizens and citizens. The soul of the state itself is the attitude, the sense of responsibility, the power of human beings as citizens and in the group, which gives direction and discipline of thought and action to realize the rule of law.

3. RESULTS AND DISCUSSION

The elements of the Indonesian rule of law constitute values derived from the whole process of the birth of the state of Indonesia, the basis of the philosophy and ideals of the Indonesian state law. Therefore, the opening position of the 1945 Constitution which also contains the formulation of the Pancasila, became the highest source of law for the Indonesian law state. The Preamble to the 1945 Constitution is the highest abstraction value and the value contained in the preamble is the guiding method for the preparation of the articles in the 1945 Constitution so as not to deviate from the values which form the basis of the country's philosophy and ideals. The holders of state power in exercising their power must naturally be guided by the values that form the basis of the philosophy and ideals of the Indonesian state, which are at the same time a moral state administration. This is based on A.V.'s opinion Dicey as quoted by Bagir Manan, said that the constitutional provisions, consisting of 2 (two) types of provisions, namely: (1) the provisions (rules) which are classified as legal rules (law), namely the rules of constitutional law (the law of the constitution). Included in the rules of constitutional law are all provisions whose arrangement can be imposed by (through) the court; and (2) the provisions which are not included as a rule of law, namely the constitutional convention or moral (moral) state administration (convention of the constitutional or constitutional morality).

Bagir Manan further explained that although the convention of order statesman regulates the ways in which state power holders run right, but not classified as a rule of law, because of the arrangement the constitutional convention is not forced by the court. Obedience to the constitutional convention is based solely on

voluntary or ethical encouragement. Therefore, the constitutional convention is also called constitutional ethics, constitutional ethics or constitutional morality. The composition of the Pancasila is hierarchical and has a pyramid shape, and when viewed from the core of its contents, the sequences of the five precepts indicate a series of levels deep and broad in content. Each precept is behind the other precepts is the specialization of the precepts before them, and if the order of each precept is considered to have such intentions, then among the five precepts there is a binding relationship to one another, so that Pancasila is one round unit. In this hierarchical and pyramidal arrangement, then The Godhead is the basis of humanity, the unity of Indonesia (nationality), democracy and social justice. Otherwise The Godhead is the Godhead humane, united (national), democratic and just social, and so on Yudi Latif, stated that as the basis of morality and direction nationality, Pancasila has an ontological, epistemological foundation, and strong axiology. Every precept has a justification of historicity, rationality, and its actuality, which if understood, internalized, trusted and practiced in a manner can consistently sustain the great achievements of the nation's civilization. The main points of morality and the direction of nationality based on nature Pancasila can be described as follows:

1. Godly values (religiosity) as a source of ethics and spirituality (which are vertical-transcendental) are considered important as the fundamental ethics of state life. Indonesia is not an extreme secular state, which separates "religion" and "state" and pretends to corner the role of religion in the private / community sphere. The state according to the nature of Pancasila is expected to protect and develop religious life, while religion is expected to play a public role related to strengthening social ethics, but at the same time, Indonesia is also not "Religious state", which only represents one (element) of religion and allows religion to dictate the state.
2. Universal human values derived from God's law, natural law, and human social characteristics (which are horizontal) are considered important as the ethical-political fundamentals of state life in world relations. The principle of broad nationality that leads to world brotherhood is developed through externalization and internalization. Out, the Indonesian people used all their power and

treasures to freely and actively "participate in carrying out world order based on independence, eternal peace and social justice". Inwardly, the Indonesian people and glorify the basic rights of citizens and residents of the country. The ethical foundation as a prerequisite for universal brotherhood is "just" and "civilized".

3. Actualization of the ethical values of humanity must first be firmly rooted in the environment of closer national relations before reaching further world associations. In internalizing the values of humanitarian brotherhood, Indonesia is a unitary state nationalities which overcome the understanding of groups and individuals. The unity of diversity in Indonesian society is managed based on the conception of nationalism that expresses unity in diversity, and diversity in unity, which in the state slogan is expressed by the phrase "unity in diversity".
4. Godly values, human values, and national values and ideals must in fact uphold the sovereignty of the people in the spirit of consultation led by wisdom. In the vision of consultative democracy, democracy gains its authenticity in strengthening the people's sovereignty, when political freedom is intertwined with economic equality, which enlivens the spirit of brotherhood within the framework of "deliberation-consensus". In the principle of deliberation, consensus, decisions are not dictated by the majority (mayorocracy) or minority powers of the political elite and businessmen (minorocracy), but are led by wisdom / wisdom that glorifies the powers of deliberative nationality and the wisdom of each citizen indiscriminately.
5. Godly values, human values, national values and ideals, as well as democratic consultations, obtain their full meaning as far as realizing social justice. On the one hand, the realization of social justice must reflect the ethical imperatives of the other four precepts. On the other hand, the authenticity of the experience of the Pancasila principles can be rooted in the realization of social justice in the life of the nation. In the vision of social justice according to Pancasila, what is desired is a balance between meeting physical and spiritual needs, a balance between the role of humans as individual beings

(institutionalized in the market) and the role of humans as social beings (institutionalized in the state), also a balance between fulfilling civil rights and politics with economic, social and cultural rights. Muhammad Tahir Azhary²⁶ quoted Oemar Seno Adji's opinion that: The rule of law of Indonesia has the characteristics of Indonesia, because it has a view of life as a state namely Pancasila. Pancasila must be appointed as the basic basis and source of law, the rule of law in Indonesia can also be called the Pancasila Law State. One of the main characteristics in the Pancasila State Law is the guarantee of freedom of religion (freedom of religion). Muhammad Tahir Azhary went on to say isn't it that although in the Elucidation of the 1945 Constitution the term *rechtstaats* is used, but what is adopted by the Indonesian State is not the concept of *rechtstaats* and not also the concept of the rule of law, but the concept of the Pancasila Law State has characteristics: (1) there is a close relationship between religion and the state; (2) rests on the Godhead of the One; (3) religious freedom in a sense positive; (4) atheism is not justified and communism is prohibited; (5) principle of kinship and harmony.

In another opinion according to Bernard Arief Sidharta, it is said that the Pancasila State has characteristics, namely:

1. Pancasila State is a state of law, in which all use of power must always have a legal basis and within the framework of the limits established by law, a fortiori for the use of public power. So, the desired government is a government based on, with and by law ("rule by law" and "rule of law").
2. The Pancasila State is a democratic country in which all its striking activities are always open to the participation of all people, in which the exercise of authority and use of public power must be accountable to the people and must always be open to rational review by all parties in the framework of the values and legal order applicable. In addition, the judiciary exercises its authority freely, and other government bureaucracies are subject to the judiciary's decisions, and citizens can submit government bureaucratic actions to the court. The government is open to critical review by the House of

Representatives and the public regarding their policies and actions.

3. Pancasila State is an organization of all people who organize themselves rationally to work together, within the framework and through the order of applicable legal rules, to realize the physical and spiritual well-being of all people by always referring to the values of human dignity and Godhead. In this conception of the Pancasila State, the state and the government are more the coordination of various rational decision-making centers with the principle of rationality-efficiency, principle of rationality-reasonableness, principle of rationality-principle and principle of rationality-value, rather than mere organization of power.³⁰ Thus, it can be said that the aspired Pancasila State is a rule of law state which is based on the principle of popular aims to bring about welfare (social justice) for all Indonesian people and world peace. Padmo Wahjono, said there were 5 (five) formal elements of the rule of law in Indonesia, namely: (1) sourced from Pancasila; (2) Consultative Assembly The people are the highest state institutions that carry out people's sovereignty, the mandatory President of the People's Consultative Assembly together with the People's Representative Council which is part of the People's Consultative Assembly is a legislative body; (3) Government based on the constitutional system, is not absolute; (4) all citizens are at the same position in law and government; and (5) independent judicial authority. Another view According to Philipus M. Hadjon, explained that the characteristics of the Pancasila legal state, namely: (1) harmony of relations between the government and the people based on the principle of harmony; (2) proportional functional relations between state powers; (3) the principle of deliberation and judicial dispute resolution is the final means; and (4) balance between rights and obligations.

Based on the principle that Pancasila is the source of all sources of state law, then every positive rule of law that applies in Indonesia must reflect the noble and pure values contained in each of the Principles of Pancasila and must be guided by the Precepts of God. Related to this, according to Darji Darmodiharjo and Shidarta,³⁴ it is said that if the philosophy of law conducts

an evaluation of the law (whether the existing law fulfills a sense of justice, legal certainty, and usefulness), for the Indonesian people, which is used as a measure, an appraisal tool, or the touchstone is the Pancasila as the source of all sources of law, which is identical with the main ideas in the Preamble of the 1945 Constitution.

The position of the Pancasila in the Indonesian constitutional system is as a fundamental fundamental. Jimly Asshiddiqie and M. Ali Safa'at said that the placement of Pancasila as a staatsfundamentalnorn was first conveyed by Notonagoro. Pancasila was seen as a legal ideal (*rechtsidee*) as a guiding star. This position requires the formation of positive law is to reach ideas in Pancasila, and can be used to test positive law. With the enactment of Pancasila as a fundamental-norm, the formation of law, its application and its implementation cannot be separated from the values of Pancasila.

4. CONCLUSION

In accordance with the meaning of the rule of law based on Pancasila, the Indonesian people have the nature of togetherness, family, and religious nature and in this sense the Indonesian nation is essentially said to be a nation of Godhead. The formulation of the Almighty God as contained in the Preamble to the 1945 Constitution, has given a unique characteristic to the State of Indonesia, which is not a secular state that separates religion from the state and is also not a religious state, namely a state that bases on a particular religion. The Almighty God formula which shows that the Indonesian state is neither a secular state nor a religious state.

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