

# TOWARDS INDONESIA AS A STATE LAW BE HAPPIEST PEOPLE

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## TOWARDS INDONESIA AS A STATE LAW BE HAPPIEST PEOPLE

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### ABSTRACT

The development of the concept of state law is a product of history. Formulation of understanding continues to evolve to follow the historical development of society in the state, although in practice the discussion refers to the concept of the modern state of the mainstream since the 19th century; Continental European *Rechtstaats* concept, and Anglo-Saxon with the concept of Rule of Law. Each country has its own style. The concept of state law in one country cannot be forced into other countries. Indonesia has the Pancasila ideology that by applying them consistently, so it can become law states that happy people.

Keywords: state law, *rechtstaats*, rule of law, happy people, Indonesia.

### Introduction

The development of the concept of state law is a product of history. Formulation of understanding continues to evolve to follow the historical development of society in the state. The roots of early thought farthest state law may be referred to at the time of the Ancient Greeks and Romans to the concept of popular sovereignty. Ancient Egyptian kingdom's legal system, the Plain of China, also Indo-Malaya. But in practical discussion of the state of law refers to the concept of the modern state of the mainstream since the 19th century; Continental European *rechtstaats* concept, and Anglo-Saxon with the concept of the rule of law.

It is undeniable that the development of law in the world has been through a long transformation. Each country has a different way of developing appropriate legal outlook on life (way of life) and a way of life. The history of the law of each country are not the same, each has its own characteristics. Owned British history different from that of China, because both have a culture, geography, and different development of science. Likewise Indonesia, which of course has its own history.

The most rapid development of the law occurred in the 18th century until the 20th. With many colonialism conducted by European countries, they impose the law into a vassal state. For example, Indonesia, which "forced" to become an instant through the transformation of state law and transplantation. The style of law in Indonesia jumped from feudalism directly into a modern constitutional state.

The legal system is closely connected with the ideas, ideals and goals of the community. The law reflects intelligence, social, economic, and political climate at the time. Relevant in case what is expressed by Carl von Savigny that law grows along with the growth of the community, the community rallied together with strength, and finally turned off by people anyway<sup>1</sup>. Departing from where needed an idea of how best to build a law in order to be happy people, especially in Indonesia.

### The Discussion

#### 1. The Term State of Law

The term state law, including the terms of young, emerging in the 19th century, when compared with other well-known terms in such constitutional democracy, constitution, sovereignty and so on<sup>2</sup>. The concept of state law related to the term *nomocratie* or rule of law which means that the determinant in the administration of state power is the law. The concept of the legal state of the most recognized in the world is the concept of state law *Rechtsstaat* Continental European products as well as the concept of the rule of law state law Anglo-Saxon product<sup>3</sup>.

The purpose of the state law is that no one is above the law and punish the ruling. Management of government must be based on law, not the word of the head of state. State and other agencies in any action should be guided by the law and can be justified by the law. The power to govern by the rule of law (rule of law) and aims to organize the legal order.

According to Brian Z. Tamanaha, a study of the state of law made by the two main approaches, namely a formal approach and substantive approach. The formal approach begins with the concept of rule by law where the law is interpreted as

<sup>1</sup>Bernard L. Tanya, dkk., *Teori Hukum; Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta: Genta Publishing, 2010, hlm. 104.

<sup>2</sup>A. Mukthie Fadjjar, *Tipe Negara Hukum*, Malang: Bayumedia Publishing, 2003, hlm.10

<sup>3</sup>Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta: Konstitusi Press, 2005, hlm. 152

an instrument of government action. Subsequently developed in the form of formal legality, the law is defined as a general norm, obviously, prospective, and certainly, and evolve again into democracy and legality, where agreement which determines the content or substance of the law. While the substantive approach to developing the legal state of individual rights. Is the fundamental base of privacy, individual autonomy and contract. Furthermore, the principle of the rights to freedom and justice's private, evolved into the concept of social welfare which contains the principles of substantive, equality, welfare and survival of the community<sup>4</sup>.

If the country under the laws of the government of the country should be based on a constitution or the constitution as the foundation of governance. The state constitution as a means of unifying the nation. The relationship between citizens and the state, the relationship between institutions of States and the performance of each element of power is at an agreed system of rules and upheld<sup>5</sup>.

Friedrich Julius Stahl, legal experts from the European Continent provides Rechtsstaat characteristics are: 1) protection of human rights. 2) Separation or division of powers to guarantee the rights of the human principle commonly known as the Trias Politica. 3) Government by regulations. 4) Judicial administration in dispute<sup>6</sup>.

The Albert Venn Dicey, legal experts from the Anglo Saxon gives the characteristics of the rule of law as follows: 1) The rule of law, in the sense that there must be no arbitrariness so that one should only be punished if they break the law. 2) The position is equal before the law, both for ordinary people as well as for officials. 3) Ensuring human rights in legislation or court decisions<sup>7</sup>.

According Asshiddiqie, there are twelve important features of the rule of law, namely; rule of law, equality under the law, the principle of legality, limitation of power, the executive organ of independent, free and impartial judiciary. Administrative courts, state judiciary, protection of human rights, democracy, means to realize the goal of the state, and transparency and social control<sup>8</sup>.

In summary, the characteristics or elements of state law can be summarized in three ways; first, there is a limitation of state power against the individual, meaning the state cannot act arbitrarily. State action is restricted by law, the individual has the right to the state or the people have the right to the ruler. Second, the principle of legality. Each state action must be based on the laws that have been held in advance that must be adhered to by the government or apparatus. Third, the separation of powers. So that right was actually protected then there needs to be a separation of powers, which is the body that makes laws, implement and try to be separated from each other are not in one hand.

A discussion of the state of law is essentially the question of power. There are two centers of power; on the one hand, there are countries with power becomes absolutely necessary to be able to govern, and on the other hand, the governed are reluctant to release all his power. If the authorities in a country only aim to obtain maximum power regardless of the freedom of his people, then fled the state law.

## 2. State Laws in the World

Historically and practically, the concept of a state of law arise in a variety of models, such as the law, according to the Continental European countries called Rechtsstaats, according to the Anglo-Saxon state law called the Rule of Law, the Social Legality concept, the concept of a state of law according to the Qur'an and Sunnah or nomocracy Islam, including the concept of Pancasila state law in Indonesia.

Rechtsstaats born on the plains of Europe, which basically relies on Continental European legal systems are termed civil law. The idea of rechtsstaats became popular in the 17th century as a result of Europe's socio-political situation dominated by absolutist king. European legal system was born out of the struggle of the bourgeoisie to get a place in the law, since then, the law is only controlled by the class king, nobility and the church. The bourgeoisie expects a guarantee of independence and the rule of law, thus was born the principle of equality before the law<sup>9</sup>.

Understand Rechtsstaats developed by experts in Continental European law, initiated by Immanuel Kant, Friedrich Julius Stahl followed by, and Hans Kelsen. Even Hans Kelsen known who put forward the theory "rechtslehre rein" (pure legal doctrine or theory of pure law), that the law should be separated from the elements such as legal nonpolitical, social, moral, and others. The idea is what gave birth to positive law. Problems arise when pure legal theory (stufentheorie) Hans Kelsen just answers what and how legal it is, not how the law should be made. The concept of Hans Kelsen Rechtsstaat difficult to continue

<sup>4</sup>Brian Z. Tamanaha, *On the Rule of Law*, New York: Cambridge University Press, 2006, hlm. 91-101.

<sup>5</sup>Miriam Budiardjo, *Dasar-dasar Ilmu Politik*, Jakarta: PT. Gramedia, Cetakan IX, 1985, hlm. 96-97.

<sup>6</sup>J.J. Von Scamhid, *Pemikiran Tentang Negara dan Hukum*, Terjemah, Jakarta: Pembangunan, 1988, hlm. 34.

<sup>7</sup>Albert Venn Dicey, *Introduction to Study of The Law of The Constitution*, Ninth Edition, ST. Martin's Street, London: Macmillan And Co, Limited, 1952, hlm. 45.

<sup>8</sup>Jimly Ashiddiqie, *op.cit.*, hlm. 15.

<sup>9</sup>Jimly Ashiddiqie, *Pengantar Ilmu Hukum Tata Negara*, Jakarta: Mahkamah Konstitusi RI, 2006, hlm. 25.

to apply in the modern world, because a country cannot distinguish between the role of the political structure and the role of law enforcement organizations (legal organization)<sup>10</sup>.

While understanding the Rule of Law became known after Albert Venn Dicey in 1885 which published the book *Introduction to the Study of the Law of the Constitution*. The rule of law is based on the Anglo-Saxon legal system or the common law system. The elements of the Rule of Law was initiated by Dicey is:

- a. The supremacy of the rule of law (supremacy of the law), namely the absence of arbitrary power (absence of arbitrary power);
- b. Position the same in the face of law (equality before the law). This argument applies to both ordinary people and the authorities.
- c. Ensuring human rights by law (in another country by the Constitution) as well as court decisions<sup>11</sup>.

From the beginning the doctrine of the rule of law in the UK does not separate from the doctrine of parliamentary supremacy. Parliament has the right to do anything, including at the time of making the realization of the Rule of Law. According to Dicey, sovereignty of parliament exceeded state law, avoid arbitrariness kingdom influenced by the regulations or decisions. People (through parliament) together with the king is the highest authority. Without a constitution even though everyone has a sense of responsibility on its leader to maintain the rule of law. The rule of law also requires that the state continues to serve people with the best.

If in the countries of Western Europe are civil law and common law, then in 1924 in Eastern Europe, precisely in the USSR (Soviet Socialist Republic) was born the concept of socialist law or the law of the state socialist. This concept is rooted in civil law but are modified and the addition of Marxist-Leninist ideology. The core concept of socialist law is that the country almost did not recognize the right of private property. State type is not based on individual freedom and mechanisms pulsar, but from the beginning, it is the state that drives society. The Soviet Union did not make the people to be afraid of the outside world, but the Soviet Union showed that better here than out there<sup>12</sup>.

Until the late 1980s, the Soviet Union became a superpower with different kinds of high aspect of life, from the economy to the military, and had alarmed the Western world. But the Soviet glory did not last long. With the development of the free market in the world, the Soviets began to lose strength because only relies on the domestic market and the defeat in the competition world. Because of the crisis and several coups, in 1989, the Soviets finally broke<sup>13</sup>.

China is one country that adheres to socialist law, but their use of its own wisdom, not the value that is owned by the Soviet Union. Yuwu Wei said that Chinese culture is a determinant factor in determining how the concept is implemented. Wei said that culture has a significant influence in the formation of a system of government, as a government run by people who shaped by different cultures<sup>14</sup>.

Japan also experienced a pretty radical legal developments. Judging from the historical side, the legal system of the newly formed nation of Japan during the Tokugawa Shogunate, and in 1870, created the office of learning a foreign government system. As with other countries, the Japanese government system experienced several periods of change. The first period (1869-1888), in this period the effects of 'foreign' began to enter. The second period (1889-1899), were introduced the German Constitution, combined with the Japanese habit through a Family Code. The third period (1900-1913), Penal began to emerge. The fourth period (1914-1945), began to determine the constitution and social change. This period was also marked by an alliance of Rome-Berlin-Tokyo. Japan got the strong influence of the German legal system. Furthermore, the period of 1947 after its defeat in World War II, the modern Constitution came into force. With the end of World War II, Japan became a constitutional monarchy with a parliamentary system of government<sup>15</sup>.

In the 6th century until the 12th century AD, in the Middle East, Islamic countries (starting from the leadership of the Prophet Muhammad. Until the Caliphate of Bani Abbasiyah) exist and apply the concept termed Islamic nomocracy. Even managed to subdue the south of Europe (especially Andalusia / Spain), All Africa, and the majority of Western Asia, and spread Islam to East Asia. Islamic law and culture visible in areas of Africa and the whole of Arabia, as well as some regions of Asia and even Indonesia<sup>16</sup>.

<sup>10</sup>Jimly Ashiddiqie dan Safaat Ali, *Teori Hans Kelsen tentang Hukum*, Jakarta: Mahkamah Konstitusi RI, 2006, hlm. 45.

<sup>11</sup>Dicey, *op.cit.*, hlm. 50.

<sup>12</sup>Azhary, *op.cit.*, hlm. 70.

<sup>13</sup>*Ibid.*, hlm. 76.

<sup>14</sup>Satjipto Rahadjo, *Negara Hukum yang Membahagiakan Rakyatnya*, Yogyakarta: Genta Publishing, 2009, hlm. 51.

<sup>15</sup>*Ibid.*, hlm. 54.

<sup>16</sup> Azhary, *op.cit.*, hlm. 92.

Nomocracy Islam is the state which is based on the concept of the Qur'an, al-Sunnah and *ijtihad* (the thinking). According to this concept, the power is a trust that is a very large and heavy. People who should be ready to bear any consequences if he is negligent in performing their duties. The teachings of Islam are very egalitarian and prioritize equality (equity), so it cannot possibly be justified group of theologians claim to be representative of the Lord to be in power in a country. The Nomocracy concept of Islam is the proper term to be pinned to the country submit and obey the rules of Islamic law (*shari'a*)<sup>17</sup>.

While Indonesia, embracing the concept *Rechtsstaats* Continental Europe, which is inherited from the colonial Dutch. The term state law in Indonesia is often translated *Rechtsstaats* or rule of law to designate the same thing. This is reflected in the Constitution of the Republic of Indonesia 1945 Amendment to the fourth paragraph of Article 1 (3) which has told "Indonesia is a State of Law". Indonesia also called Democratic countries are reflected in the Constitution 1945 Amendment to the fourth paragraph of Article 1 (2), that "sovereignty rests with the people and implemented in accordance with the Constitution". Consequential that Indonesia is a country of law, the highest authority in the country is legal.

### 3. Towards a Happy State of Indonesian Law of the People

History of state administration can thus be traced from the history of the nation itself. Characteristics and identity of a person is crucial basics of nation and state in the constitution. It can be seen from one of the basic consensus contained in the constitution, namely the agreement on the purpose or goal together (the **general goals of society or the general acceptance of the same philosophy of government**)<sup>18</sup>.

Formal conception of a state law aimed at the way in which the law was announced (by the authorities), the clarity of norms and temporal dimensions of the promulgation of the norm. The state law is not addressed to the completion of legal proceedings on the fact the law itself, and is not related to whether the law was the law is good or bad. While the substantive conception of law state moves over it, while recognizing the formal attributes. The conception of substantive law states moves further. Basic rights or derivatives into the foundation used to distinguish between good law that meets the basic rights and bad laws that ignore basic rights. Formal concept of state laws focuses on the feasibility of legal sources and forms of legality while substantive concept also includes requirements on the content of legal norms<sup>19</sup>.

Every nation and civilization have each character unique. This character is based upon the historical and cultural development of society. In fact, each nation has its own character and qualities that are intrinsically nothing is superior to each other. The same thing happens in the formation of the legal system which has close links with the culture of the people<sup>20</sup>.

Indonesian law state can be described as a home project, in which he had to be built, then cared for, and then passed on to his successor. Necessary self-discovery or identity in its formation. Judging from the history of Indonesia following the steps *Rechtsstaat* or civil law, because Indonesia was colonized by the Dutch long enough. However, if the civil law concept is applied pure, most likely not bring happiness to the people of Indonesia. The law will move much slower than the dynamics of Indonesian society. Even worse, the implementation of the government will move stiff and tend to be repressive. Likewise, the application of the concept of the Rule of Law in a pure, state control of the public will be very weak, because the people of Indonesia are very pluralistic and scattered. When compared with the rule of law in force in the United Kingdom, the British public is 'a descendant' so as not to appear to differences in cultures, and also there is the figure of the king as a unifying symbol of the nation. Even if applied as it is to promote liberalism will bring division in Indonesia.

Indonesian law requires a state concept (typical and special) Indonesia. A concept derived from the noble values that exist from Indonesia, not the values is transplanted by other countries. As stated by Carl Friedrich von Savigny, that the law is a manifestation of public awareness as *volkgeist* (the soul of the nation). Act as a legal product, must be extracted and derived from Indonesian national diversity, culture, also beliefs and values of the Indonesian nation. The characteristics of a form of state law Pancasila. Legal norms which crystallized into law ultimately have legal purposes a happy person, so as to present a legal product that contains the value of social justice<sup>21</sup>. It is better to imitate conception Indonesia, Japan, which maintains its traditional culture, although it has been amended in such a way. Japan is one of the few countries that still retain their culture, despite having undergone many changes.

Indonesia is a country that is distinctive, because the characteristics of Indonesia is 'kinship and mutual assistance'. Value 'kinship and mutual assistance' are very different from the Western liberal-individualistic models. Western-style thinking, rational, linear, boxing and discriminatory, began shifting the intuitive mind, holistic, and not East-linear. A sharpening the

<sup>17</sup>*Ibid.*, hlm. 98.

<sup>18</sup>William G. Andrews, *Constitutions and Constitutionalism*, New Jersey: Van Nostrand Company, 1968, hlm. 12-13.

<sup>19</sup>Tamanaha, *op.cit.*, hlm. 102.

<sup>20</sup>Yanis Maladi, "Eksistensi Hukum Adat dalam Konstitusi Negara Pasca Amandemen", dalam *Jurnal Mimbar Hukum*, Volume 22, Nomor 3, 2010, hlm. 452.

<sup>21</sup>Wahyu Nugroho, "Menyusun Undang-Undang yang Responsif dan Partisipatif Berdasarkan Cita Hukum Pancasila (*Drafting Responsive And Participative Regulation Based On Pancasila Law Idealism*)", dalam *Jurnal Legislasi Indonesia*, Volume 10, Nomor 3, 2013, hlm. 45

custom it is true that a country. The dominance of Western-style thinking is gone, because the West suffer from a 'culture of duping people / flavor'. Noble values of a nation are to be maintained. Indonesia may just go with the flow changes in the world, but Indonesia should not be washed away in total in these changes<sup>22</sup>.

Pancasila as the state ideology, if it were appropriate to Indonesian law states that a multi-racial, multi-cultural, multi-ethnic, multi-religious, and the area is very spacious. To achieve goals and achieve goals with the foundation and guide the national legal system to be built is the legal system of Pancasila. Pancasila legal system is a system that is identical with the interests of the legal, social values, and the concept of justice into a legally binding prismatic by taking elements of good.

Satjipto Rahardjo including legal scholars call the Legal System of Pancasila as the system is rooted in a distinctive national culture. Laws are not in a vacuum, but rather exist in a society with the peculiarities of each cultural roots. Because the law in the service of society, the legal system should also be almost as unique as the cultural roots of the communities it serves. Legal System Pancasila is the legal system that is typical of the people of Indonesia.

Referring to the opinion of Fred W. Ringga as quoted Moh. Mahfud MD., Pancasila is a prismatic concept which absorbs the best elements of the concepts that some elements essentially contradictory. Pancasila protection for all elements of a pluralistic nation that later in the legal system of rules guiding bore clearance. Unfortunately, in this Reform Order Pancasila rarely mentioned with pride, even in the speeches of state officials once. Teaching courses Pengantar Indonesian Law on Higher Education Law also rarely do deepening of the legal concept of Pancasila<sup>23</sup>.

As a prismatic conception, Pancasila contain elements of good and fit with the typical value of Indonesian culture that has lived in the community for centuries. This prismatic minimal conception can be seen from the four things; First, Pancasila contains elements both from the view of individualism and collectivism. Recognized that man as a person having rights and fundamental freedoms, but at the same basic obligations attached to it as God's creatures and as social beings. Second, Pancasila integrates the concept of state law "Rechtstaats" which emphasizes on the civil law and the rule of law and the concept of constitutional state "the Rule of Law" which emphasizes the common law and sense of justice. Third, the law as a tool Pancasila receive community updates (law as a tool of social engineering) as well as a sense of justice that mirror life in the community (living law). Fourth, Pancasila adopts religious nation state, not the state religion, but also not empty religious (secular state). The state must protect and nurture all faiths.

Pancasila Indonesia can make selecting the concept of state law was suitable to be applied in Indonesia. For example, Indonesia is not a state religion, but religion is very strong recognition in Indonesia, as evidenced in Article 29 paragraph 2 of the Constitution of the Republic of Indonesia of 1945 that the State guarantees the independence of each resident to embrace their religion and to worship according to his religion and trust it. In addition, the law enforcement process, Indonesia following the principle of civil law, namely the principle of legality, but Indonesia also uses the common law principle of justice. Indonesia does not follow the principle of legality sociality, but in Article 33 paragraph 2 of the Constitution of the Republic of Indonesia in 1945 that the production branches which are important for the country and who dominate the life of the people controlled by the state. State intervention is required and regulated in the constitution for the welfare of its people.

But in this era of globalization Pancasila get a test, that is, when faced with the need to maintain the concept of legal pluralism with the concept of legal unification. Legal pluralism can be interpreted as recognition of his various unwritten laws (Indigenous law and Islamic law) in accordance with the dynamics of the community, and its presence throughout Indonesia. This is apparent in the Constitution of the Republic of Indonesia in 1945 Article 18 B, paragraph 2, which states that "The State recognizes and respects units of indigenous peoples and the rights traditional still alive and in accordance with the development of society and the principles of the Republic Indonesia, which is regulated by law". While the law calls for the unification of legal concepts that apply throughout Indonesia to maintain the rule of law.

Although these two concepts look different, but not separate, Gustav Radbruch stated that in law, there must be a value of legal certainty, justice and expediency. Countries with a legal basis, it must have certainty, but without forgetting the sense of justice in society. The combination of the two will have applied in Republika Indonesian shrimp Act No. 5 of 1960 on the Basic Regulation of Agrarian. The values of land in the community included. The goal is to legalize unwritten common law, customary law and modernize in order to fit with the times. An example is the regulation of the Communal Land Rights, Property Rights Land, Broking, leasehold, rental rights, and so on.

Pancasila and the Constitution of the Republic of Indonesia in 1945 is the philosophical basis of the life of the nation, not only in matters of legislation, but every issue of life. Ronald Dworkin argues, in living up to the constitution, it is necessary for moral reading. The Constitution contains the value of quality that is not owned by the usual rules, so it should look for the meaning behind the writings. The Constitution also governs the existence of the nation and the country, because this constitution involves millions of people who live in its shade. However, the constitution is not a 'holy book' that should not be changed, the

<sup>22</sup>Rahardjo, *op.cit.*, hlm. 98-99.

<sup>23</sup>Moh. Mahfud MD., "Politik Hukum dalam Perda Berbasis Syari'ah", dalam *Jurnal Hukum*, Volume 14, Nomor 1, 2007, hlm. 10.

change of the constitution should be very basic, and have a significant impact in the life of the state. Such changes should also be based on values that exist in the community, not as a mere ruler desires<sup>24</sup>.

Can be affirmed that Indonesia with Pancasila ideology enshrined in a constitution, the Basic Law of the Republic of Indonesia in 1945, Indonesia can be a state law that happy people, because of its ability to choose the best for his people if applied consistently. If the Indonesian state really wants a happy people, then Indonesia must obtain the loyalty of its people. To receive such loyalty, Indonesia must serve the people wholeheartedly, as an affectionate mother to her child. Search and updates about the concept of state law should be done, because the dynamics of the community that continues to run. Hope ideal state law happy Indonesian will continue to emerge, because Indonesia is not a static state, but a state that moves along with the changing times

### Conclusion

Based on the above, it can be concluded that the concept of the law of the country of birth based on the history and culture of each country so it cannot be imposed from one country to another. Rechtsstaat, the rule of law, legality sociality, numeracy Islam and Pancasila state law is a form of 'formal' of state law, but the substance is derived from the value of the countries that use these forms. Culture can influence the passage of a state. Indonesia has the ideology of Pancasila which is prismatic; can strike a balance between civil law and common law. By consistently applying the Pancasila, Indonesia can be a state law that happy people.

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<sup>24</sup>Raharjo, *Negara Hukum ...*, op.cit., hlm. 92.

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