

## UNDERSTANDING PANCASILA POSITION AS THE FUNDAMENTAL NORMS "GRUNDNORM" OF INDONESIAN LAW

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### ABSTRACT

The understanding on the legal system of a state should be started from philosophy values that guide the life of the nation. Ideally these values become the basis of the development of legal principles which are then be translated within legal norms, among others, in legislation and judicial decisions as well as customary law. The formulation of Pancasila as the basic philosophy of the state and nation as well as the source of all sources of law is an amalgamation of several principles, namely; The First; Principle of Belief in One and Only God, The Second; Principle of Fair and Civilized Humanity, The Third; Principle of Unity of Indonesia, Fourth; Principle of Democracy is in the Lead of Wisdom in a Consultative / Representative, The Fifth; Principle of Social Justice for all the People of Indonesia. One of the values contained in the First principle is "The Value of Affection", the translation of the value of affection is the existence of the kinship principle. Value of affection at least is the basic concept underlying the protection of children and handling of "juvenile delinquency". As in the Law No. 23 of 2002 which was amended by Law No. 35 of 2014 on the children protection, and the Law No. 11 of 2012 on juvenile justice. One of the values contained in the second principle is the value of humanity. Development of basic principles from the humanity values can refer to Article 27 to 34 of the 1945 Constitution as the constitution of the Unitary of Republic of Indonesia. The value contained in the third principle, among others, is the value of unity in diversity, affirmed in Article 1 of the 1945 Constitution of Republic of Indonesia and elaborated in the Law No. 40 of 2008 on the Elimination of Racial and Ethnical Discrimination. The elaboration of the fourth principle, can be found in the basis of consultation and consensus implemented in one of the Law No. 30 of 1999 on arbitration and alternative dispute settlement. The translation of the fifth principle can be seen in the embodiment of the values of justice. The value of justice is the foundation of all laws and court rulings in Indonesia, among others, as regulated in the Law of the Republic of Indonesia No. 48 Year 2009 regarding the power of Justice.

Keywords: General Law, Indonesian law, Pancasila

### A. Introduction

Every nation has its own characters that distinguishes it from other nations. The same thing applies to the law in force at a particular state and nation. Understanding the laws of a country must firstly begin from an understanding of the norms. Indonesia as a national state certainly has its own characteristics in term of law. Since the proclaimed on August 17<sup>th</sup>, 1945 the founders of Indonesia has agreed to place Pancasila as the basic norm of Indonesian Law. The decision to make Pancasila as the basic norms of Indonesian law was not a hasty choice, and values contained in Pancasila has become the basis of the behavior of Indonesian nation long before Indonesia was declared as an independent state. Historically values in the precepts of Pancasila were excavated from the base value of the Indonesia nation. As revealed by savigny "*Das Recht wird nicht gemacht, es ist und wird mit dem volke*" (The law was not made, but grow and flourish in the soul of the nation).<sup>1</sup>

As a formulation consisting of the five principles of Pancasila as the current formulation, the term "Pancasila" is relatively new; that for the first time Pancasila as the state ideology introduced by Ir. Sukarno, Member of *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI)* – Investigation Agency for the Preparation of Indonesian Independence at the trial of Investigation Agency for the Preparation of Indonesian Independence on June 1<sup>st</sup>, 1945; that since its inception on June 1<sup>st</sup>, 1945, Pancasila had been developed to produce a manuscript of the Jakarta Charter on 22<sup>nd</sup> of June 1945 by the Committee of Nine and agreed to become the final formulation on August 18<sup>th</sup>, 1945 by the Committee for Indonesian Independence Preparation; that the formulation of Pancasila since June 1<sup>st</sup>, 1945 as addressed by Ir. Sukarno, the formulation of the Charter of Jakarta on June 22<sup>nd</sup>, 1945 until the final formulation on 18<sup>th</sup> of August 1945 is an integral process of the birth of Pancasila as the National Principle;<sup>2</sup> so the development of thinking, and its elaboration is still wide open to be studied and understood. Therefore, it is not wrong if the understanding of Pancasila is often influenced by the ruling regime in accordance with the adopted legal politics at the time.

In the Old Order (*Orde Lama*) regime led by President Soekarno, the development of the concept of Pancasila followed the thoughts of Soekarno as one of the originators of the idea of the enactment of Pancasila as the National Principle. By the alternation Old Order regime into the New Order (*Orde Baru*) regime led by President Soeharto, then the development of Pancasila was conducted in a structured and formal form by forming a state agency to review and doctrine the values of Pancasila to all components of the nation.

<sup>1</sup>Ati Latifulhayat. "Carl Frederich on Savigny". *Khazanah. Journal of Legal Studies of Padjadjaran*. Volume 2 No. 1 of 2015. Pg 197.

<sup>2</sup>The Consideration of Indonesia Presidential Decree Number 24 of 2016 on the Birth of Pancasila

Discussion topics on Pancasila has stopped to be discussed along with the cessation of the new order. One of the factors affecting the existence of Pancasila in the new order is the policy of the Suharto regime which made Pancasila as a political tool to maintain the status quo of his power<sup>3</sup>.

One of the most important topics being discussed in the legal community was the position of Pancasila as the main source of law (*Grundnorm*). Are all the laws, both in the form of legislation, customs, and court decisions that exist in Indonesia, automatically has been based on the values contained in Pancasila? This question is always tempting to be answered by the learner of law. The predecessors have tried to give a lattice and found the characteristics for the law of Pancasila.

Pancasila as the basics of thought and as an ideal of law is intended to bring happiness and prosperity, peace and freedom in the society of Indonesian nation. Furthermore, the country is based on the recognition of The One and Only God, humanity, nationality, democracy and social justice of the people of Indonesia.<sup>4</sup> New ideas and to implement the values contained Pancasila as the source of all sources of law in Indonesia, the constitutional order.

In the science of law, the definition of the source of all sources of law can be interpreted as an identifier source (*kenbron van her recht*) and is defined as the origin of source, the source of the values which underlies the born of the rule of law (*welbron van recht*). Therefore, the definition of Pancasila as the source is not a source of law in the sense of *kenbron* law where the source was originally form, the place to see and to know the principles of positive law, but rather in the sense of *welbron* as the origin value. This source is a source of positive law. So Pancasila is a source of value and values contained in the law norms established by the State.<sup>5</sup>

The general picture of law of Pancasila can be found from the values contained in the precepts of Pancasila formulated in the Preamble of the 1945 Constitution.

In the fourth paragraph of the Preamble of the 1945 Constitution, it is contained elements that according to the law there is requirement for the presence of a legal order in Indonesia (*rechtsorde*) or (legal order) which is a unity and overall legal regulations. With the stipulation of Pancasila formally in the preamble of the 1945 Constitution, therefore Pancasila has a position as a basic norm of positive law, therefore, the procedures of national life are not only rely on the principles of social, economic, political, but also in synergy with the overall principles attached to it, namely guidance to cultural principles.<sup>6</sup>

The 1945 Constitution is the main basic thoughts of the founding fathers about how this country was held under the provisions of law or referred to as a legal state. Pancasila position as the State Guidance according to Kaelan, cited by Ongki states that Pancasila as the State Guidance is the source of all sources of law as well as covering the atmosphere of mysticism (*Geistlichenbintergrund*) of the 1945 Constitution, and to realize the ideals of law for the legal basis for the State, as well as contains norms that require the Constitution to contain the contents of which require the governments and others State organizers (including the parties organizers and the functional groups) to uphold the moral ideals of Indonesian noble people.<sup>7</sup>

In connection with the development of the nation, the law has a function as a preserver of order and security, means of development, justice enforcement and public education.<sup>8</sup> So that all forms of development activities (*rechtsbeoefening*) of national laws should be based on the values contained in Pancasila as the basic norms of the State.<sup>9</sup> State law contains five principles of Pancasila, namely;

*First*, The principle of Belief in One and Only God. This principle is stated in the preamble of 1945 Constitution paragraph IV, which stated "... therefore the independence of Indonesia shall be formulated into a constitution of the

<sup>3</sup>AzymuardiAsra cited by Sadilsra. Re-actualization of Pancasila in the Multiculturalism Life.National Seminar on "Pancasila Existence in the Era of Pluralism".Student Executive Board of Faculty of Law of Univ. Atmadjaya. Yogyakarta, May 2<sup>nd</sup>, 2009..

<sup>4</sup>Roeslan Abdul Gani, quoted by Heri Santoso et.al."Coherence and Correspondence".' Actualization of values of Pancasila in product of legislation, Post-Reform (Review of Philosophical, sociological and Juridical' ..Proceedings of the Congress of Pancasila IV: strategy, institutionalization of Values of Pancasila.<https://books.google.co.id>

<sup>5</sup>OngkiSetioKuncono"The Position of Pancasila as the Legal Foundation in Indonesia". Accessed from <http://www.spojurnal.com/law>, on Tuesday April 12<sup>th</sup>, 2016 at 04:19 p.m

<sup>6</sup>Sri Widayati.."The Meaning of Pancasila as a Source of Law". Accessed from <http://www.g-excess.com> on Tuesday April 12<sup>th</sup>, 2016 at 04:21 p.m

<sup>7</sup>Ongki op.cit .. See also Kaelan. Kaelan.Pancasila Nationalism State., Downloaded on Thursday, September 17<sup>th</sup>, 2015. 9:45 a.m.

<sup>8</sup>Ali TaherParasong. Internalization of Pancasila in the Formation Legislation in Indonesia.Accessed from.<http://fhumj.org> on Tuesday April 12<sup>th</sup>, 2016 at 04:34 p.m

<sup>9</sup>DaniPinasang. Pancasila as the Basic Norms ((Grundnorm) in order to develop national legal systems.Journal of Unsrat Vol. XX / No 3 / Apri-June / 2012. Accessed from <http://repo.unsrat.ac.id>, on Friday April 15<sup>th</sup>, 2016 at 11:14 a.m

Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God.<sup>10</sup> The freedom of religion should be implemented based on three pillars, namely freedom, the rule of law, and tolerance. *Second*, the principle of universal humanity. This principle recognizes and treats people according to the status and dignity as God's creatures, also recognizes equality, equal rights and obligations of human rights without distinction of tribe, ancestry, religion, race, color, social status, and more... *Third*, the principle of nationality or unity in diversity, that every citizen has the same position, rights and obligations and the Indonesian people are free to self-determination and sovereign, so it does not allow any intervention (intervention) of other nations in terms of the domestic affairs. *Fourth*, the principle of deliberative democracy or people sovereignty. The incarnation of this principle can be seen in the approval of the people on the legislation. *Fifth*, the principle of social justice. This principle is embodied, among others, in the provision of social security and state institutions engaged in social organizing social problems in the country.<sup>11</sup>

The problem that need to be assessed and addressed in this study is how the form and description as well as the scope of the law of Pancasila as Indonesian law based on Pancasila as the source of all sources of law (*GRUNDNORM*).

## B. Results and Discussion

### 1. The Scope of the Indonesian Legal Studies based on Pancasila

In the outermost layer, law is understood as the norm, order and regulation containing the rules of the commands and prohibitions which can be seen in the form of legislation and customary law. At this level, law is sometimes simply understood as legislation. At the outermost layer, law is examined from the normative point of view (normative perspective).<sup>12</sup>

In deeper layers, the law recognized as a guideline for human behavior derived from empirical experience of human. Laws of this type developed in accordance with the principle of is empirical, rational, general, and cumulative and it is all four at once.<sup>13</sup>The law in this empirical perspective, was developed based on the verified concept that lead to the principles being tested further by the constant repetition to bear Theory of Legal Sciences. The theory of legal sciences was developed not only from the perspective of empirical, but also developed from the basic values of law (*grundnorm*). Ideally the principles, theories of law is supposed to be the source of their legal norms. But the limitations of human ability to translate principles, and the theory of law into the rule of law, especially the written legal norms, principles, theories of law are directly used as a complement to legal norms.<sup>14</sup>

Innermost layer of the law referred to as the basic values. Human experience filled with doctrine values that are universal. Value is valid indefinitely and without boundaries. This value throughout the ages has always verified. This truth is the source of principles and legal theory. In the context of Indonesian-ness there are at least five main values, - as the main basic values embodied in the principles of Pancasila, which are the values of divinity, humanitarian values, the value of diversity, the value of deliberation and social value of the Justice.<sup>15</sup>

### 2. The Values Contained in the Precepts of Pancasila

The position of Pancasila as paradigm of science means the science of law must pivot, proceeds and leads to the values of Pancasila. Its influence will be seen on the object, and the method and purpose of law.<sup>16</sup> Objects of Indonesian Legal studies are consistent with the paradigm of theological, metaphysical and empirical. Indonesian Legal Studies which based on paradigm of Pancasila, is the science of law that involves aspects of sense in its approach... associated with a second aspect of the development in the science of law, namely the rule of law and fact. So always specify what should happen and to establish the relevant facts of reality.<sup>17</sup>

Pancasila is a value system, already qualified as a system, or in other words Pancasila has systematic characteristic, because: the five principles of Pancasila -precepts have relationships that are hierarchical (first precept: One God principle underlies and animates humanity principle, unity principle, democracy principle and justice principle and does not contradict to one another even is a unity that is formulated comprehensive-integrative,<sup>18</sup>

<sup>10</sup>Ali Taher. Op Cit. See Latif, State Plenary: Historicity, rationality and actuality of the Pancasila, Jakarta: Kompas Gramedia, 2011, pp. 67.

<sup>11</sup>Ibid

<sup>12</sup>Herlambang. "Corruption Prevention Policy from the Perspective of Criminal Law". Inauguration speech. 15<sup>th</sup>October, 2015.

<sup>13</sup>Ralph Ross and Ernest Van Den Haag in his book "The Fabric of Society" wrote that the contents of empirical science, rational, general, and cummulative and it is all four at once. In Herlambang. Ibid.

<sup>14</sup>Ibid

<sup>15</sup>Ibid

<sup>16</sup>Sujdjito. Actualization of Pancasila Values in legal education. National Seminar. Actualization of Pancasila Values in Indonesian legislation... Faculty of Law of UGM. In Sidharta quoted by Arief Proceedings of the Congress of Pancasila VI: Strengthening, Synchronization, accessed from <https://books.google.co>

<sup>17</sup>Ibid.p.432

<sup>18</sup>Indri Djanarko. "Pancasila as the system of philosophy". Accessed from: <http://indridjanarko.dosen.narotama.ac.id>, on Tuesday, Nov 8, 2016

Pancasila is essentially a system of values which is the crystallization of the noble values of the Indonesian culture throughout history, and culture which is rooted in suitable outside cultural elements so that they are wholly integrated into the Indonesian culture.<sup>19</sup>

As a philosophy, Pancasila has its own philosophical characteristic which are different from other philosophies, among them:

1. the precepts of Pancasila is an integral system that are wholly and intact (as a totality). In another sense, if not wholly and intact, or one principle with other principles are separately, then it is not Pancasila.
2. Pancasila arrangement with a system that is wholly and intact can be described as follows
  - a. Principle 1, covering, underlying, and animating: principle 2, 3, 4, and 5.
  - b. Principle 2, covered, based on, and inspired by the precept 1, as well as underlying and animating precept 3, 4, and 5.
  - c. Principle 3, covered, based on, and inspired by the precepts 1, 2, as well as underlying and animating; precept 4 and 5. -
  - d. Principle 4, covered, based on, and inspired by the precepts 1, 2, and 3, and underlies and animates precept 5.
  - e. Principle 5, covered, based on, and inspired by the precepts 1, 2, 3, and 4.
  - f. Pancasila as a substance means that the elements are original/permanent/primer.
  - g. Pancasila as an independently existing basis, whose elements are derived from itself.
  - h. Pancasila as the reality, means that it lies within Indonesia people and its society, as a fact of life of the nation, which grows, lives, and thrives in everyday life.<sup>20</sup>

Value is the normative benchmark that affect humans in making his choice among alternative actions for ways. The main emphasis of this definition is on the external factors that influence human behavior.<sup>21</sup>

**a. The Value Contained in the First principle of Believe in One and Only God.**

The value of divinity can be found on the precepts of Believe in One and Only God (fourth subject matter of the 1945 Constitution), which expressly reflected in the sentence;

"In the grace of Allah Almighty...", we shall relate this to Article 29 of the 1945 Constitution. This first precept reflects the faith and piety of the Indonesian nation to God Almighty. This precept also includes and animates others precepts, for example in terms of realizing the humanity values which are fair and civilized. In addition, it is also contained the values of freedom for the Indonesian nation to embrace and execute commands of religion / belief respectively. This leads to a consequence, which is an obligation for each individual / group of Indonesian people to maintain harmony between followers of a religion / belief. The first precept covers and animates the next four precepts.<sup>22</sup>

One of the values contained in the First principle is "The Value of Affection", the translation of the value of affection is the existence of the kinship principle. Kinship contains essential feature of their loving relationship between fellow members in the family, the parents (father, mother) and all of their children. Kinship principle is a real force, if applied in the nation's life seriously and with attitude and goodwill depth to serve the interests of the nation.<sup>23</sup>Value of affection at least is the basic concept underlying the protection of children and handling of "*juvenile delinquency*".

Handling troubled children before the law must be done with affection, solely for the sake of the children's future.

*Instead, for the purposes of interpretation, It also includes, inter alia, the 1989 Convention on the Rights of the Child (hereinafter "the CRC"), The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter "the Beijing Rules"), the 1990 United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter "the Tokyo Rules"), the United Nations Rules for the Protection of Juveniles deprived of Reviews their Liberty (hereinafter "the Havana Rules"),] and the United Nations Guidelines for the Prevention of Juvenile delinquency (hereinafter "the Riyadh Guidelines")]. As well as international human rights instruments that are general in scope<sup>24</sup>,*

The value of affection is the main basis to create the children's the future, both children who have problems with the law, and children who do not have problems with the law.

<sup>19</sup>Ahmadnasher. "Pancasila as the System of Indonesia Philosophy. ahmadnasher.staff.gunadarma.ac.id. downloaded on Tuesday, April 12<sup>th</sup>, 2016. At 12:40 p.m

<sup>20</sup>Rowland Bismark Fernando Pasaribu. Pancasila as a System of Philosophy. Accessed from: *staff.gunadarma.ac.id*. on Friday, April 1<sup>st</sup>, 2016 at 11:01 a.m

<sup>21</sup>Dudung Rahmat Hidayat .Mulyadi. The Nature and Meaning of Value. Post Graduate School of UPI. 2006. Accessed from <http://file.upi.edu/Direktori>, on Wednesday, 13<sup>th</sup> April, 2016 at 02:42 p.m

<sup>22</sup>*Ibid.*, Pp., 241.

<sup>23</sup>Made Sadhi Astuti. Punishment against Children as Actors Of Crime. Institute of Teacher Training press. Malang. 1997. p89.

<sup>24</sup>Juvenile Justice and Human Rights In The Americas. The Inter-American Commission of Human Rights. <https://www.cidh.oas.org/countryrep/JusticiaJuvenile>, downloaded on Thursday 17<sup>th</sup> September 2015. At 9:25 am

**b. The Value Contained in the Second Principle of "Just and Civilized Humanity"**

One of the values contained in the second principle of "Just and Civilized Humanity", is the value of humanity. Development of basic principles of human values can be based on the Article 27 to 34 of the 1945 Constitution as the constitution of the unitary of Republic of Indonesia.

This precept is overwhelmed and inspired by the first principle, as well as covers and animates the third precept and so forth. Just and civilized humanity is consciousness of human attitudes and behavior based on the potential cultivation of human conscience in relation to norms and culture in general, both to the personal, human beings, as well as the surrounding nature. In principle, a just and civilized humanity is human attitudes and behavior appropriate to the nature of human nature which is modest, aware of the value and culture. The realizations of the value of a just and civilized humanity, among others are participate in the establishment of world order based on freedom, lasting peace and social justice; uphold human rights at the base of the idea of harmony between the individual and society (mono-dualism); and the admission toward human dignity as God's creature.<sup>25</sup>

Two basic ideas derived from the formula of humanity are; one, that we should treat people with respect, and, two, that we should not treat them as a means except to the extent they are also seen as the ultimate goal.<sup>26</sup>

For example, it can be argued that the humanistic approach in the use of criminal sanctions, does not only mean that the criminal imposed on the offender must match the value of civilized humanity, but also must be able to raise awareness of the offender of the values of humanity and social values of society life. The approach is oriented to humanistic values that require attention to the principle of individualization of criminal use of criminal sanctions as a means of crime prevention<sup>27</sup>

Humanistic principle in criminal law has been recognized as a universal principle, as stated in the Declaration of Human Rights in 1948 by UN particularly in Article 5 to Article 12.<sup>28</sup>

**c. The Values Contained in the Third Principle of "Unity of Indonesia"**

Along with a variety of efforts to realize the democratic legal state, it is also appeared demands of local communities to make local Indonesian tradition, or at least local traditions to be recognized and respected. Presumably Indonesia was characterized by diversity of ethnicity, religion / belief and linguistic (languages). Attention to diversity as in the past few decades has vastly improved. Previously for a long time, the central government were to propagate the unity and integrity within the scope of the Unitary of Republic of Indonesia (NKRI), which was also still mentioned in the Constitution (Article 1 (1)).<sup>29</sup>

Respect for human rights also means appreciation of diversity (plurality) and the recognition of local traditions. Moving on from the concept of globalization, we will examine developments in the law... The main issue here is how to understand the obligation to fulfill the basic rights (human) and translate them into the local situation (local). Simultaneously it involves an attempt to understand the situation with local situations and finding ways for (approaches and instruments) human rights to be able to act to improve (protect) the situation of specific social groups (minorities).<sup>30</sup>

**d. The Values Contained in the Fourth Principle of "Democracy is in the Lead of Wisdom in a Consultative / Representative"**

In line with the views of Friedman, cited by Montesquieu about the legal system, the use of the positive law must consider the values that live in a society of a nation.<sup>31</sup>

In such a perspective, the law grows and develops in accordance with the conditions and needs of the community where it would be located. One belief in legal positivism is the belief of history that was developed by *Carl von Savigny*, who analyzed the law from the perspective of history. According to this belief, the law was raised together with the onset of the community. Law is the soul of the people and inseparable from the community.<sup>32</sup> According to Savigny there are several principles that must remain within the law, so the law is in accordance with the development of society.

*Law has a fixed character peculiar to the people. Law develops like the language or manner of the people. Thus,*

<sup>25</sup> *Ibid.*

<sup>26</sup> Gary Banham. "Kant's Formula of Humanity", Editor, Kant Studies Online. [http://www.garybanham.net/PAPERS\\_files](http://www.garybanham.net/PAPERS_files), Downloaded on Tuesday, 29<sup>th</sup> September 2015 15:53 pm

<sup>27</sup> Tri WahyuWidiastuti, "Principle of Criminal Individualization in criminal law and criminal law of Islam in Indonesia". P. 45. Accessed from <http://download.portalgaruda.org/article>, on Thursday, September 1<sup>st</sup>, 2015. At 9:35 a.m

<sup>28</sup> United Nations Universal Declaration of Human Rights in 1948. United Nations (UN). copy @ [lexmercatoria.org](http://lexmercatoria.org). <http://watchlist.org>, Downloaded on Thursday October 1<sup>st</sup> 2015 at 10.00 am

<sup>29</sup> Agustinus Pohan, Topo Santoso and Martin Moering. Criminal Law in Perspective. Larasan Library. Working closely with the University of Leiden-Groningen University-University of Indonesia. 2012. 3. Downloaded from <http://media.leidenuniv.nl/legacy/hukum-pidana-criminal-law.pdf>, On Thursday 24<sup>th</sup> September 2015 01:39 p.m

<sup>30</sup> *Ibid.* p.4

<sup>31</sup> Montesque. The Spirit of Law. Translator Khoirul Anam. Nusamedia. Bandung. 2007. Page 87.

<sup>32</sup> Hari Chand. Modern Jurisprudence. International Law Book Series. Kuala Lumpur. 1994. p124.

*the life of law is integrally connected with the life of the people. It is an entirely new idea to see law rooted in the life of the people. Until the times of Savigny, the law had been studied as rooted in nature or right reason or by the positivist, as the will of the sovereign. It was for the first time that a different source of law, namely, the life of the people, was located by Savigny. This implies that law is not the will of a sovereign nor based on any divine or natural law but it is traced in the life of the people. There is no particular form or essence of law. It depends upon the development of the life of the people. Law is based on a common conviction of the people. Law has no independent existence. It is based on the (volkgeist) common conviction of the people. Law is considered by Savigny as a product of the people's life as a manifestation of its spirit. Thus, it has its source in the general consciousness of the people. When people live together a spiritual unity is visible which is expressed in language, manners, mores and law. This unity is preserved by tradition by successive generations. It is a slow and long process.<sup>33</sup>*

Besides Savigny, hence the name of Gierke, as one of the experts involved in the process of codification of German law, developed the theory of "associative development" to explain in more scientific concept of "Volkgeist" espoused by Savigny. Some thoughts of Gierke, can be presented as follows;

*From the point of view of Roman Law such an entity as a town corporation is not a real person but a legal fiction adopted for practical purposes, while from Germanistic point of view it is as much a reality as property. The "association theory" (Genossenschaftstheorie) in the ultimate form given by Gierke, showed that the two Roman categories of universitas and societas do not make intelligible the types produced by the Germanic law of association. It sets in their place, by the side of corporate association, Germanistic "communities of collectivehand," and pointed decisively toward the conclusion that the collective person possessed an actual existence in all the forms in which it was manifested. It has sharpened our discernment of the fact that juridical persons, even though not apparent to our sight, share this lack of physical existence with all of juridical facts and concepts. As we nevertheless ascribe reality to property or to an obligation, so too the State, the commune, the society (Verein), the endowment (Stiftung), are something real, not merely fictitious.<sup>34</sup>*

According to Puchta which is one of the developers of thought by Savigny argues that the law of a nation is tied to the soul of the concerned nation (Volkgeist). The law, can be: (1) direct form of customs, (2) through legislation, (3) through the science of law in the form of works of legal experts.<sup>35</sup>

Use of Customary Law as a means of Alternative Dispute Settlement in line with efforts to solve the problem of slowness of the judicial process in Indonesia, both at the court and in the Supreme Court. In addition, "The Nature of Indonesia is known to have disliked the court, and theoretically provided some alternatives for them to resolve disputes<sup>36</sup>,

The results showed that the legal community believes, consultation is the most major way in resolving disputes. Some of the factors that cause people prefer PSA is the court makes matters even more complicated, the PSA process is simple and fast, no publicity in the process, and the solution can be chosen freely<sup>37</sup>. It is something common when people use the traditional PSA, which is consultation in a variety of disputes<sup>38</sup>.

#### **e. The values contained in the five precepts, namely "Social Justice for All People Indonesia"**

The value of Justice (social) can be found in the fifth precept which is the principle of social justice for all Indonesian people (the second main thought) translated in Articles 23, 27-31, 33, 34.

This fifth precept is overwhelmed and inspired by the first to the fourth principle of Pancasila. Social justice for all Indonesian people meant that every Indonesian receive fair treatment in all fields, such as legal, political, social, economic, and cultural. The meaning of social justice also include the notion of fair and prosperous.<sup>39</sup>

With regard to this fairness, it was expressed an opinion of *Ulpianus* and *Thomas Aquinas*. According to *Ulpianus* "justice is the will that is steady and remains to give to each part (*iustitiaestconstans et perpetuavoluntasiussuumcuiquetribendi*). This thought of *Ulpianus* is in line with the thinking of *Thomas Aquinas*, which states that "special justice is justice on the basis of similarity or proportionality". This particular fairness is distinguished into (1). Distributive justice (*Justitiadistributiva*), (2) the cumulative justice (*justitiacommulativa*), (3) vindicative justice (*justitiavindicativa*)."<sup>40</sup>

### 3. Mono-dualism Theory as a Theory of Law of Pancasila

<sup>33</sup> Ibid. P. 126.

<sup>34</sup> Ibid. P.110

<sup>35</sup> Huijbers, Philosophy of Law in history Perfective. 1988.P 120

<sup>36</sup> Budiarto.Ali, et al. Law Reform in Indonesia. Study Results of the Development of Law on World Bank Project. Cyberconsult Law Project. 1999.P 25.

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Ibid., P., 243.

<sup>40</sup> DarjiDarmodiharjo and Shidarta, Principles of Philosophy of Law, GramediaPustakaUtama, Jakarta, 2006.p, 156-157.

One is an American sociologist, Jeffrey Alexander, made suggestions that were very helpful in this regard. He did speak from the 'polarity' but of 'continuum': Science can be seen as an intellectual process that occurs in the context of two different environments, the world of empirical observation and non-empirical one metaphysical.<sup>41</sup> If viewed from the perspective of apriority and deductive thinking, then the value is one of the basis for the theory formation. Theory is a series of parts or variables, definitions, and propositions that are interconnected that presents a systematic view of the phenomenon to determine the relationship between variables, with the intention of explaining natural phenomena.<sup>42</sup> The second way of building theory in Post *teriori* by way of inductive thinking is to analyze and abstracting the facts.<sup>43</sup>

The development of the theory of law of Pancasila is the characteristic of the present law of Indonesia built on the values contained in Pancasila. Indonesian nation was built on the values, principles and norms that are different from any other nation.

The inauguration of Pancasila as an ideology of the nation as well as a source of law is important to confront the wave of globalization, especially in the field of law.

The wave of democratization that occurred in conjunction with increased globalization as if made the ideology to be increasingly irrelevant in a world without borders. But, as widely known, globalization contains many ironies and contradictions. On one hand, globalization has resulted in the bankruptcy of many ideologies-both universal and local-but on the other hand, local nationalism, even in its most bearish (crude), a kind of ethno-nationalism and tribalism even it shows symptoms of improvement, ...continued to threaten integration of pluralistic nation-state from the point of ethnic, socio-cultural, and religious as Indonesia.<sup>44</sup>

Additionally Pancasila is necessary as "*Common Platform*" for a pluralist and multicultural society such as Indonesia, which serves as a guide to the development of pluralism that exists and including legal pluralism.

According to Furnivall, "plural society" is a society that consists of two or more elements or orders of social coexistence, but not mixed and fused into a single political unit (Furnivall 1944: 446). Furnivall theory is widely associated with the socio-political reality of Europe which is relatively "homogeneous", but highly colored by ethnic chauvinism, racial, religious, and gender. Based on the framework of socio-cultural, political and European experience, Furnivall saw plural societies of Southeast Asia would fall into anarchy if it failed to find an adequate formula of pluralist federation.<sup>45</sup>

Pancasila as the legal source of Indonesian adopts the position of balance recognition of mankind as personal (individualistic) and humans as social beings (collective) or by NotoNagoro term called as the principle of *Mono-dualistic*. "Things that are absolute of the man is ... the nature itself who must live together, have the nature of human as individuals and as citizens who live together or social beings".<sup>46</sup> Mono-dualistic concept embraced by Pancasila is actually a blend of basic principles developed in the West that marked by individualism and in East marked by collectivism<sup>47</sup>.

Individualistic concept puts a human on the self-centered position over those of common life. Society is a collection of individuals, whose presence is required in order to strengthen and protect individuals.

*Political and social philosophy that emphasizes individual freedom. Modern individualism emerged in Britain with the ideas of Adam Smith and Jeremy Bentham, and the concept was described by Alexis de Tocqueville fundamental to the American temper. Individualism encompasses a value system, a theory of human nature, and a belief in the certain political, economic, social, and religious arrangements. According to the individualist, all values are human-centered, the individual is of supreme importance, and all individuals are morally equal. Individualism places great value on self-reliance, on privacy, and on mutual respect.*<sup>48</sup>

<sup>41</sup> John Nixon. What is theory ?. Educar 34, 2004. 27-37. University of Sheffield, UK. Head of School of Education 388 Glossop Road, Sheffield S10 2JA, UK. <http://www.raco.cat/>, Downloaded in Thursday, April 19, 2016 On at 11:17.

<sup>42</sup> Theory - Indonesian Wikipedia, the free encyclopedia, <https://id.wikipedia.org>, Download on Thursday 19 April 2016 9:52 pm

<sup>43</sup> Suyanto. *Methods of Social Research. Various Alternative Approach...* Jakarta: Kencana 2005 p34 in Understanding theory is Definition According to the experts. Accessed from <http://www.landasanteori.com>, on Thursday, April 14<sup>th</sup>, 2016 9:57 A.m

<sup>44</sup> AzyumardiAzra, "Pancasila in the Middle of World Civilization: Perspectives of Multiculturalism and Multicultural Education", Discussion of Archipelago Institute toward 100 Years of Jakarta National Awakening, April 16<sup>th</sup> 2008, Accessed from <http://wyt-civiceducation.blogspot.com/2008/05/set-article.html>, on January 5<sup>th</sup>, 2016 at 9:14 a.m.

<sup>45</sup> Ibid., Pp., 5.

<sup>46</sup> NotoNagoro, *Pancasila in Popular Science*, Literacy Development, Jakarta, 1987.p., 41.

<sup>47</sup> Erwin K, Thomas "Individualism, Collectivism" and Us, September 9, 2007, <http://www.socyberly.com/Society/Individualism-Collectivism-Us>, Downloaded on Date February 11, 2008 04:17 Pm.

<sup>48</sup> Collectivism, [http://importanceofphilosophy.com/Evil\\_Collectivism.html](http://importanceofphilosophy.com/Evil_Collectivism.html), Downloaded on February 11<sup>th</sup>, 2008 16:17 pm

In connection with this individuality-ism the recognition of human rights is a very important factor. Protection of human rights in view of Pancasila, in contrast to human rights was based on the ideology of others.

Pancasila as the philosophy of the state and the nation must become a culture (*way of life*) in various aspects of social life in Indonesia, because it also contains the values that are universally recognized which is human rights. However, the values of human rights are not only related to the second precept of "fair and civilized humanity", but it is contained in all the precepts of Pancasila. In a practical level, the benchmark realization of the values of human rights through the Pancasila is on the fifth principle, namely "social justice for all Indonesian people", because in the preamble of the 1945 Constitution, the five precepts is the ultimate goals that is formulated with: "and to realize social justice for all Indonesian people,"<sup>49</sup>

On the opposite perspective of individualism, it is known the idea of collectivism. Collectivism is more concerned with the unity interests than personal one. Personal interests should be subject to the interests of society as a whole. Individuals are part of the whole society,

*At the root of this ethical standard is the belief that a collective is more than just individuals interacting together. It is the belief that the group is an entity itself, more important than the sum of the individuals. The individuals become secondary to the collective. Their well-being and even their lives are ignored if the group has something to gain. Individuals are not recognized. They are merely a tool for the group. Collectivism is a form of anthropomorphism. It attempts to see a group of individuals as having a single identity similar to a person. The collective is claimed to have ideas, and can think. It has purpose, and it acts to achieve goals. It even has a personality, called culture. It claims to have moral rules the collective should follow. It claims to have collective rights, as well.*<sup>50</sup>

Pancasila philosophy outlook on society is certainly not synonymous with collectivism exist in other community based on ideologies other than Pancasila.

A basic understanding of society is: living together between two to many people. Society can exist only if there is mutual interchanges between individual citizens. Mutual-giving among residents produce live together. Togetherness-as a whole life is the interests of individual citizens. Individual interests of citizens are met by the interests of a whole society. Such living conditions of togetherness can be recruited as a definition: people who are living together among a number of people are held through interchanges giving.

In this sense, the individual citizens of the community is seen not as a hierarchical institution placed above him. Society is the individual man himself that is naturally associated with other human beings, which through interactions give each other called the community. Instead people never consider individual citizens as beings who are beyond him, but as a genetic source of itself. Therefore, the public has never had its own interests in conflict with the interests of individual citizens. The only interest is in the interests of the whole individual citizens. Therefore, naturally between individual citizens and the public was never be any conflict of interest.<sup>51</sup>

Monodualist concept also means recognition of the position of human beings and human-free as God's creatures. With regard to this free beings it is philosophically connected with the concept of free will or referred to as "*Free Will*".<sup>52</sup> The development of law in Indonesia must take a place for the view of human beings which have free will. This means that the law must also be able to manage free will so that it does not undermine the value of humanity.

As opposed to the concept of "free will" is the concept of "determinism", who believe that humans have limitations.<sup>53</sup> As human beings, the gods bound by divine law. It often means that all behavior and events that befall humans have all been arranged by God Almighty.

The founders of the Indonesian nation, have tried to draw on the ideas and formulate them in the state constitution.

1. There is a flow of thought that states that the country is composed on the basis of individual theory, individualistic theory, as taught by Thomas Hobbes and John Locke (17th century), JJ. Rousseau (18th century) Herbert Spencer (19th century H, J.laski (20th century). According to this flow of thought the state is legal society which is based on contract across to individuals in the community (Social Contract) ...

<sup>49</sup> Muhammad Mustafa, "The Embodiment of Civil Rights Guaranteed in 1945 Constitution", Institute Limited Discussion Nusantara IV, on April 02<sup>nd</sup>, 2008, accessed from <http://wyt-civiceducation.blogspot.com/2008/05/set-article.html>, on January 5<sup>th</sup>, 2016 at 09:14 a.m.

<sup>50</sup> Ibid.

<sup>51</sup> Marjono, "Conception of Inter-Nation Global Life According to Ideology of Pancasila" Strahan Center for Research and the Department of Defense, accessed from <http://wyt-civiceducation.blogspot.com/2008/05/set-article.html>, on January 5<sup>th</sup>, 2009 9:21 a.m

<sup>52</sup> Free Will", First published Mon January 7<sup>th</sup>, 2002; substantive revision Thu April 14<sup>th</sup>, 2005, <http://plato.stanford.edu/entries/freewill/>. Downloaded on February 6 2008 1:57 AM,

<sup>53</sup> Determinism", Wikipedia, the free encyclopedia <http://en.wikipedia.org/wiki/determinism>, downloaded on February 11<sup>th</sup>, 2008, 10:36 o'clock.



2. Other flow of thought about the state is "theory" class "of the state (Class Theory) as taught by Engels Marx, Lenin. The state is the tool group that has the most powerful economic position to oppress other class which have flabby position ....
3. Another flow of thought from state of understanding of the theory might be called integrative theory, taught by Spinoza, Adam Muller, Hegel and others Century 18 and 19. According to this thinking, the state is not to ensure the interests of a person or class, but guarantee interests of the people as a whole united ...<sup>54</sup>

#### 4. Norms of Pancasila Law

Development of Indigenous Congress as one of the PSA that applied for a community in Indonesia actually has been widely recognized and executed secretly. Some of them have recognized its existence, both in legislation and court decision (Supreme Court). Some research indicates that the role of the courts in criminal proceedings adopted the traditional criminal procedural law into positive law made possible by the Emergency Law No. 1 of 1951 About Emergency of actions - a temporary measure to organize the unity of the pecking order and the docket - the civil courts.

One embodiment of principle of Belief In The One Supreme God can be seen in the provisions of Article 2, paragraph 1 of the Legislation of the Republic of Indonesia Number 48 Year 2009 regarding the power of Justice clearly explained that "Justice is done SAKE OF JUSTICE UNDER BELIEF IN THE ONE SUPREME GOD" has a meaning that any decision of the judge must could provide a sense of justice is based on the Belief In The One Supreme God in the community. For the meaning of Justice by Belief In The One Supreme God is so vast and important, because not only related to the seekers of justice, but is also closely associated with the Almighty God the creator of life.

The provisions of Article 197 paragraph 1 sub a of Constitution of the Republic of Indonesia Number 8 of 1981 on Criminal Procedure Code also states that "the head of the verdict is written reads 'SAKE OF JUSTICE UNDER BELIEF IN THE ONE SUPREME GOD' is certainly very much in tune with what is written in Article 2 paragraph 1 Constitution of the Republic of Indonesia Number 48 Year 2009 on Judicial Power. The meaning of the sentence must really be a guideline and basis of any judge in the decision of a case being dealt with."<sup>55</sup>

Other examples of legal norms that have been formulated in legislation regulation as the elaboration of Pancasila can be found in constitution Number 39 of 1999 on human rights, in particular Article 2, 3 and 4 and 5. **Article 2** which provides that, "The Republic of Indonesia acknowledges and holds in high esteem the rights and freedoms of humans as rights which are bestowed by God and which are an integral part of humans, which must be protected, respected, and upheld in the interests of promoting human dignity, prosperity, contentment, intellectual capacity and justice".

The embodiment of principles of Pancasila can also be identified in the Court's Decision that adopted the common law as Indonesian customary law which is the implementation of the value bhineka contained in the Third principle. Product noteworthy of Supreme Court is MA decision on October 8, 1979 No. 195 / K / Kr / 1978, which raised the Customary Law Bali Logic Sangraha as positive criminal law<sup>56</sup>. In addition it should also be noted Decision MA on February 22<sup>nd</sup>, 1985 Reg No 666 K / Kr / Pid / 1984 which in essence is that the defendant (Arifin Lagonah, BA) guilty of adultery customary in the District Court of Luwuk, Central Sulawesi<sup>57</sup>. Next is the Supreme Court Decision On May 15<sup>th</sup>, 1991 Reg No. 1644 K / Kr / Pid / 1988 which stated that the demands of public prosecutor in the State Attorney Kendari unacceptable, because Tauwi defendants were tried and sentenced in accordance with local custom<sup>58</sup>, efforts to develop customary law carried out by preparing a compilation of customary law is incentive to do the people of Bali<sup>59</sup>. This is because the written culture that developed and storage of the ancient documents received enough attention from the Bali community<sup>60</sup>.

#### E. Closing

1. Indonesian laws that sources on the values contained in Pancasila are distinguishing feature of a foreign legal system. Pancasila law is the law in accordance with the legalsense of the people who live and develop with society development.
2. Values are concentrated sources for the development of principles, theory and norms of Law of Indonesia, including the values contained in principle of Belief In The One Supreme God, principle of Just and civilised humanity, principle of The unity of Indonesia, Principle of Democracy led by the wisdom of deliberations among representatives, principle of Social justice for the whole of the people of Indonesia

<sup>54</sup>PadmoWahyono, Construction of Law in Indonesia. Indo Hill. 1989. P.100-101.

<sup>55</sup>WahyudiKurniawan. For the Sake of Justice based on the Principle of One and Only God "a judge on the promise of the divine. Accessed from <http://www.umm.ac.id>, on Thursday, February 2<sup>nd</sup>, 2017 at 02:33 p.m

<sup>56</sup>Soemadipradja, R. Criminal Law Jurisprudence. Armico. Bandung, 1990. P 17.

<sup>57</sup>Supreme Court. Yuriprudensi 1990. P. 36

<sup>58</sup>Varia Peradilan. The Justice Jornal. No. 128. On May XI, 1996

<sup>59</sup>I Made Urdana. I Made Urdana. *Capita Selecta of Criminal Procedural Law of Custom*. Eresco, Bandung, 1993..P. 23

<sup>60</sup>Hadikusuma. Hilman. The Administrative Law of Custom. RajawaliPers, Jakarta, 1989. P. 71

3. Pancasila law manifests itself in the values as a source of law "recht Idea" or Grundnorm, Indonesian law, once a significant source for the development of Indonesia and the principle of legal principles to be implemented into the legal norms in the form of legislation or customary law. The values, principles and theory as well as legal norms are ideally form the basis for the judge's decision, thus there will be justice with the closeness between the court decision.

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