

## THE POSITION OF PANCASILA IN THE ARRANGEMENT OF THE TYPES AND HIERARCHY OF LAWS

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### ABSTRACT

*Pancasila as a Rechtsidee and Staatsfundamentalnorn which is manifested in the main ideas of the Preamble of the 1945 Constitution of the Republic of Indonesia, in legal life is the highest norm. It creates articles in the basic law (staatsgrundgesetz) and determines the content and form of the hierarchical lower layers of the laws. Therefore, in line with the development of state administration in Indonesia, the types and hierarchy of laws and regulations need to be rearranged to give positions to various regulations needed in the administration of government, such as Ministerial Regulations, Governor Regulations, Regent / Mayor Regulations and Village Regulations. Such reality is certainly inseparable from the legal tradition of Indonesia as a country that adheres to hierarchical teachings as an implication of the adoption of the Continental European legal system (civil law system), which prioritizes written law as a source of legal order.*

*Keywords:* Pancasila position, types and hierarchy of statutory regulations.

### A. INTRODUCTION

In the history of Indonesian constitutionality, we note that the *founding fathers* of our country had succeeded in abstracting and formulating thoroughly the values and principles that have long been rooted and developed in our nation's society as formulated in Pancasila as the basis of philosophy (*Philosophische Grondslag, Staats Idee*) of the country. In this meaning, Pancasila is used as the basis for regulating state government or state administration.

The notion of Pancasila as the basis of the state as meant above is in accordance with the content of the Preamble of the 1945 State Constitution of the Republic of Indonesia, which clearly states: "..., then the National Independence of Indonesia is compiled in a Constitution of the State of Indonesia, which is formed in a composition of the Republic of Indonesia. Indonesia which is sovereign of the people *based on* the Almighty God, just and civilized humanity, Indonesian and populist unity led by wisdom in Deliberation / Representation, and by realizing a social justice for all Indonesian people".

This reality shows that for the Indonesian state, Pancasila is a fundamental element of state principles and has a special position in the life of the state and the law of the Indonesian nation. *Notonegoro* states that the basic legal norms and the so-called fundamental principles of the state in law have a permanent nature and position, which do not change for the formed state, so that by means of the law they cannot be changed<sup>1</sup>.

This has the consequence that Pancasila is the source of all state laws<sup>2</sup> as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia. Such construction means that the main function of Pancasila which acts as the basis for regulating state governance in relation to the laws applicable to the Indonesian nation and state have their position declared by the *founding fathers* by affirming that Pancasila is a legal ideal (*Rechtsidee*) which controls both written and unwritten basic laws. It is stated in the main ideas of the Preamble of the 1945 Constitution of the Republic of Indonesia, as follows:

1. "State"; it reads: which protects the entire Indonesian nation and all the blood of Indonesia, on the basis of unity by realizing social justice for all Indonesian people. In the "Preamble", the definition of the united states that the State which protects and covers the whole nation as a whole is accepted. Therefore, the State overcomes all group and individual understandings. The state according to the definition of "the Preamble" requires unity to encompass the entire Indonesian nation as a whole. This is one basic state that should not be forgotten.
2. The state wants to realize social justice for all Indonesian people.
3. The third principle contained in the "Preamble" is a state that has people's sovereignty, based on democracy, deliberation and representation. Therefore, the state system formed in the Constitution must be based on representative deliberation. Indeed, this school is in accordance with the nature of Indonesian society.
4. The fourth point of thought, which is contained in the "Preamble", is the state based on the Supreme Lordship, according to just and civilized humanity. Therefore, the constitution must contain the content that obliges the government and other state administrators to maintain a human character that is exalted and upholds the noble moral ideals of the people.

<sup>1</sup> Marzuki, UUD Negara Republik Indonesia Tahun 1945 sebagai Landasan Paradigmatik dalam Pembangunan Hukum di Indonesia (the 1945 Constitution of the Republic of Indonesia as a Paradigmatic Foundation in Legal Development in Indonesia) (Jakarta: Jurnal Konstitusi LK SPs Universitas Sumatera Utara, Volume I Nomor 2, November 2009), p. 30.

<sup>2</sup> See Article 2 of Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Formation of Laws and Regulations.

In this idea construction, *Gustav Radbruch*, a legal philosopher, emphasizes that the ideal of law does not only function as a regulatory measure to test whether a positive law is fair or not, but also functions as a constitutive basis which determines that without legal ideals law will lose its meaning as a law<sup>3</sup>.

Such a context is in line with the view *Rudolf Stammler's* by stating that the ideal of law will be able to provide a unifying direction to help formulate a fundamental conception of life because it is able to find the correct law, i.e<sup>4</sup> :

1. True law is the highest universal point in any study of life;
2. True law is the only thing which makes it possible to understand the existence of society as a whole by means of absolutely valid methods; and
3. True law shows the way to union with all endeavors of a fundamental character aimed at right consciousness.

Furthermore, according to *Stammler*, the ideal of law serves as a guiding star (*Leistern*) for the achievement of the ideals of society because it contains two sides: *with the ideals of law we can test the positive law that applies and towards the ideals of law we can direct positive law as a business with coercive sanctions towards something just*<sup>5</sup>.

In relation to legal ideals (*rechtsidee*), the values contained in Pancasila as a philosophical juridical paradigm have a constitutive function which determines whether the Indonesian legal system is the correct legal system and has a regulative function that determines whether the positive law applied in Indonesia is a fair law or not.

This reality shows that Pancasila in the legal norm system in Indonesia which adheres to the thought of structuralism of legal products plays an important role in maintaining the consistency and consistency of principles in Indonesian positive law.

Such a constellation can be related to the opinion of *Hans Nawiasky* who argues that apart from tiered norms, legal norms in a country are also grouped. In general, the grouping of legal norms in a country is divided into four groups, as follows:

1. Group I is called *Staatsfundamentalnorm* (State Fundamental Norms);
2. Group II is called *Staatsgrundgesetz* (Basic State Rules);
3. Group III is called *Formeell Gesetz* (Formal Law);
4. Group IV is called *Verordnung* and *Autonomesatzung* (Implementing Rules and Autonomous Rules)<sup>6</sup>.

State fundamental norms are the highest norms in a country, meaning that this norm is not formed by a higher norm. The norm, according to *Maria Farida Indrati Soeprapto*, is called *pre-supposed* or "predetermined", which is the source of other norms underneath. Furthermore, according to *Hans Nawiasky*, it is the basis for the formation of the constitution of a country<sup>7</sup>(*staatsverfassungs*).

## B. IDENTIFICATION OF PROBLEMS

Based on the background, as noted earlier, the obtained formulations of the problem are as follows:

1. What is the status of Pancasila in the context of the arrangement of the type and the hierarchy of legislation in Indonesia?.
2. How is the arrangement of the type and hierarchy of laws and regulations in Indonesia?

## C. RESEARCH METHODS

### 1. Research Specifications

Based on the identification of the problem, the specification or type of this research was descriptive analytical because this research was aimed at obtaining a description of the existence of Pancasila in arranging the types and hierarchies of laws and regulations in Indonesia.

With regard to this research, it analyzed the implementation of the position of Pancasila in the laws and regulations in Indonesia which is the philosophical foundation and basis of the State so that a holistic study was obtained in order to develop a format of legislation in Indonesian constitutionality.

<sup>3</sup> Hamid S. Attamimi, Pancasila Cita Hukum dalam Kehidupan Bangsa Indonesia (*Pancasila; Ideals of Law in the Life of the Indonesian Nation*), in Oetoyo Oesman and Alfian, Pancasila sebagai Ideologi dalam Berbagai Bidang Kehidupan Bermasyarakat, Berbangsa dan Bernegara (*Pancasila as Ideology in Various Fields of Community, National and State Life*), (Jakarta: BP-7, 1991), p. 68-69.

<sup>4</sup> W. Fridman, Teori dan Filsafat Hukum, Idealisme Filosofis dan Problema Keadilan (Susunan II) (*Theory and Philosophy of Law, Philosophical Idealism and Problems of Justice (Edition II)*), (Jakarta: Rajawali Pers, 1990), p. 29-30.

<sup>5</sup> Hamid S. Attamimi, *loc.cit*.

<sup>6</sup> Januari Sihotang, Rekonstruksi Ketetapan MPR dalam Sistem Perundang-undangan Indonesia (Reconstruction of MPR Decrees in the Indonesian Legislative System), (Yogyakarta: Deepublish, 2016), p. 115-116.

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

## 2. Approach Method

The approach method used in this research was a normative juridical research method (*legal research*)<sup>8</sup>, using several approaches to be able to answer the problems studied, as follows: (1) statute, conceptual, and historical approaches.<sup>9</sup> The statutory approach was used to be able to examine in depth the various regulations governing the types and hierarchies of statutory regulations. A conceptual approach was used to understand the position of Pancasila in the Indonesian constitutional system in relation to the formation of laws and regulations.

Normative juridical research was used because the data studied were sourced from secondary data or legal library materials, which included: primary, secondary, and tertiary legal materials related to the types and hierarchy of laws and regulations as constitutional juridical implementation of The 1945 Constitution of the Republic of Indonesia, such as Law no. 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Formation of Laws and Regulations.

## D. DISCUSSION

### 1. Pancasila in the Context of Arranging Types and Hierarchy of Legislation.

Taking into account the position of Pancasila as a *statutory norm*, Pancasila, which is embodied in the main ideas of the Preamble of the 1945 Constitution of the Republic of Indonesia, in legal life is the highest norm, which creates basic legal articles (*staatsgrundgesetz*) and determines the content and form of layers of law or the lower one. This is a logical consequence of the existence of a hierarchy of laws and regulations in a lower legal norm arrangement with a higher legal norm. Therefore, the determination of Pancasila as a legal norm outlined in the main ideas of the Preamble to the 1945 Constitution of the Republic of Indonesia guarantees the necessity of conformity between Pancasila as a legal norm contained in basic law and lower legal norms.

Based on such a constellation, in the construction of the 1945 Constitution of the Republic of Indonesia, in the legal system applicable to the Indonesian State, Pancasila is in two positions, namely: *First*, as a legal ideal (*Rechtsidee*), in this context Pancasila is in the Indonesian legal system. , however, it lies outside the system of legal norms. In this position, Pancasila functions constitutively and regulatively against the existing norms in the legal norm system. *Second*, as the highest norm in the system of legal norms originating from the main ideas of the Preamble of the 1945 Constitution of the Republic of Indonesia, Pancasila is a basic norm (*Grundnorm*) that creates all lower norms in the legal norm system and determines whether or not they are valid. the norms referred to.

This reality can be from thought *Hans Kelsen's* regarding *seen "Stufenbau des Recht"* which states the following:

*A norm is valid because and in so far as it was created in a certain way, that is, in a way determined by another norm; and this latter norm, then, represents the basis of the validity of the former norm. The relation between the norm determines the creation of another norm, and the norm created in accordance with this determination, can be visualized by picturing a higher and lower-level ordering of norms. The norm determining the creation is the higher-level norm, the norm created in accordance with this determination is the lower-level norm.*<sup>10</sup>

In his research, Kelsen emphasized the aspects of norm formation and validity. In other hand, norms have validity when norms are formed in ways that have been determined by other norms, while regulated content is a follow-up to other norms. Norms that are able to determine other norms are norms that have a higher position than other norms. In the Indonesian context, it could be that Kelsen's thoughts were then mandated by the constitution to be further regulated in the Law.<sup>11</sup>

In the formation of Indonesian laws and regulations which have the ideals of Pancasila law with both constitutive and regulatory functions and as a fundamental norm of the state, according to *Hamid S. Attamimi*, the success of whether the law formed will be law and whether the law formed is fair or not is very dependent on awareness and appreciation of Pancasila that is believed by state administrators and governments, and the people's representatives who make the formation of these laws and regulations. The higher the level of awareness and appreciation of the ideals of law and fundamental legal norms of the state, the statutory regulations that are formed the closer to the values contained in Pancasila, and vice versa, the lower the level of awareness and belief in the intended life, the farther the regulations are from these values. Pancasila values.

### 2. Arrangement of Types and Hierarchy of Laws and Regulations

Legally there is no prohibition on regulating the order of laws and regulations, but there are also countries that do not adhere to the tiered legal system, because the legal system is not only limited to the statutory system of legislation, so that it is not it is unlikely that there are countries that do not adhere to hierarchical teachings in their legal system<sup>12</sup>.

The legal tradition of Indonesia is a country that adheres to hierarchical teachings as an implication of adhering to the Continental European legal system (*civil law system*), which prefers written law as a source of legal order.

<sup>8</sup> Soerjono Soekanto and Sri Mamudji, 1985, *Penelitian Hukum Normatif Satu Tinjauan Singkat (Normative Legal Research: One Brief Overview)*, (Jakarta: CV Rajawali, 1985), p. 15.

<sup>9</sup> Peter Mahmud Marzuki, *Penelitian Hukum (Legal Research)*, (Jakarta: Kencana, 2005), pp. 93-94.

<sup>10</sup> Hanno Kaiser, "Notes on Hans Kel Pure Theory of Law", in Dian Agung Wicaksono, *Implications of the Re-Existence of the MPR Decree in the Hierarchy of Legislative Regulations on Guarantee of Fair Legal Certainty in Indonesia*, (Jakarta: Journal of the Constitution, Volume 10 Number 1, March 2013), p. 152-153.

<sup>11</sup> *Ibid.*

<sup>12</sup> Bagir Manan, *Theory and Politics of the Constitution*, (Yogyakarta: FH UII Press, 2003), p. 205-206

Consequently in Indonesia this hierarchical teaching is practiced in several legal institutions, starting from the MPRS Decree No. XX / MPRS / 1966, MPR Decree No. III / MPR / 2000, Law No. 10 of 2004, and finally Law No. 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Formation of Laws and Regulations.

However, in the course of Indonesian constitutionality, this type and hierarchy continues to undergo a study of the development of thought, including placing jurisprudence as part of legal order. *Jimly Asshiddiqie* in this matter stated:

Therefore, the judge's decision in the form of jurisprudence should be given an increasingly important place in the legal order in the country in the future, so that we do not only depend on the forms of written regulations produced by the legislative body, and executives. For this reason, in refining the provisions regarding the source of legal order and the forms and order of the new regulations, I propose that jurisprudence be stated explicitly in the same degree as law.<sup>13</sup>

Such a view, of course, still raises the problem of perceptions of different views related to the meaning of statutory regulations, as stated by *Van der Tak* that "laws and regulations are written legal rules made by authorized officials or office environment which contain abstract and abstract rules of behavior. binding in general."<sup>14</sup>

However, in the context of structuring the types and hierarchy of laws and regulations, it is necessary to expand in accordance with the development of the Indonesian state administration, which includes: the

1. The 1945 Constitution of the Republic of Indonesia
2. MPR Decree
3. Laws and Government Regulations in Lieu of Laws
4. Government
5. Presidential Regulations
6. Ministerial Regulations and the Regulations of Government Institutions at the level of a Minister.
7. Provincial
8. Governor Regulations
9. District / City Regulations
10. Regent / Mayor Regulations
11. Village Regulations.<sup>15</sup>

#### 1. The 1945 Constitution of the Republic of Indonesia

The 1945 Constitution of the Republic of Indonesia is intended to cover the main text and its amendments, which constitute the mother constitutional law, which contains guarantees of protection of human rights, distribution or restrictions on state power that are fundamental in nature and the form and structure of the state administration which are also fundamental in nature.

Theoretically, the 1945 Constitution of the Republic of Indonesia *Hans Nawiasky's* is a group of *Staatsgrundgesetz* as outlined in a written legal document, which has the position of the highest legal norm in the State, and is a single norm.

#### 2. MPR Decrees

MPR Decrees are a form of statutory regulation that is not explicitly stated in the 1945 Constitution of the Republic of Indonesia, but is a legal norm that grows in the practice of state administration. This MPR decision as statutory regulation is a written regulation made by the MPR which contains rules of conduct that are abstract and bind (in) general terms.

This MPR decree in *Hans Nawiasky's* construction is also classified as the Basic State Rules (*Staatsgrundgesetz*), because it contains basic rules and general rules that are broad in nature. In other words, the MPR Decree is a single norm and has not been sanctioned and has become a guideline in the formation of laws and regulations under it.

#### 3. Laws and Government Regulations

Lieu of Laws are different from the 1945 Constitution of the Republic of Indonesia and the MPR Stipulations which are the Basic Rules of the State, Laws and Government Regulations in Lieu of Laws (Perpu) are more concrete and detailed norms, and can already apply directly in society, so that in construction *Hans Nawiasky's* can be grouped into *Formeel Gesetz*.

Laws and Perpu are no longer a single norm, because sanctions are attached as a means of coercion. In Indonesia, the authority to form laws rests with the DPR and the President, while the Perpu is stipulated by the President in compelling crises. Therefore, in relation to the Perpu, it is better if in the future it is stipulated in the Law the criteria of urgent matters of urgency as well as the criteria for material content that are justified to be regulated in the Perpu. In this context *Bagir Manan* thinks it is necessary to consider the elimination of the Perpu in the statutory system to avoid misuse, authority and legal implications due to the DPR's refusal of the Perpu to become law.<sup>16</sup>

<sup>13</sup> Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism*, (Jakarta: Secretary General and Registrar of the Indonesian Constitutional Court, 2006), p. 342.

<sup>14</sup> Bagir Manan, *op.cit.*, P. 216. Compare also the meaning in Article 1 Number 2 of Law No. 12 of 2011 which states: "Legislation is a written regulation that contains legally binding norms and is established or stipulated by a state institution or authorized official through a procedure stipulated in statutory regulations.

<sup>15</sup> Compare this with the Opinion of *Jimly Asshiddiqie* 's which states the Orderly Sources of Law and the Order of Legislation as follows: 1. Basic Regulations, including: UUD, Amendments to the Constitution, and Basic Charter. 2. Laws, Government Regulations In Lieu of Laws, and Jurisprudence. 3. Government Regulations and Presidential Regulations. 4. Ministerial Regulations and Ministerial Officials' Regulations. 5. Provincial Regulations. 6. Governor Regulation. 7. Regency / City Regional Regulations. 8. Regulations of the Regent / Mayor. 9. Village Regulations (*Self Governing Law*), in *Jimly Asshiddiqie, op.cit.*, P. 344-345.

<sup>16</sup> Bagir Manan, *op.cit.*, P. 220.

#### 4. Government Regulation`

Government Regulation is a *verordnung* or implementing rule in *Hans Nawiasky's* construction. Therefore, Government Regulation is simply the regulatory authority that is in the hands of the President to carry out statutory orders (organic rules). Government regulations are statutory regulations that are "*administratiefrechtelijke*", because they cannot regulate and create constitutional rules.<sup>17</sup> Government regulations are formed because they are expressly ordered by law.

#### 5. Presidential Regulation

Presidential Regulation is also an implementing rule (*verordnung*) in *Hans Nawiasky's instruction*, as the authority given to the President in administering government, both to carry out laws and government regulations. Similarly, in the President's consideration, a statutory provision requires implementing regulations. in the form of a Presidential Regulation. Therefore, the Presidential Regulation was formed to enable the President to carry out government administration (state administration), to complement the existence of Government Regulations which were only limited to statutory orders.

#### 6. Ministerial Regulations and Regulations of Ministerial Government Level Institutions.

Ministerial `Regulations and Ministerial Government Level Institutions' Regulations are laws and regulations issued to carry out the affairs of each ministry or Ministerial Level Government Agency. This Ministerial Regulation has the authority to be limited to only the Minister who leads the Department, because only the Minister who leads the Department has the apparatus to properly implement the Ministerial Regulation<sup>18</sup>. This regulation is also classified *verordnung* as the implementing rule in *Hans Nawiasky's* construction.

Meanwhile, this Ministerial Level Governmental Agency Regulation is meant to be a part of laws and regulations issued by institutions at the ministerial level, such as: the Governor of Bank Indonesia, the Commander of the Indonesian National Armed Forces, the Chief of the Indonesian National Police and the Attorney General.

#### 7. Provincial Provincial Regional

Regulations are statutory regulations established by the Provincial DPRD and the Governor which regulate the interests of the community or governance which are the functions of the Provincial government in the implementation of autonomy affairs and assistance tasks. In construction *Hans Nawiasky's*, this rule is *Autonomu Satzung* as an autonomous rule.

#### 8. Governor Regulations

Governor Regulations are intended as implementing regulations of Provincial Regulations as a product of the regional legislative and executive branches. This regulation is also part of the *Autonomu Satzung* in the legal norm group according to *Hans Nawiasky*.

#### 9. District / City Regulations

Regency / City Regional Regulations are regulations whose content is the same as Provincial Regional Regulations, only the scope of their application is different, namely in the context of autonomy and co-administration. Likewise, the position in the grouping of legal norms according to *Hans Kelsen* is *Autonomu Satzung*.

#### 10. Regent / Mayor Regulations

The Regent / Mayor Regulation is an organic rule of the Regency / City Regional Regulation to carry out autonomy affairs and assistance tasks. Grouping *Hans Nawiasky's* also includes *Autonomu Satzung*.

#### 11. Village Regulations

Village as an integral part of government administration needs to be strengthened with the authority to form Village Regulations as a sub-system of statutory regulations. This Village Regulation is made by the Village Head with the joint agreement of the Village Consultative Body regarding all village household affairs in the field of autonomy and assistance tasks. It is hoped that this Village Regulation can develop customary traditions that exist in Village communities, especially traditional villages.

This regulation is also *Satzung Autonomu* in construction *Hans Nawiasky's*, because this legal norm also regulates the implementation of village government affairs and the interests of local communities, within the framework of village autonomy within the ties of the Unitary State of the Republic of Indonesia.

### E. CONCLUSION

Based on the description as mentioned above, the following conclusions and suggestions are obtained in this paper: The

#### 1. Conclusion

- 1.1. Pancasila as a *Rechtsidee* and *Staatsfundamentalnorm* guarantees the necessity of conformity between Pancasila as a legal norm contained in basic law with lower legal norms, however, it very much depends on the awareness and appreciation of Pancasila which is believed by state administrators and government, and the people's representatives who make the formation of these laws and regulations.

<sup>17</sup> *Ibid.*, p. 222.

<sup>18</sup> Jimly Asshiddiqie, *op.cit.*, p. 354.

- 1.2. The type and hierarchy of statutory regulations need to be rearranged to give positions to various regulations required in the administration of government, such as Ministerial Regulations, Governor Regulations, Regent / Mayor and Village Regulations.
2. Suggestions
  - 2.1. It is expected that in the formation of legal norms related to the types and hierarchies of laws and regulations, it is necessary to regulate the content of Pancasila in the legal norm system, both in the context of being a *Rechtsidee* and *Staatsfundamentalnorm*.
  - 2.2. It is expected that a comprehensive study of the types and hierarchy of statutory regulations, so that the position, type and material of future statutory regulations will provide legal certainty in the context of regulating the administration of the State and governance.

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### Laws and Regulations of the Republic of Indonesia

*The 1945 Constitution of the Republic of Indonesia of*

*Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Establishment of Legislation.*

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