



***JUDICIAL REVIEW OF THE 1945 CONSTITUTION OF THE REPUBLIC OF  
INDONESIA AGAINST PANCASILA***

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**ABSTRAK**

Indonesia is a state of law that strongly holds the rule of law as a place to regulate all forms of running the constitutional system in Indonesia, in the theory put forward by Adolf Merkl which was systematically elaborated by Hans Kelsen and refined by Hans Nawiasky states that norms in each country must be tiered, the highest norms being the source and norms of criticism for the norms below them. The practice in Indonesia so far is that regulations whose hierarchy is under the Law (autonomy sizing) are tested to the Law (female Gesetz), while the Law itself is tested to the Basic Law (staatgrund gesetz), but never at all the Basic Law is tested to Pancasila as a fundamental state norm (staatsfundamentalnorm). So this study will seek the answer to how to test the constitution against Pancasila as a fundamental state norm in Indonesia and what institutions are authorized to carry out such testing. To find answers to problems in this study, researchers use two kinds of approaches: the statutory approach (Statue Approach) and the Conceptual Approach (Conceptual Approach). Researchers also use the research method that is normative juridical. The results showed that the constitutional examination of Pancasila can be carried out, and the institution authorized to do so is the People's Consultative Assembly with a legislative review mechanism.

**Keywords:** *Judicial Review; Pancasila; Staatfundamentalnorm.*

**INTRODUCTION**

Pancasila is the five foundations of nation and state that are crystallized from the values that live in a plural and plural Indonesian society rich in local wisdom (Nugroho, 2013). In its historical family, it turns out that the values of Pancasila have actually long been lived and applied in Indonesian society even long before independence. The living system, perspective, and lifestyle of Indonesian people during the royal era reflect the values of Pancasila (Firdaus, 2022).

Hundreds of kingdoms have stood in Indonesia consisting of a cluster of islands, Adi Sudirman said 700 kingdoms once stood in Indonesia, each of which had different patterns both in terms of religion race, and culture, however, hundreds of kingdoms could coexist and complement each other and uphold respect for differences. Even in one of the studies mentioned that there are still around 186 kingdoms that still exist and survive until Indonesian independence is proclaimed (Haris Kurniawan, 2012). This shows that their persistence until Indonesia becomes independent determines that unity and unity must be maintained and must not be divided, of course, while still practicing the noble values that have been maintained for centuries.

The noble values that they adhere to and live as a guideline for life, become the way of thinking and the way of life of our society in their daily lives, which uphold the values of divinity, plurality, togetherness, respect for differences, humanity, justice, and even unity that are rooted in the lives of Indonesian people. These values were never imposed by the ruler but instead, they grew organically following the characteristics of Indonesian society.

The colonization carried out by the Dutch for a very long time did not fade the noble values adhered to by the Indonesian people, the first victory possessed by the Indonesian people during the colonial period was that they did not lose their identity as an Indonesian nation so that this would later become the capital of the igniter of the independence struggle, this can be seen for example from the period of national awakening where at that time many people were began to join national organizations such as *sarekat dagang Indonesia* and *Budi Utomo* where during these times Indonesian youth had firmly ventured collectively to use the word 'Indonesia' as the name attached to the names of these national organizations. In addition, for example, individuals who dare to use the word Indonesia are youth figure Tan Malaka who wrote a book entitled *Naar de Republik Indonesia* (Sirait, Pardosi, Manullang, & Sirait, 2023).

These strong desires for independence have political goals based on a sense of national unity, independence, solidarity, and non-cooperation (MPK, 2017). Such feelings are born because they have not lost their identity as Indonesians who should also have the same rights and are not differentiated from colonizers who are nobody in this archipelago.

Until the independence period where Pancasila was formally recognized as the basis of the state contained in the fourth paragraph of the Constitution of the Republic of Indonesia in 1945 further abbreviated as the 1945 NRI Constitution which was ratified on August 18, 1945, which had previously begun with the reading of the text of the proclamation on August 17, 1945 which became evidence that Indonesia had stood as a *de facto* independent state, And the text of the proclamation became the cover of the colonial legal order, and became the basis or source of law for the national legal order.

Pancasila contained in the fourth paragraph of the preamble of the 1945 NRI Constitution is mentioned as the basis for an independent Indonesian state, where this fact shows that Pancasila is a living value in Indonesia and even a source for the constitution in Indonesia which in theory can be called a fundamental state norm (*staatsfundamentalnorn*) which can be a source and even a norm criticizing other norms under it (Warassih, Medan, & Mahmutarom, 2005).

Pancasila is promoted as the basic philosophy of the state (*philosophe ground slag*) by our founding leaders, and besides that, it is also referred to as a dynamic guiding star (*Leitstar*) as a guide star to the course of an independent Indonesian nation and even aspired to as a worldview (*Weltanschauung*) that can be a source of inspiration for countries around the world in carrying out international goals and problems (Sancaya, 2013).

Thus, Pancasila is the highest norm in Indonesia which can be categorized as a fundamental state norm (*staatfundamentalnorn*) in theory that the fundamental norm is the source and valuation standard for the norms below it, namely the basic norm (*staatgrundgesetz*), as well as the basic

norm becomes the source and valuation standard for the norm below which is called the law (formalegesetz) which is also the source and the validity value for the implementing norm under it, namely the autonomous/implementing norm (autonomy sizing).

In practice in Indonesia, if the implementing regulation or autonomous rule conflicts with the law, it will be tested by the Supreme Court as an institution of judicial power that has the authority to conduct such tests, then further if the law conflicts with the constitution it is tested in the Constitutional Court as an institution of judicial power specifically established to test the constitutionality of a law which is tested against the constitution as a constitution (Putra, 2018), but the problem is that in Indonesia there is still no mechanism or technical rules and institutions that can test the constitution against the fundamental norms of the state in this case in Indonesia known as Pancasila.

Although so far the Constitutional Court has stated not only as the guardian of the constitution, the Constitutional Court is also an institution that can protect the state ideology (the guardian of the ideology) in this case is Pancasila. However, there is no technical rule that can give the Constitutional Court the authority to test the Constitution against the fundamental norms of the country. Even though the fundamental norms of the state are sources and norms of criticism for the legal norms under it.

## **RESEARCH METHODS**

The author in this case uses a normative juridical research method where the author will conduct research and in-depth study of secondary data consisting of primary legal material and secondary legal material or fasting materials which can be in the form of laws and regulations and literature related to the problem being studied, especially related to judicial review and studies of Pancasila and stufenbautheorie (Soekanto, 2007).

Then from that this study uses two approaches carried out to obtain a very strong and comprehensive analysis in finding answers to problem formulations, namely first using a statutory approach (statute approach) where with this approach the author will consistently use applicable laws and regulations as the basis for this approach and research arrangement, the second is carried out conceptual approach (conceptual approach) which Compile systematically conceptually how the steps and structure of laws and regulations and regulations.

Furthermore, in this normative research, the legal materials used are legal materials taken in literature, both in the form of laws and regulations, as well as other literature, especially those discussing Pancasila and the Constitution as well as testing as well as institutions authorized to conduct these tests. After the legal materials are obtained, the first thing to do is an inventory of norms related to the subject of research then after that an analysis will be carried out assisted by other literature materials as a guide to get answers to the problem formulation.

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## RESULTS AND DISCUSSION

Looking at the two problem formulations that have been described in the previous section, then after collecting library materials in this study, answers can be given with the following discussion:

To answer the first question related to the examination of the constitution against Pancasila, we will first describe in theory what the hierarchical framework is. Nawiasky grouped norms in the state into four different parts, the first is the fundamental norm of the state (staatsfundamentalnorm) in theory, the first norm is the final cause that cannot be traced back to the basis of its validity because it has been determined in advance by the people in the country, Pancasila has become a civic nationalism or has become the nationalism identity of the Indonesian people before independence, In addition, Pancasila has also become a common denominator or agreement of founding leaders in Indonesia when it was formulated and determined by BPUPKI and PPKI and it is proven to this day that Pancasila is the source of all sources of law in Indonesia, the two basic rules of the state (staatgrundgesetz), the three laws (formal gesetz), and the last is the implementing rules (Verordnung) and autonomous rules (autonomy sizing).

Positively related to the hierarchy of laws and regulations in Indonesia, it has been regulated in Law Number 12 of 2011 concerning the Establishment of Laws and Regulations as amended several times and most recently amended by Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations, especially in Article 7.

### **Types and Legal Hierarchy consist of :**

- a. Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- b. Ketetapan Majelis Permusyawaratan Rakyat.
- c. Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang.
- d. Peraturan Pemerintah.
- e. Peraturan Presiden.
- f. Peraturan Daerah Provinsi.
- g. Peraturan Daerah Kabupaten/Kota

Looking at the hierarchical framework mentioned above, we actually cannot see that Pancasila is part of the hierarchy, so in theory, it will find a flaw in the definition because the 1945 NRI Constitution which in that Article is placed as the highest hierarchy is not in harmony with the theory of norm hierarchy which says that the highest norm is no longer sourced from other norms, The 1945 NRI Constitution is theoretically only in harmony with characteristics as a basic state norm (staatgrundgesetz) not as a fundamental state norm (staatsfundamentalnorm).

Therefore, if we cannot see Pancasila explicitly in Article 7 paragraph (1) of the Law on the Establishment of Laws and Regulations, then we must look for it implicitly in the same law, Article 2 of the Law stipulates that Pancasila is the source of all sources of state law. Thus, we can implicitly mean that although hierarchically in Article 7 does not explicitly mention the

position of the Pancasila hierarchy, Article 2 which regulates Pancasila as the source of all sources of state law has given the highest position absolutely to Pancasila not to the 1945 NRI Constitution.

Thus, the highest position of the 1945 NRI Constitution stipulated in Article 7 is not the highest in absolute terms because there is another norm, namely Article 2 which requires the 1945 NRI Constitution as one of the country's laws to be subject to and sourced from Pancasila, meaning that it must not conflict. Therefore, using such logic, it can theoretically be justified and verified that Pancasila is the fundamental norm of the state (*staatsfundamentalnorn*), and the 1945 NRI Constitution is the basic norm of the state (*staatgrundgesetz*).

In Indonesia, the norm level theory is applied with almost perfect numbers, one of which is with the mechanism for testing laws and regulations implemented by the institution of judicial power in this case carried out by the Supreme Court and the Constitutional Court, the Supreme Court conducts testing of laws and regulations whose hierarchy is under the law or can be called judicial review in the form of testing the legality of law and regulation, while the Constitutional Court examines laws against the constitution or judicial review in the form of testing the constitutionality of a law. The mechanism is made based on norm level theory which says that the highest norm is the source as well as validation of the enactment of a law and regulation.

However, in Indonesia there is no mechanism for testing the constitution or basic norms against the fundamental norms of the state as the highest heiraki in theory, even on one occasion the Constitutional Court received a request for testing the 1945 NRI Constitution against Pancasila, but the Constitutional Court then issued Determination Number 18/PUU-XIX/2021 in which the Constitutional Court had held a preliminary examination hearing and found that the subject matter The petition filed by the Petitioner is a review of articles in the 1945 NRI Constitution which contradict Pancasila including the first, second, and fifth precepts.

Thus, by Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) letter a of the Constitutional Court Law, and Article 29 paragraph (1) letter a of Law Number 48 of 2009 concerning Judicial Power, one of the constitutional powers of the Constitutional Court is to adjudicate at the first and last instance whose decision is final to test the Law against the Basic Law. Therefore, since the petitioner's application is not related to the legal examination of the 1945 NRI Constitution, the Court determined: Declaring that the Constitutional Court is not authorized to hear the petitioner's application.

Although actually on many occasions included in several decisions the Constitutional Court always said that the Constitutional Court is not only the guardian of the constitution, the Constitutional Court is also an institution that can protect the state ideology (the guardian of the ideology) but because no norm gives the authority to test the 1945 NRI Constitution against Pancasila, the Constitutional Court cannot carry out this test.

However, that does not mean that it is not permissible to test the constitution against Pancasila, in this case, the Constitutional Court only stated that it was not authorized to do so, but because no regulation technically gives the authority to test the constitution against

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Pancasila, we face the fact that the Constitutional Court refused to conduct such a test because it was not authorized.

In theory, the door is still very wide open to test the constitution of Pancasila, because, after all, Pancasila in Indonesia is a fundamental state norm that can be a source and even a norm critic of the norms under it as well as the basis for the enactment of the norms under it.

This possibility is still wide open for testing because in addition to theoretically being stated so, juridically Article 2 of the Law on the Establishment of Laws and Regulations states that Pancasila is the source of all sources of law, then causally all laws in the country of Indonesia including the 1945 NRI Constitution must not conflict with Pancasila.

Therefore, even though in Indonesia even though the test of the 1945 NRI Constitution on Pancasila has not yet been found, there is still a possible mechanism to do which may be somewhat more complicated to do than the usual legal test. The mechanism is a testing mechanism that can be carried out by the legislature in Indonesia, in this case, the People's Consultative Assembly this is regulated in the 1945 NRI Constitution in Article 3 paragraph (1) which states that the MPR is authorized to amend and implement the Basic Law.

If the public sees that the 1945 NRI Constitution is no longer by the noble values contained in Pancasila, then individually or collectively they can submit a request or petition for the MPR RI to immediately amend the 1945 NRI Constitution, especially to articles that are considered contrary to Pancasila and are no longer relevant for use in Indonesia.

After answering the first question that allows testing of the 1945 NRI Constitution against Pancasila, we will analyze what institution is most authorized to carry out such testing. In the author's opinion, ideally, the institution that is most entitled to carry out such testing is the Constitutional Court where in this case the Constitutional Court is the guardian of the Constitution, the Constitutional Court is also the institution that can protect the state ideology (the guardian of the ideology) in this case is Pancasila.

In addition, Pancasila is contained in the Preamble of the 1945 NRI Constitution indicating that the Constitutional Court can ideally protect the country's ideology by using its authority, but because there are still formal norms that give this authority to the Constitutional Court, the Constitution cannot do so.

Then legally formally, the institution authorized to amend and enact the constitution in this case is the People's Consultative Assembly whose composition consists of legislative power. Article 3 paragraph (1) of the 1945 NRI Constitution states that the MPR has the authority to amend and enforce the Basic Law, it can be interpreted that the MPR can make changes to the 1945 NRI Constitution if it is no longer relevant and contrary to Pancasila. This mechanism is no longer referred to as judicial review because the institution authorized to conduct it is the legislature itself where this mechanism can be referred to as legislative review.

## CONCLUSION

After being reviewed and discussed in the discussion above, this research can be concluded The basis for testing the constitution of Pancasila can be carried out and it is still very wide open to the possibility of conducting such testing, this can be seen in theory from the theory of the norm level that the highest norm becomes the source and becomes the basis for the validity of the norms under it. Pancasila can theoretically be categorized as a fundamental state norm that oversees laws and regulations in Indonesia, including the 1945 NRI Constitution. In addition, Article 2 of the Law on the Establishment of Laws and Regulations stipulates that Pancasila is the source of all sources of law so that causally all legal norms in Indonesia in addition to having to agree with Pancasila must also not conflict with Pancasila. So that the examination of the Constitution on Pancasila can be carried out. The institution that ideally or should be able to test the constitution against Pancasila is the Constitutional Court as the protector of the constitution and ideology, however, because no norm gives such authority to the Constitutional Court, the Constitutional Court cannot do so. The second and most legally accurate institution to carry out such testing is the People's Consultative Assembly where the MPR is given the authority by the 1945 NRI Constitution, especially in Article 3 paragraph (1) to amend and enact the constitution, the MPR one of them because the articles in the 1945 NRI Constitution have contradicted Pancasila can make changes or amendments. However, this mechanism is known as legislative review, seeing that the institution that conducts the test is a legislative institution, not the judiciary, as we know so far as judicial review.

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