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THE URGENCY OF CONCEIVING PANCASILA AS POSITIVE LEGAL SOURCE IN INDONESIA

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ABSTRACT : Pancasila is so far known as grundnorm in Indonesian legal order and legal norm system. It has an implication to law enforcement in judicative field in Indonesia as governed in Article 2 clause 2 of Law No. 48 of 2009 on Judicial Power stating that the state judicature applies and enforces the law based on Pancasila. This article aims to study the misconception of Pancasila theory as grundnorm and the urgency of conceiving Pancasila as the source of Indonesian positive law. Considering the result of research, it can be seen that the conception of Pancasila as grundnorm theoretically and historically is affected by western-style legal education. Called as grundnorm and staatsfundamentalnorm, the position of Pancasila is beyond the constitution and therefore Pancasila is detached from the 45 Constitution (UUD 45). Pancasila becomes abstract, is only presupposed and not a positive law, while in fact the principles of Pancasila are contained in the Preamble of 1945 Constitution. The author argue that actually Pancasila is a positive law and a basic norm of constitution. Pancasila contained in the Preamble of UUD 1945 is instead established and is natural law because of its character as the source principles to legal products below it. The urgency of conceiving Pancasila as the positive law enacted in Indonesia is related to the judge in deciding a case implementing Pancasila to bring the justice into reality.

KEYWORDS : *Pancasila, positive legal source, Indonesia*

I. INTRODUCTION

The Republic of Indonesia government has established various attributes and positions of Pancasila and Indonesian society and nation have approved them, because Pancasila is the nation's self identity. Formally, Pancasila has been established as the state foundation and the source of legal order because it is the source of any state legal sources [1]. Pancasila legal system is the one belonging to Indonesian nation and state, the part of world civilization product. Pancasila Legal System is a distinctive legal system different from other legal systems existing in the world [2]. Pancasila in legal practice studied in this article is contained in judicative field governed in the Law No. 48 of 2009 about the Power of Justice. The existence of Pancasila in state judicature system is governed specifically in Article 2 clause (2) of Law No. 48 of 2009 about the Power of Justice, stating that the state judicature applies and enforces law and justice based on Pancasila. The article is imperative in nature, meaning a command to be done obligatorily, and if it is not implemented, the verdict becomes *nieteg*(void). Considering the provision of Article, Pancasila should underlie the performance of law enforcement practice in the court institution, and thereby becomes important in the last examination of a judge verdict. Judge verdict should reflect Pancasila values, but in fact many verdicts are not consistent with Pancasila values. It can be seen from the people's dissatisfaction with the legal product of judicative institution. In addition, the institutions observing judicature system like Indonesian Corruption Watch (ICW) found that referring to the Article 10 of Penal Code (Indonesian: *KitabUndang-UndangHukumPidana*,) thereafter called KUHP) addressing the principal punishment (imprisonment and fine), the verdict of imprisonment against the corruptor is 2 year and 7 month imprisonment only on average, and IDR 116,483,500,000 fine. It increases from 2 year and 5 month imprisonment in 2018 [3]. The very low average of punishment for corruption crime makes it is irrelevant to call the crime an *extra ordinary crime*, and leads to a stigma of judicature mafia**,** collusion etc, because of unsolvable disparity in the judge verdict as there is no standard judge verdict in Indonesia. Pancasila has been conceived as *grundnorm* so far and therefore is considered beyond the constitution. This conception is held on by Indonesian judges. Therefore, an attempt should be taken to change the paradigm and to explain that Pancasila is a positive law enacted in Indonesia. This article aims to study the misconception of Pancasila as *grundnorm* and to propose a change of paradigm that Pancasila is the source of positive law enacted in Indonesia and therefore can be applied by the judge to enforce the law.

II MISCONCEPTION OF PANCASILA AS *GRUNDNORM* AND *STAATSFUNDAMENTALNORM*

There has been an assumption that Pancasila as Indonesia's state foundation is called *grundnorm* and *stats fundamentalnorm* as suggested by Hans Kelsen in his *Stufenbau Theorie* and continued by Hans Nawiasky in *theorie von stufenbau der rechtsordnung*. Hans Kelsenin his ***Stufenbau* theory** mentions that *grundnorm* is the formal reason that validates the legal norm. He thinks that legal norm is a norm system regulating human behavior. A legal norm is not singular but it is very plural. Therefore, a reason is required to unite the norms existing in the legal system. It is this reason that is called *grundnorm*or ground norm by Hans Kelsen. Therefore, *grundnorm* is a reason arranged to validate all legal norms existing… as stated by Kelsen: "The basic norm is not created in a legal procedure by a law-creating organ. It is not - as a positive legal norm is - valid because it is created in a certain way by a legal act [rather,] it is valid because it is presupposed to be valid, and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating act.[4]

There is a different idea about hierarchy in Hans Kelsen's*StufenbauTheorie* compared with the position of Pancasila as Indonesia's state foundation and source of any legal sources (supreme law) in Indonesian legal system all at once. Hamid Atamimi also tries to put Indonesian legal system into Hans Kelsen's*Stufenbau* model scheme and reveals that Pancasila belongs to an ideal of law. In *Stufenbau theory*, Pancasila is considered as *grundnorm* that is abstract in nature. As elaborated previously, there is no specifying characteristic of *grundnorm*; it is just an assumption, so that it does not belong to positive legal order. It builds on an argument that *grundnorm* in Kelsen's perspective can be classified into four indicators or basic characteristics [5]:

a. Something abstract, assumed, non-written, and having universal effectiveness
b. It is not *geesetzt*(specified) but is *vorausgeesetzt* (assumed) in the presence of human mind.
c. It does not belong to positive legal order; it is beyond positive legal order but becomes the supreme foundation of positive legal order enactment (metajuristic).
d. Its substance states: an individual should obey or behave just like what is specified by the constitution.

The claim of Pancasila as ground norm, in fact, cannot meet four criteria of Kelsen'sgrundnorm. Firstly, grundnorm is not "specified" one. Secondly, grundnorm is not natural law. Thirdly, grundnorm provides objective legality to the norms of constitution without being bond to the substance of norms. Fourthly, grundnorm should compensate the norm hierarchy. Pancasila is not a ground norm (in the sense of Kelsen'sgrundnorm) as believed in widely so far. It is instead more appropriate to call the juridical fact of Pancasila contained in the Preamble of 1945 Constitution the positive law because of its specified characteristic and natural law and its disposition as the source principles of legal products below.

Some Indonesian legal experts like RoeslanSaleh and A. Hamid S Attamimi state that Pancasila is grundnorm as introduced by Kelsen. This statement is confusing because Kelsen's definition of grundnorm as necessary hypothetical presupposition is much different from the definition of Pancasila suggested by Bung Karno on June 1, 1945[5].With the formal stipulation of Pancasila in the Preamble of 1945 Constitution by an agency called (Indonesian: *PanitiaPersiapanKemerdekaan Indonesia*, thereafter called PPKI) , it is more appropriate to states that Pancasila in the Preamble of 1945 Constitution serves as positive law rather than as grundnorm. Putting Pancasila into the fourth paragraph as the closing part of the Preamble of 1945 Constitution means that Pancasila has had its formal definition, i.e. Pancasila has been specified formally in the Preamble of 1945 Constitution as the Republic of Indonesia's state foundation by PPKI as the supreme legal organ authorized to stipulate the 1945 Constitution on August 18, 1945. This statement is confirmed by Kaelan stating that the formal inclusion of Pancasila into the 1945 Constitution gives Pancasila a position to be the ground norm of positive law [6]. Pancasila has been stipulated as the source of any legal sources (either material or formal). Likewise, it has been specified by Indonesian Independence Preparatory Committee therefore it is not a grundnorm.

Pancasila is a ground norm of constitution, the implementation manifestation of which is contained in the articles (body), and then the ground norm and the norm of constitution become the constitutional legality basis of all Indonesian legislations. Thus, indeed Pancasila is not grundnorm, because grundnorm is a norm considered as the supreme and ultimate norm. Its existence is not stipulated but a rule (power) but is presupposed by human mind. Grundnorm is the source beyond positive law or metajuristic. It is a general norm, including any (religion, morality, decorum, and legal) norms. It is not written norm at al, as it is just assumed. It is accepted by community or people axiomatically (as the truth needing no further authentication). Its validity is assumed to be very abstract and an individual should obey or act just like what has been specified in the constitution. It becomes the supreme basis or foundation of a legal order enactment, concerning the law that should be obeyed. It also provides accountability for why the law should be implemented. Disobedience to it does not generate sanctions just like those occurring in legal conventions. It is the supreme determinant of justice value, but it has never been reasoned completely.

Referring to Kelsen's explanation, according to Yogi Sumakto, it is inappropriate for RoeslanSaleh and A. Hamid S. Attamimi to construct Pancasila as grundnorm in Indonesian legal order; therefore Kelsen's doctrine about grundnorm as the supreme ultimate norm of a legal order has never had static element, while Pancasila interpreted as grundnorm is fully static. Kelsen's declination against natural law as the basis of positive law validity has confirmed a view that Pancasila is not Kelsen'sgrundnorm[5]

For it to be called ground norm, the grundnorm should meet a number of conditions below:

Firstly, grundnorm or the basis of validity should be a non-positive norm, non-specified norm. Secondly, grundnorm is not natural law and should be different from natural law, because the grundnorm of natural law is categorical in nature, while the basic legality of positive legal system should be hypothetical, i.e. the presupposed basic norm if certain conditions are met. Thirdly, the grundnorm provides objective legality to the norms of positive constitution without being bond to the content of norms. The grundnorm should be so empty of substance and refer to legal dynamic that it is not harmful to positive law. Fourthly, the grundnorm should authorize the creation of supreme positive norms (first constitution historically) from legal system and provide constitution and norms coming from the constitution with binding power. As such, the grundnorm should compensate the hierarchy of norm and be the starting point to the law-making procedure.

These four conditions of Kelsen's norm are not met by Saleh and A. Hamid S. Attamimi; therefore an attempt of constructing the position of Pancasila in Indonesian legal norm system does not justify his claim that Pancasila is a grundnorm in the Preamble of 1945 Constitution. The position of Pancasila in the 1945 Constitution has been interpreted precisely as the grundnorm from Kelsen. Thus, many attempts having been taken to construct Pancasila as the ground norm by building it on the Kelsen'sgrundnorm doctrine are in vain, as it is inapplicable to Indonesian legal norm system. Compared with Pancasila as the source of any legal source in Indonesia, Pancasila is normatively contained in the Preamble of 1945 Constitution. It means that Pancasila is an integral part of 1945 Constitution (as both material and formal legal sources). Pancasila contained in the 1945 Constitution is established by PPKI.

JimlyAsshidiqie also states that one of problems in the past making Pancasila used as the means of legitimizing power and moreover making Pancasila a closed ideology is an opinion that Pancasila is above and beyond constitution. In addition, there is an opinion calling Pancasila the state's fundamental norm *(Staatsfundamental-norm)* using Hans Kelsen and Hans Nawiasky's theory [7].

Hans Kelsen's theory concerns the hierarchy of legal norm and validity chain creating the legal pyramid *(stufentheorie)*. One of figures that developed the theory is Hans Kelsen's pupil, Hans Nawiasky. Nawiasky's theory is called *theorie von stufenbau der rechtsordnung*. The norm, according to the theory, is composed of: [8]

1. State's fundamental norm *(Staatsfundamentalnorm)*;
2. State's ground rule *(staatsgrundgesetz)*;
3. Formal Law *(formellgesetz)*; and
4. Implementing regulation and autonomous regulation *(verordnung en autonomesatzung)*.

*Staatsfundamentalnorm*is a basis to the establishment of a state's constitution or *(staatsverfassung)*. Legally, *Staatsfundamentalnorm* is positioned to be the condition to the enactment of a constitution. Some *Staatsfundamentalnorm* has been preexisting before the existence of a state's constitution. Nawiasky says that the supreme norm called a basic norm of a state by Kelsen should be called *Staatsfundamentalnorm* (the state's fundamental norm) rather than*staatsgrundnorm*. Based on Nawiasky's theory, A. Hamid S. Attamimi compares it with Kelsen's theory and applies it to the legal order structure in Indonesia as follows: :[9]

1. *Staatsfundamentalnorm*: Pancasila (Preamble of UUD 1945).
2. *Staatsgrundgesetz*: Body of UUD 1945, *Tap MPR* (Decision of People's Consultative Assembly), and State Order Convention.
3. *Formellgesetz*: Law or Act.
4. *Verordnung en AutonomeSatzung*: Hierarchically starts from Government Regulation to Regent or Mayor's Decree.

The position of Pancasila as *Staatsfundamental-norm* was firstly suggested by Notonagoro. He states that Pancasila is viewed to be the ideal of law (*rechtsidee)* constituting the guiding star[10]. This position requires the positive law making to achieve the ideas in Pancasila, and to be used to examine the positive law. In the establishment of Pancasila as *Staatsfundamentalnorm*, law making, application, and implementation are inseparable from Pancasila values. However, the position of Pancasila as *Staats-fundamentalnorm* puts it above or higher than Constitution. If it does so, Pancasila does not belong to the definition of constitution as it is higher than or above the constitution. To discuss this problem, we can turn back into the conception of grundnorm and constitution according to Kelsen and the development made by Nawiasky, and see the relation between Pancasila and UUD 1945 (1945 Constitution).[11]

Jimly's opinion stating that Pancasila is *staatsfundamentalnorm* is inappropriate, because it assumes that Pancasila is not the part of constitution, while constitution consists of Preamble and articles (as written in the Article II of Additional Provisions of the 1945 Constitution Following the Amendment). The preamble in which

Pancasila is contained is an integral part of the body, a series of integrated values and norms. It is because the Preamble contains basic ideas, i.e. the basic values of Pancasila as the state foundation poured into the body of 1945 constitution in the form of its articles. Thus, there is an elaboration of basic values into ground norm [12].

Although a progressive legal system has been introduced in scientific discourse and the Power of Justice Law has mentioned that every judge verdict should be based on Pancasila, in Indonesian legal practice the judge still becomes the microphone of Law (Act); thus the statement "verdict for the sake of justice based on Belief in the Divinity of God" is merely a formality. In other words, the statement can be interpreted as "for the sake of justice based on the Law". In this case, the judges do not play their role independently.

SudiknoMertokusumo states that, according to Montesquieu and Kant's classical view, the judges do not play their role independently in applying the law to legal event. Judges are only the microphone or the mouthpiece of the law *(bouche de la loi)*. Thus, the judges can neither change the legal power of law nor add and reduce it. It is because, according to Montesquieu, the Law is the only source of positive law. Therefore, for the sake of law certainty, legal integrity, and freedom of citizens threatened by the judges' discretion, the judges should be under the law. Considering this view, judicature is merely a form of syllogism [13].

In line with the statement that "judge is merely the mouthpiece of law, in Hans Kelsen's theory on law, JimlyAsshidiqie states that viewed from dynamical perspective, the court's decision that presents individual norm is made based on the general norm of law or habit, is the same way by which the general norm is made based on the constitution [7].

There is no national legal product legalizing the enactment of Hans Kelsen'sStufenbauTheorie in Indonesia, but the judges have been accustomed with referring to the general norm, i.e. the law to be applied to certain concrete cases, in applying the law. It is interpreted as the statement "judges are the mouthpiece of law (judges apply and implement the law literally) [14]. Hans Kelsen as a positivist stands on western individualism. The theory wants to release law from the effect of other factors. Therefore, law is merely viewed from normative aspect of law. In this case, the theory grows in western legal system adhering to individualism

There is a doctrine so far that it is the law that is prioritized to resolve concrete cases and then can be a legal event. Lily Rasjidi and IB Wiyasa's opinion on Kelsen's perspective belonging to legal positivism is elaborated as follows:

1. State's legal system is effective neither because it has a base in social life (according to Comte and Spenser) nor because it originates from the nation's spirit (according to Savigny) and because of basic natural law, but because it gets positive form from the authorized institution. That is why Hans Kelsen separates law from other factors;
2. Law should be viewed merely from its formal form. That is why the formal legal from is separated from the material one[15].

Considering the opinion above, legal justice is entrapped in the rigid formality of law, while the society life is dynamic. Similarly, the resolutions of similar cases actually have different background; thus even the application of law to the similar cases can be different for the sake of true justice, but it should be adjusted with the justice living within society, because it is in the society life that the law works. As such, the law application to a verdict should be accountable to the society or community as a target of the judge verdict to create the society order.

As suggested by Tebbit, the ideal law certainty roots from the legal formalism. Consequently, there is a tendency to interpret law as the closed system considering other social factor irrelevant and complying with the rules meaning ignoring the feeling of justice in assessing the special case. Meanwhile, the typicality of a case should instead be found in the substance of concrete situation of the case, rather than in the formal rule as if it can be adjusted with the case. The root of all procedures is the assessment behind the unrevealed and unconscious reasoning.

III. HISTORICAL EFFECT OF PANCASILA MISCONCEPTION ON LEGAL EDUCATION IN INDONESIA

Each of human life communities has its own understanding and distinctive mechanism in implementing and maintaining its sustainability. Similarly, Indonesians have typical culture, custom, religion, and creed that then create the nation's self identity characteristics in living within society and state. Recalling culture and custom growing along with the age of a nation's society, all regulations should have been arranged and institutionalized in societal life. However, it does not occur in Indonesia because Indonesians experienced a very long colonial period. In this case, the way of solving problem in societal life, particularly in law enforcement for the sake of justice, is not easy because the legal authority to solve the judicature problems occurring in the colonial government that was surely affected by colonial culture.

Colonialism have been done for hundred years by the nation with the characteristics very different from other custom, culture, and social institution, and particularly the legal institution existing, growing, and developing in

societal life was in contradiction with the colonial one, the implementation of which was compelled by the colonial nation over the colonized nation by dominating the state government. This condition becomes the paradox of legal development in Indonesia from time to time. In the life of colonized people, the following feelings arise: reluctance, fear, entanglement, and inferiority, then manifested into the feeling of hopeless in dealing with external culture, because those were brought from the more advance and modern colonial country.

Colonial government obtruded its will in political, economical, and even social and cultural areas, highly affecting the nation's advance in education field, particularly legal education. The East Indies colonial government tried to influence the colonized nation with the argumentation of truth in its own nation's cultural life through education, while education and culture were very important to a nation's growth and development, in which a nation has typical specification different from others'.

In its development, Indonesian intellectuals, the educated class at that time attending education, began to be aware of the fate of their nation that was colonized by other nation and began to think that there was a difference of culture and self identity between the nation living and supporting the nation and that of the colonizing nation. The introduction section has introduced a book entitled Pancasila as Indonesian ideology, containing SoedimanKartohadiprodjo's writing, as explained below:

oroganotoN htiw gnola ojdorpidahotraKnamideoS ,htrae s'aisenodnI no tnemtaert s'lainoloc eht ot noitaler nI naisenodnI sa alisacnaP ot noitnetta laiceps gniyap sralohcs lagel naisenodnI noitareneg-s1 fo wef a ot degnoleb eveihca ot smia efil lateicos namuh ot detaler wal taht srosseforp hctuD sih morf denrael eH .yhposolihp efil eht evag metsys lagel hctuD eht hcihw ni ,thguat metsys lagel hctuD eht ni ytirailucep was eh tuB .ecitsuj fo gnileef eht htiw noitcidartnoc ni yllacirtemaid si msilainoloc taht raelc neeb sah ti elihw ,ecalp a msilainoloc derdnuh rof dezinoloc neeb sah taht noitan a fo nezitic a sA .ecitsuj

[16]hcum yrev ecitsujni eht tlef eh ,sraey

To find out that legal education world influenced significantly the legal development in Indonesia, it should be known first when the Indonesian educated communities began to know what was called *legal scholarships*, when western legal science entered and became legal study in Indonesia. Firstly, there was theoretical study. This study was manifested into academic study, legal education field in Indonesia. SoedimanKartohadiprodjo belongs to the 1st-generation Indonesians who had legal skill and were educated academically. Soediman studied law in *Rechtshogeschool* (legal college) in Jakarta established by East Indies government. Its curriculum, teaching system, and object taught (law and legal science) were similar to those taught in Netherlands. So, law, legal science, and juridical mindset learnt in both Jakarta and Netherland (Leiden) were Dutch juridical mindset (civil law). It is legal science, law and legal mindset that were then taught to the next generations. Recently, American juridical mindset (common law) becomes another variant of western mindset beginning to influence the mindset of Indonesian legal scholars. So, the Indonesian legal scholars were created through western educational system. Thus, the mindset implanted into the legal scholars' mind was the western one. More generally, it can be said that Indonesian intellectual group was established through western educational system and the science taught also came from the West.[16]

Considering the opinion, it can be recognized that education affects strongly the Indonesians' life journey, but in this case there is an error effect because there is a sharp difference between two nations living in Indonesia at that time: Indonesians who indeed have lived in belief, ideology, culture, customary law, and life complexity much different from those of colonial nations that came and lived in Indonesia, and then penetrated into the societal life to live as colonial in Indonesia.

Dutch education strongly influenced the generation of nation's mindset who were studying state order system in Indonesia, as explained by SoedimanKartohadiprodjo:

lanoitacude nretsew hguorht (hctuD) nretsew morf noitacude rieht deriuqca spuorg lautcelletni naisenodnI 'snaisenodnI ,nosaer taht roF .eno nretsew eht yllaitnesse saw detaerc tesdnim eht ,erofereht ;nrettap dna metsys dna tesdnim nretsew gnisu demrofrep era noitutitsnoC 1945 eht gniylppa dna ,gniviecnoc ,gnidaer fo syaw feileb a morf detraped msilaudividni dna yhposolihp nretseW .ymonoce dna ,citilop ,redro etats ,wal fo stpecnoc daetsni alisacnaP no desab yhposolihp noitan s'aisenodnI ,elihwnaeM .*"lauqe dna eerf detaerc era nem"*taht sah ti elihwnaeM .wollef rieht htiw gnola ssenrehtegot ni detaerc era sgnieb namuh taht feileb a morf detraped noitcidartnoc ni ,yhposolihp tnereffid no desab desopmoc saw noitutitsnoC 1945 eht taht ylraelc nwonk neeb dna noitpecnocsim ,noitaterpretnisim taht gnisirprusnu si ti suht ;tesdnim dna yhposolihp nretsew htiw

[17] noitutitsnoC 1945 eht no derrucco noitacilppasim

Here is SoedimanKartohadiprodjo's statement on western mindset indeed different from Indonesians' mindset:

The globalizing western mindset since Renaissance departed from individualism. Their way of thinking briefly assumes that human beings are created as autonomous creatures free and separated from others, or naturally human beings are in the perfect freedom to decide their action. Thus, for the human beings to live within society, a party should be established to do the organization task. It is called State as a group given the power or authority. Then, how many individual powers that should be given to the State through the act of managing the

power? Thomas Hobes states that the management is conducted completely or fully in order to be effective if in fact the State is considered as capable, while John Lock states that it is conducted partially because there is some power inherent to the existence of each corresponding human, and if it is released, humanity character will disappear. The integral part is human rights. State is instead established to protect (individual) human rights.
In western perspective, human beings are autonomous creatures; thus to ensure their individual sustainability, an organization is needed to safeguard each of individuals, the task of which is given to the government. Therefore, government issues a regulation to maintain the individual rights.

IV. URGENCY OF CONCEIVING PANCASILA AS FORMAL LEGAL SOURCE IN INDONESIA

The implementation of Pancasila and 1945 Constitution as the formal legal source is an imperative to a judge verdict, so the judge verdict will not be completed if it has not been trialed with constitution, in the last trial of RI's Constitution (UUD 1945), verdict should be synchronous/harmonious with the constitutional norm and with the ground norm of constitution, Pancasila. Just like the legislation process originating from the material law of Pancasila and UUD 1945, Indonesian judge verdict will have no meaning, if it is left to be free of the relation to Pancasila and UUD 1945.
In this case, the content of abstract norm inspires the concrete norm of law as the basis of decision. Thus, people will be able to see whether or not the decision issued has been consistent with the nation's ideology, Pancasila. It can be felt in living within society, because the court institution is a strategic means of cultivating Pancasila with applicative purpose, to ground Pancasila. Indonesian legal practice correlates to legal education, in which Pancasila is metajuristic and presupposed only, because of the effect of Pancasila as grundnorm as suggested by Hans Kelsen. *Grundnorm* and *staatsfundamentalnorm* theories are something beyond the constitution. Meanwhile, in fact the principles of Pancasila are contained in the 1945 Constitution constituting the part of RI's constitution (see Article II of Additional Provisions) and should be called the ground norm of Republic of Indonesia's Constitution. .
Indonesian legal science builds on Dutch legal education system; therefore the legal practice keeps performing following the legal education system. Similarly, there is an assumption believed in continuously that Pancasila is *grundnorm* and *staatsfundamentalnorm*; thus it does not become the norm testing instrument because *grundnorm*and*staastfundamentalnorm* are the provisions beyond the constitution. Indonesian national law enforcement system is a part of national legal system containing the legal science element. The legal science developing in Indonesia to support the national law enforcement system is, of course, Pancasila inspired with the divinity values. In our state building on Pancasila, in the presence of the principle of divinity, each of sciences (including legal science) will not be completed if it is not accompanied with divinity science.
The court verdict based on divinity principles is defined as the one resulting from a judicial process of Indonesian court that has justice values as the ideal and builds any verdicts on divinity values. The divinity values here means the ones originating from religion tenets as the guidance in decision making and the values originating from the ones living within Indonesian customary community. The judges are in charge of exploring those values to be consideration in decision making. It is this that later is interpreted as the development of Indonesian legal decision based on divinity principle (substance) with the judge behavior based on divinity principle (culture) as the law enforcing institution in Indonesia (structure). In enforcing Indonesian national legal system, this study focuses particularly on the court verdict in fact confirms the following fringes: (1) Article 29 (1) of1945 Constitution: State builds on Belief in the Divinity of God; (2) Article 1 of Law No.4 of 2004: The Power of Justice is the power of an independent state to organize judicature to enforce the law and justice based on Pancasila to achieve the performance of Republic of Indonesia constitutional state; (3) Article 3 (2) of Law No.4 of 2004: State judicature applies and enforces law and justice based on Pancasila; (4) Article 4 (1) of law No.4 of 2004: Judicature is performed "For the sake of Justice based on the Belief in the Divinity of God"; (5) Article 8 (33) of Attorney Law No.16 of 2004: "For the sake of justice and truth based on Belief in the Divinity of God, the prosecutor does prosecution with conviction based on legitimate evidence". The national fringes aforementioned clearly require the presence of "religious approach". Even with the phrase frequently mentioned "Pancasila justice" and the provision of Law about the Power of Justice (Law No.4 of 2004), stating that "Judges obligatorily explore, follow, and comprehend legal values and feeling of justice living within society (Article 28 clause 1), it can be said that the fringes of National Legal System confirms the need for "cultural-religious approach". These are the characteristics of Indonesian Judicature System. Implementing the principles of justice and divinity equally in judicature process in Indonesia will be the starting step toward the Indonesians' ideal to construct their own law, corresponding to the guidelines of life within nation and state as mentioned in Pancasila values. Law enforcement based on the guidance of law will not be meaningful if it does not consider the principle of justice according to God's guidance.
Judges as the power of justice holder play an important part in justice enforcement. The judges should refer to the principle of justice to find absolute justice, and are the manifestation of the attempt of human beings that are fond of the law higher than positive law. In their position, the judges should be able to give the people the

feeling of justice in which the judges are responsible neither to the state nor to the nation, but firstly to God the Only One, then to the self. Regardless the religions adhered to by the Judges in Indonesia, all religions have guided their adherents to give the feeling of justice, because justice is the religious guidance. In practice, the judges are required to elaborate the law not only as the mouthpiece of law, but also being capable of translating it and serving as the legal spiritualist. It is this kind of judges that can make fair decision based on the Belief in the Divinity of God.

V. CONCLUSION

Theoretically, misconception of Pancasila has occurred among the scholars assuming Pancasila as *grundnorm* and *stattsfundamentalnorm*. With theoretical consequence of Hans Kelsen and Nawiasky's theories, Pancasila is separated from constitution, while it is contained in the Preamble of 1945 Constitution either factually or juridically, as the concrete positive law written in the Preamble of Constitution established by PPKI even becoming the foundation of state and the source of any legal sources, thereafter called the ground norm of constitution. Otherwise, Pancasila as grundnorm is abstract, presupposed, not written, not positive law because there is no one establishing grundnorm. The factors contributing to this misconception is western legal system education because Indonesia has been colonized for a long time.

Conceiving Pancasila as positive law in Indonesia is urgent because generally Indonesian judges prioritize what is written in the law in applying the law to certain concrete cases and the countries standing on Continental European System view that judges are bond to the law. The application of Pancasila and 1945 Constitution as material legal source has been existent in each law-making, but the application according to Pancasila as the source of formal law, the place where law is found in certain concrete cases, is an imperative to a judge verdict because the judge verdict will be not meaningful if it is separated from Pancasila and 1945 Constitution.

SECNEREFER

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