

**Online Journal Manuscript**

**THE EXISTENCE OF PANCASILA AS A MEASURING INSTRUMENT OF THE  
CONSTITUTIONALITY OF ACTS AGAINST THE CONSTITUTION 1945 IN THE  
CONSTITUTIONAL COURT: A PHILOSOPHICAL AND CONSTITUTIONAL LAW  
PERSPECTIVES**

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SEMARANG, INDONESIA

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# The Existence of Pancasila as a Measuring Instrument of the Constitutionality of Acts against the Constitution 1945 in the Constitutional Court: A Philosophical and Constitutional Law Perspectives

By: Ahmad Basarah

*Arief Hidayat, Adji Samekto*

Not only played an important role as the guardian of constitution, the Constitutional Court is also functioned as the guardian of ideology, Pancasila. It means that Pancasila should be used as the basis to examine, nullify and to decide the Constitutionality of laws in Indonesia.

This research critically analyses: (i) Why do Pancasila, the Indonesian *rechtsidee*, should be used as a measuring instrument or as a reviewing tools on the process of constitutional review in the Constitutional Court; (ii) Precedents or decided cases that used Pancasila as the basis to determine the constitutionality of a particular law (especially a judicial review of Acts in the area of politics, economic, social and religion during 2003-2013); (iii) The best formula to ensure the Constitutional Court to always use Pancasila as the main basis for judicial review of laws.

This research is based on positivism paradigm. A doctrinaire approach is utilized to address the research questions and to reach the objectives of this research. Additionally, a deductive analysis is used in this research.

This work has found that: First, there are convincing facts that Pancasila as the national principle was born on 1 June 1945 when Soekarno gave speech in front of BPUPK general assembly. Pancasila was not born on 18 August 1945 at the same time with the ratification of the Constitution (UUD 1945) since the legal position of Pancasila and the Constitution is not equal. Pancasila should be used as a measuring instrument for the Constitutional Court to review the constitutionality of every law considering the legal position of Pancasila as the *rechtsidee* of Indonesia that has regulatory function to determine the fairness of a particular law. Second, during 2003-2013 there are three types of Court decisions from Pancasila perspective: decisions without consider Pancasila as a measuring instrument, decision that not only mentioned articles in the Constitution but also stated about the value of Pancasila but the value of Pancasila are not clearly mentioned as a measuring instrument; and decision that clearly used Pancasila as a measuring instrument. Third, the best formula to ensure the Constitutional Court to always use Pancasila as the main basis for judicial review are by judicial interpretation and by amending Law regarding Constitutional Court.

Keyword: Pancasila, Constitutional Court and Judicial Review.

## **A. Introduction**

As stipulated on Article 24C (1) Constitution 1945 which is also restated in Article 10 (1) a to d Law No. 24/2003 on Constitutional Court as amended by Law No. 8/2011 on the amendment of Law No. 24/2003 on Constitutional Court (UU MK) mentioned that one of the Court authority is to examine the constitutionality of Laws against the Constitution of 1945.

According to Arief Hidayat the Constitutional Court is functioned as the guardian of the constitution as well as the guardian of the ideology, Pancasila. It means when the Court examines, nullifies and decides the Constitutionality of laws in Indonesia should not only based on the Constitution 1945 but should also use Pancasila as a measuring instrument.[1]

The debate that accompanied some of the Constitutional Court decisions regarding the constitutionality of a particular laws were how the Court applied values of Pancasila when they examined constitutional cases. On applying such power in examining laws, the Court should be committed not only to use positive law approach but also responsible in achieving the ultimate goal of Indonesian law system. However, some of the Court decisions were still questioned because not fully based on Indonesia's *rechtsidee*.

Our founding fathers has agreed that Pancasila is a *philosofische grondslag*, which is a foundation, philosophy, thought and the deepest soul of the establishment of Indonesia as a free nation. Pancasila is also has a quality as a *rechtsidee*, which is an ideal law (*ius constituendum*) that will be directed as a positive law (*ius constitutum*).[2]

Constitutional review as well as legislative review and executive review are an instrument in order to Pancasila to be functioned to value the fairness of the law. Rudolf Stammler and Gustav Radbruch stated that in addition to the regulation function, *rechtsidee* has a constitutive function which directed a positive law in order to achieve a communal goal and fairness.[3]

## **B. Problem Statements**

Research questions in this dissertation are: (1) Why do Pancasila, the Indonesian *rechtsidee*, should be used as a measuring instrument or as a reviewing tools on the process of constitutional review in the Constitutional Court; (2) Precedents or decided cases that used Pancasila as the basis to determine the constitutionality of laws (especially a judicial review of laws in the area of politics, economic, social and religion during 2003-2013); (3) The best formula to ensure the Constitutional Court to always use Pancasila as the main basis for judicial review of laws/acts in Indonesia.

## **C. Research Method**

This research is a legal research which is based on certain method, design, and insight, aims to analyze one or more legal symptoms. This dissertation use a positive law, philosophical, historical, and comparative approach in order to explain the birth of Pancasila and to describe the position of Pancasila as *rechtsidee* and the use of Pancasila as an instrument to decide constitutional cases in the Constitutional Court.

A deductive analysis is used in this research. This analytical model puts Pancasila, laws/acts, as well as Constitutional Court decisions as a major premise. Therefore, Pancasila, Constitution 1945, laws/acts and precedents or decided cases from the Court are utilized to examine whether or not the Constitutional Court has considered those legal sources in their decisions. A philosophical and historical approach in the context of

constitutional law is used to achieve the objectives of this research.

## **D. Discussion**

### **1. Pancasila as *Rechtsidee* and a Reviewing Instrument in the Constitutional Court**

#### **a. The Birth of Pancasila as National Principle**

Historically, there are three versions of Pancasila in the process of its formulation which are: Pancasila 1 June 1945, 22 June 1945 and 18 August 1945. The story was began in the end of East Asian when Japanese indicated that they were likely to lose the war. Finally, there was an agreement between occupying Japanese forces and some Indonesian prominent figures who later became Indonesia's founders to prepare the investigation of Indonesian independent.

On 29 April 1945, an Investigating Committee for the Preparation of Independence (BPUPK) was formed. The first meeting agenda on 29 May-1 June 1945 were discussed the national principle of Indonesian independence. The second BPUPK meeting on 10-17 July 1945 were prepared the draft of Constitution of Indonesian independence.[4]

The first BPUPK meeting chaired by Radjiman Wediodiningrat with 60 members of Indonesia's founders including Soekarno. The four-day meeting agenda was to listen the speech of 40 members BPUPK regarding the idea of national principle of Indonesia's independent that would be formed.

However, there was no solid answer for a fundamental question which raised by the chair of BPUPK, Radjiman Wediodiningrat, in the opening address of BPUPK's first meeting about what national principle for Indonesia's independence would be?. The majority of speakers, 39 members of BPUPK, has delivered their thought but none of them gave a systematic and holistic answers regarding Indonesia's national principle.

Radjiman Wediodiningrat's question, finally, got the answer from the last speaker, Soekarno, in his speech on 1 June 1945. Soekarno addressed five fundamental principles for Indonesia's national principle which he called as Pancasila. On 1 June 1945, Soekarno gave his speech to answer the question of BPUPK chairman about Indonesia's national principle in the context of *philosophische grondslag* or the view of the world (*Weltanschauung*) with a systematically, solidly and coherently. On that historical date, Soekarno addressed his idea about Pancasila, which was the name of the five fundamental principles of Indonesia's independent. The main idea that was addressed in the Soekarno's speech then agreed by the member of BPUPK as the ground to draft the philosophical basis of Indonesia's independence (*philosophische grondslag*).[5]

In the end of the first round of BPUPK meeting, BPUPK formed a technical committee to collect proposals from the members that would be discussed in the next meeting (10-17 July 1945). Eight members of BPUPK were sat on the committee (the Committee of Eight) chaired by Soekarno. The committee consisted of 6 representatives from nationalist faction and two from Islamic faction. The member of the Committee were Soekarno, M. Hatta, M. Yamin, A. Maramis, M. Sutardjo Kartohadikoesoemo, Otto Iskandardinata (Nationalist faction), Ki Bagoes Hadikoesoemo dan K.H. Wachid Hasjim (Islamic faction).[6]

As a chair of the technical team, Soekarno, during the recess period of 8<sup>th</sup> regular session of Chuo Sangi In (18-21 June 1945) in Jakarta, initiated informal meeting related to the role and duties of the technical team. In the end of that meeting, Soekarno initiated to form another committee which later known as a Committee of Nine. Member of the Committee were consisted of Soekarno (Chairman), Mohammad Hatta, Muhammad Yamin, A.A. Maramis, Soebardjo (nationalist faction), K.H. Wachid Hasjim, K.H. Kahar Moezakir, H. Agoes Salim, dan R. Abikusno Tjokrosoejoso (Islamic Faction).[7]

The Committee successfully formulated and agreed the draft of the preamble to the Independent Constitution which has been signed by the member of the Committee of Nine on 22 June 1945. The draft was completed on 22 June 1945. Soekarno gave its name as “Mukaddimah”, M. Yamin called the charter as “Piagam Jakarta/Jakarta Charter”, while Sukiman Wirjosandjojo named it as “*Gentlemen’s Agreement*”.

On 18 August 1945 the agreement of the Jakarta Charter was changed by Preparatory Committee for Indonesian Independence (PPKI). The important point that changed in the Jakarta Charter was “seven word” following the first sila of Pancasila “*Ke-Tuhanan, dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*” (Believe in God, with the obligation to carry out syariah for adherents of Islam) which changed to: Believe in one and the only God. Also followed by the changing of the draft of Article 6 (1) regarding the requirement of the Presidential candidate. Originally, the provision required that the Presidential candidate should be Indonesian and a Moslem, which later changed to just the Presidential candidate should be Indonesian.

With respect to the changing of the “seven word”, Mohammad Hatta has a significant role, as his acclaimed in his own biography, *Memoir Mohammad Hatta*. A day in the beginning of opening session of PPKI meeting, Hatta approached Islamic faction members to withdraw the seven word “Believe in God, with the obligation to carry out syariah for adherents of Islam” in the Jakarta Charter with the new phrase “Believe in the one God and the Only God”. The reason for the changed was due to maintain a national unity.[8]

From the explanation above, it’s clear that the draft of Pancasila, since the speech of Soekarno on 1 June 1945, the draft of Jakarta Charter 22 Juni 1945 by the Committee of Nine which chaired by Soekarno until the final draft of PPKI of 18 August 1945 which also chaired by Soekarno, was a single integrated process of the birth of Pancasila as Indonesia’s national principle.

Regarding the role of Soekarno in formulating national principle is also acknowledged by Radjiman Wediodiningrat as a former chair of BPUPK in his introductory note in the book of the Birth of Pancasila:

*“The birth of Pancasila is the result of steno-grafisch verslag from the unwritten speech of Soekarno (voor de vuist) in the first meeting on 1 June 1945 when he was explain about our national principle (Beginsel), as the reflection of his imagination. Indeed, the Soekarno’s unwritten speech is not systematically delivered. However, the most important thing is the substance. Hopefully, “the birth of Pancasila” can become a compass, a guidance for the whole nation-state in the efforts to fight and completed the independence of the nation.”*[9]

A.B. Kusuma mentioned that based on the testimony of Bung Hatta, Radjiman,

M. Yamin and several other BPUPK members which also supported by an official minutes of meeting stated that Pancasila is the original idea of Soekarno. Additionally, A.B Kusuma also stated other supported evidences include: First, documents from the recess session which also included proposals from BPUPK members that showed there was none from the members were proposed principles that consist of five sila except Soekarno. Second, Soepomo and his fellows on 15 June 1945 proposed a draft of Temporary Constitution (Undang-Undang Dasar Sementara) described that the national principle was "Nationality" and "Believed in God" not the principle of five (Pancasila). Third, Mr. M. Yamin in his writing that published in Asia Raya on 22 June 1945 proposed two national principle which were Nationality and Religion, and again, not the principle of five.[10]

Based on the facts above, so it is clear that the day when Pancasila born was on 1 June 1945. Firstly, BPUPK was the first organ that formed based on the agreement form Indonesia's founders which at that time was functioned as the People Consultative Assembly (MPR RI) as we know today. Secondly, the only agenda in the first meeting of BPUPK on 29 May to 1 June 1945 was to discuss the national principle of Indonesia's independent. Thirdly, Soekarno was an official member of BPUPK. Fourthly, Pancasila as the national principle was for the first time delivered comprehensively, solidly and systematically by Soekarno in his speech on 1 June 1945 in front of BPUPK assembly in order to answer Chair of BPUPK's, Radjiman Wedyodiningrat, question regarding what the national principle of Indonesia's independent would be?. Fifth, Soekarno as a member of BPUPK explained five basic principles for the Indonesia's independent and named it as Pancasila which then accepted unanimously by the member of BPUPK.[11]

#### **b. The Birth of Pancasila and the Ratification of Constitution 1945**

Recently, some people remain believe that the birth of Pancasila was 18 August 1945. This view is actually not true, since the Preparatory Committee for Indonesian Independence (PPKI) on 18 August 1946 has never ratified Pancasila as the national principle of Indonesia. On 18 August 1945, PPKI just only decided two things: (1) formalized and ratified Constitution 1945; and (2) Elected Soekarno and Hatta as the first President and Vice President of Republic Indonesia. The hypothesis regarding PPKI on 18 August 1945 just only ratified Constitution 1945 and never formalized Pancasila at that date was proved by the enactment of Predisential Decree No. 18/2008 on Constitutional Day. The consideration section of the Presidential Decree mentioned that PPKI on 18 August 1945 has ratified Constitution 1945 as the Indonesian Constitution.

Pancasila was not born on 18 August 1945 at the same time with the ratification of the Constitution (UUD 1945) since the legal position of Pancasila and the Constitution is not equal. It is not true if we said that Pancasila as national principle is included in the preamble Constitution 1945 paragraph 4, since if its argued that Pancasila is part of the preamble of Constitution 1945 and it is also ratified at the same time with Constitution 1945 these view are not only does not comply with the historical facts but also lowering the level of Pancasila to become equal with 1945 Constitution. Pancasila as its included in the 4<sup>th</sup> paragraph of Constitution 1945 is

actually just its *sila* or the phrase but not the soul and the intrinsic value of Pancasila. Pancasila is a basic norm (*grundnorm*) that is abstract or meta-judicial which located in the world of idea as the *rechtsidee* of Indonesia's independence national principle.

Some people also said that Pancasila is located in the highest legal source which is preamble of Constitution 1945. If we follows this idea, it will raise some basic question: if its correct that Pancasila included in the fourth paragraph of the preamble Constitution 1945 so Pancasila as the national principle already been replaced several times when Indonesia applied Federal Constitution 1949 (Konstitutsi RIS 1949) and when Indonesia used Temporary Constitution 1950 (UUDS 1950), since the articles of Constitution has been changed and were not as the same as the articles in the fourth paragraphs of Constitution 1945. The question is it correct if Pancasila as national principle can be replaced or amended at the same time with the amendment of Constitution. The answer shall be not. Constitution might be changed time to time, but Pancasila as a national principle might not been changed or be replaced over the time.

By putting Pancasila as part of Constitution 1945 it means that we are lowering the quality of Pancasila as the basic and the highest principle (*grundnorm*) of the state. Additionally, by mentioning Pancasila is included in the fourth paragraph of 1945 Constitution it means that we are lowering the level of Pancasila to become equal with 1945 Constitution. Pancasila is actually not part of 1945 Constitution, but Pancasila should be a source to legally validate the Constitution.

### **c. Pancasila Should be Used as A Reviewing Instrument by the Constitutional Court**

Beside the consequence of Pancasila as the national principle which is functioned as a regulatory measuring instrument to review the constitutionality of acts, there are some other reasons why Pancasila should be used by the Constitutional Court as a reviewing tool in term of the Court authority to review the constitutionality of a particular law. The first reason is the consequences of interpretation theory that capture or describe the meaning of the principle or a norm which is stated in the Constitution as the basis when the Constitution were created. The second argument is part of the consequences of the legal order principle. And the third argument is because the provision in the Law No. 12/2011 which is stated that Pancasila is the ultimate and the sole legal resources in Indonesia.

With regard to the first reason, the idea is that in the textual interpretation of the Constitution, the Court should be able to capture a basic principle or a moral value of its nation. Moreover, it should be fitted with the basic idea of that nation. This kind of interpretation are defined by Ronald Dworkin as a moral reading.[12] Secondly, Roeslan Saleh argued that Pancasila is the material of legal source and it is also the legal philosophy of Indonesia. Therefore, every idea and law which are not fit with Pancasila, even though it is good in the view of common, should not been approved as a law. [13] Thirdly, it is because the legal consequences of the provision of Law No. 12/2011 which stated that Pancasila is the ultimate and the sole legal resources in Indonesia. Article 2 Law No. 12/2011 basically is a logical consequences of the legal position and the role of Pancasila as *grundnorm*. *Grundnorm* might be assumed as the



source of everything that has started. It is not derived from anywhere. The validity is accepted just it is. *It is valid because it is presupposed to be valid.* Pancasila is the ground without must be synchronized with the other norms.[14]

## **2. The Use of Pancasila as A Reviewing Instrument to Review the Constitutionality of Laws Against Constitution 1945 in the Constitutional Court**

Over the past 10 years since 2003, a year when the Constitutional Court was established, to 2013 the Court had examined 641 constitutional cases. 570 cases had already decided with 148 cases were awarded for the petitioners/applicants, 205 were refused, 160 cases were denied, and 57 cases were windrowed by the petitioners.

### **a. Constitutional Court Decisions in the Area of Politic Affairs**

For example, the Constitutional Court decision Number 56/PUU-VI/2008 (Independent Candidacy). Petitioners challenged the article 1 number 4, article 8, article 9 regarding the phrase “political parties or a coalition of political party” and article 12 (1) Law No. 42/2008 on President and Vice President General Election (Election Law) in term of independent candidates or candidates who are run independently without a political party were not be allowed to be nominated in the general election.

Petitioners argued that Constitution 1945 does not forbid independent candidate to run for President and Vice President without joined a political party. It means that the existence of independent candidate is not violating Constitution 1945. However, the Court rejected the petitioner’s argument because article 1 number 4, article 8, article 9 regarding the phrase “political parties or a coalition of political party” and article 12 (1) of the Election Law was in line with the Constitution 1945.

The Court argued that phrase “political parties or a coalition of political party” as it is mentioned in the article 6A (2) Constitution 1945 interpreted that only political parties or a coalition of political party might nominate the candidate of President and Vice President in the general election. In this case, Constitutional Court was only used Constitution 1945 as a reviewing instrument. The court was not used Pancasila as the reviewing tool. Even though, with respect to the right of candidate in the case No. 56/PUU-VI/2008 the Court should also use Pancasila as a reviewing instrument especially the fourth sila.

### **b. Constitutional Court Decisions in the Area of Economic Affairs**

For example, the Constitutional Court decision Number 28/PUU-XI/2013 (Cooperative’s Legal Entity). This application was submitted to the Court because the petitioners feel that their constitutional rights was violated by the Cooperative Law. The philosophical basis of Cooperative Law was capitalism with the main characteristics are capital investment and individualism.

Petitioners argued that article 1 number 1 Cooperative Law especially the phrase “individual person” violating article 33 (1) Constitution 1945 because the definition of cooperative which can be established by individual person violating a kinship principle and will lead a cooperative to individualism (prioritize individual interest). The Court was agreed with the petitioners and decided that the Cooperative Law was unconstitutional and strike down the law.

When we analyze the Court consideration, it is found that values of Pancasila has been

applied as a reviewing instrument to examine Cooperative Law. This is showed from the Court argument that the economic system of a particular country is not totally neutral, because economic as a system is highly related with the common values of the people in that country.

#### **c. Constitutional Court Decisions in the Area of Social Affairs**

The Constitutional Court decision Number 5/PUU-IX/2012 (A Prototype for International School Standard-RSBI). The problem that faced by the petitioners is the mandate, message and the duties of the state as stipulated in the fourth paragraph of Constitution 1945 which based on the petitioner's argument was denied by RSBI Law, especially in the article 50 (3) that regulate: "Government and/or local governments operated at least one education unit in every level education in order to become RSBI". Petitioners argued that: RSBI in principle was violated the duties of the Government to educate the life of the nation, RSBI triggered a dualism education system; RSBI was a new model of education liberalization. The Court agreed with the petitioners and decided that article 50 (3) of RSBI Law was violated the Constitution 1945 and deemed unconstitutional.

The Court argued that there was a differentiation between RSBI with non-RSBI, not only with the facilities, funding but also the output of the education will lead to the segregation between those two school systems including for the students. In the Court decision they relied on the philosophy of the education based on Pancasila. The Court decided that article 50 (3) RSBI Law was unconstitutional. In these decisions, the Court were not clearly mentioned Pancasila as a reviewing tool, but the values of Pancasila were reflected in the argument of the decisions.

#### **d. Constitutional Court Decisions in the Area of Religious Affairs**

The Constitutional Court decision Nomor 140/PUU-VII/2009 (Religious Blasphemy). The argument behind the complaint of Law Number 1/PNPS/1965 regarding Prevention of "Religious Abuse and/or Defamation (Religious Blasphemy Law) was the Law has caused a religion discrimination against six religions which been formalized in Indonesia which is also violating with human rights principles and the freedom of religion as its contained in the Constitution 1945.

With respect to this complaint, the Court in their decision decided to reject all of the petitioners argument because the Religious Blasphemy Law does not determine the limit of the freedom of religion but it regulates a hostile activity, abuse or blasphemy against a particular religion and also to limit the interpretation or activity that mislead from the primary doctrines of religions in Indonesia.

The Court had already used Pancasila as a measuring tools. Constitutional Court in its argument stated the position of Pancasila as the national principle as well as mentioned the position of the first sila of Pancasila Believe in one and the only God.

#### **e. The Values of Pancasila in the Constitutional Court Decisions**

There are three types of court decisions from Pancasila perspectives: First, decisions without consider Pancasila as a measuring instrument. In the first type of decision, the Court is only used a textual and a historical interpretation of the Constitution 1945.

Second, decisions that the Court tried to construct its interpretation not only from Constitution 1945 but also beyond of that the Court has tried to dig deeply to the fundamental values of the Constitution. The effort to dig the fundamental values is by using Pancasila. However, the values of Pancasila are not clearly mentioned as a measuring instrument and not directly address sila of Pancasila as its consideration.

Third, a decision that clearly used Pancasila as a measuring instrument. In this decisions, the Constitutional Court in the consideration has explained the position of Pancasila as the national principle. For instance the position of the first sila Believe in one and the only God.

From the analysis of several Constitutional Court decisions as mention above, the Constitutional Court should be used the third approach which is explicitly used Pancasila as a measuring tools to determine the constitutionality of laws in Indonesia. Supposedly, the Court might not only literally read the phrase of articles in the Constitution 1945. It is because they need some kind of reviewing tools, the supreme sources of the law, as a reviewing tool, measuring instrument or a baseline regarding the existing laws.

### **3. Reconstruction of the Implementation of Pancasila as a Reviewing Instrument to Review the Constitutionality of Acts in the Constitutional Court.**

#### *a. A Comparison the Use of Rechtsidee as A Reviewing Instrument to Review the Constitutionality of Laws in Germany's Constitutional Court*

The obligation for Germany's Constitutional Court to decide the constitutionality of federal statutes or state statutes against Constitution is mandated by article 100 (1) Germany Constitution and article 13 (1) of Germany's Constitutional Law. Since 1951-2013 there has been 207.671 applications submitted to the Constitutional Court, from that number the Court has strike down 688 federal or state statutes because it deemed unconstitutional.[15]

Germany Constitution as well as Germany Law regarding Constitutional Court especially in the Article 78 actually only stated that the Constitutional Court on reviewing of the Constitutionality of Act is used the Constitution as a measuring tool. However, if we look deep inside to the whole process of the judicial review by the Justices, the Court is also considering a value beyond of the Constitution that they mentioned as a basic value that believed by our founding father as a must-have value for every nation.[16]

For example of the used of must-have values, values that every nation should have, was when Germany Constitutional Court strike down Abortion Law that enacted by the Germany parliament. In order to examine the law of unreasonable abortion, the Court applied the basic principle beyond the Constitution that the State should protect every life of human being, including the life of fetus.

## **b. Efforts to Optimize the Implementation of Pancasila as a Reviewing Instrument to Review the Constitutionality of Acts in the Constitutional Law**

As a concrete actions to ensure the Constitutional Court to always use Pancasila as the main basis for judicial review are (i) by applying judicial interpretation and (ii) by amending Law regarding Constitutional Court and its implementing regulation which regulate a procedural law regarding constitutional review.

The obligation to ensure the use of Pancasila as a measuring instrument might be applied by using a judicial interpretation. The Constitutional Justices must be able to interpret Article 24C (1) 1945 Constitution that stated “The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution...” shall be interpreted as The Constitutional Court is also reviewing laws against the values of Pancasila as the ultimate and the sole legal sources.

The concrete form of the judicial interpretation is very important, not only aims to put Pancasila as a reviewing instrument but also in order to apply a living constitution paradigm. A Constitution might be called as a living constitution as long as it grows and develop corresponding with the future necessities. Living means live, which means that the Constitution should not rigid but should be dynamic to follow the need of the people. As it is stated by David Anders that “*The phrase ‘living Constitution’ refers to the premise that the Constitution’s meaning should evolve with time.*”[17]

Next solution is by amending Law regarding Constitutional Court and its implementing regulation. Some provisions that might be amended are, Article 21 of Law No. 24/2003 regarding the official pledge of the Constitutional Justices “...shall fulfill my obligations as a constitutional judge to the best of my abilities and in the fairest of manners, and to strongly uphold the Constitution 1945 of the Republic of Indonesia” should be revised as follows “shall fulfill my obligations as a constitutional judge to the best of my abilities and in the fairest of manners, and to strongly uphold Pancasila, the 1945 Constitution of the Republic of Indonesia.”

Second, article 48 (2) Constitutional Court Law stated that “Each of the decisions of the Constitutional Court shall set forth: (a) A heading which reads: ‘IN THE NAME OF JUSTICE BASED ON GOD THE ALMIGHTY’; (b) The identities of the litigants; (c) A summary of the appeal; (d) The considerations of the facts discovered in the hearings; (e) The legal considerations underlying the decision; (f) the statements of the decision; and (g) The day, the date the decision is made, the names of the constitutional judges and the Clerk of the Court. Article 48 (2) shall be amended by adding an obligation to use Pancasila as a consideration in every decision as follows (a) A heading which reads: ‘IN THE NAME OF JUSTICE BASED ON GOD THE ALMIGHTY’; (b) The identities of the litigants; (c) A summary of the appeal; (d) The considerations of the facts discovered in the hearings; (e) The legal considerations underlying the decision and its compliance with Pancasila; (f) the statements of the decision; and (g) The day, the date the decision is made, the names of the constitutional judges and the Clerk of the Court.

## **E. Conclusion**

Based on explanations and problem analysis above, the conclusion of this research are as follows:

1. There are a persuasive historical and juridical facts that support Pancasila as the national principle was born on 1 June 1945 which is Pancasila that conceptually and systematically addressed by Soekarno on his speech on 1 June 1945 in front of BPUPK general assembly in order to answer the question from the chair of BPUPK general assembly Radjiman Wedyodiningrat regarding what should the basic principle of Indonesian nation state should be?. The only agenda in the first meeting of BPUPK on 29 May to 1 June 1945 was to discuss the national principle of Indonesia's independent. Soekarno's speech as a member of BPUPK addressed five fundamental principles for Indonesia's independent, named Pancasila. The main idea of Soekarno's speech then unanimously agreed by the member of BPUPK as the ground to draft the philosophical basis of Indonesia's independence. Pancasila was not born on 18 August 1945 at the same time with the ratification of the Constitution (UUD 1945) since the legal position of Pancasila and the Constitution is not equal.

Beside as the consequence of Pancasila as the national principle which is functioned as a regulatory measuring instrument to review the constitutionality of every Act, there are some other reasons why Pancasila should be used by the Constitutional Court as a reviewing tool in term of the Court's authority to review the constitutionality of a particular law. The first reason is the consequences of interpretation theory that capture or describe of the meaning of the principle or a norm which is stated in the Constitution as the basis when the Constitution were created. The second argument is part of the consequences of the legal order principle. And the third argument is because the provision in the Law No. 12/2011 which is stated that Pancasila is the ultimate and the sole legal resources in Indonesia.

2. With respect to the use of Pancasila as a reviewing tool to review the constitutionality of laws, there are three types of Court decisions from Pancasila perspective: First, decisions without consider Pancasila as a measuring instrument; Second, decisions that the Court tried to construct its interpretation not only from Contitution 1945 but also beyond of that the Court has tried to dig deeply to the fundamental values of the Constitution. The effort to dig the fundamental values is by using Pancasila. Third, a decision that clearly used Pancasila as a measuring instrument.
3. As a concrete actions to ensure the Constitutional Court to always use Pancasila as the main basis for judicial review are (i) by applying judicial interpretation and (ii) by amending Law regarding Constitutional Court and its implementing regulation which regulate a procedural law regarding constitutional review.

## **References**

- Dworkin, Ronald. *Freedom's Law: The Moral Reading of the Constitution*. New York: Oxford University Press Inc., 2005.
- Departemen Penerangan Republik Indonesia. *Lahirnya Pantja-Sila*. Jakarta: Departemen Penerangan, 1947.
- Goldford, Dennis J. *The American Constitution and the Debate over Originalism*. New York: Cambridge University Press, 2005.
- Kusuma, A.B. *Lahirnya Undang-Undang Dasar 1945 (Edisi Revisi)*. Jakarta: Badan Penerbit fakultas hukum Universitas Indonesia, 2009.
- Kementerian Hukum dan HAM, *Kajian Akademik Terhadap Penetapan Hari Lahirnya Pancasila 1 Juni 1945*. Jakarta: Kementerian Hukum dan HAM, 2016.
- Latif, Yudi. *Negara Paripurna, Historisitas, Rasionalitas, dan Aktualitas Pancasila*. Jakarta: PT. Gramedia Pustaka Utama, 2011.
- MD, Mahfud. *Politik Hukum di Indonesia*. Jakarta: Pustaka LP3ES, 1998.
- Tanya, Bernard L. dkk, *Pancasila Bingkai Hukum Indonesia*. Yogyakarta: Genta Publishing, 2015.
- Saleh, Roeslan. *Penjabaran Pancasila dan UUD 45 Dalam Perundang-undangan*. Jakarta: Aksara Baru, 1979.
- Sekretariat Negara Republik Indonesia. *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945 – 22 Agustus 1945*. Jakarta: Sekretariat Negara Republik Indonesia, 1998.
- Sekretariat Jenderal MPR. *Empat Pilar Kehidupan Berbangsa dan Bernegara*. Jakarta: Setjen MPR RI, 2012.
- Hidayat, Arief. “Konsepsi Negara Hukum Indonesia Berdasarkan Pancasila”, Makalah dalam Seminar Nasional dengan tema Sistem Ketatanegaraan Indonesia yang diselenggarakan pada 24 April 2013 di MPR, Jakarta
- The Federal Constitutional Court, “History, Location, Dutie”, [http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Faltblatt.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Faltblatt.pdf?__blob=publicationFile&v=2), diakses 3 September 2016.
- Sekretariat Jenderal dan Kepaniteraan MKRI. “Pancasila dan Mahkamah Konstitusi”. Majalah Konstitusi, No.29 –Mei 2009.
- Wittig, Caroline Elisabeth. *Ideological Values And Their Impact On The Voting Behavior Of Justices Of The Federal Constitutional Court Of Germany*, Thesis, 2009.

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4. Vice Chairman of Tim Kerja Sosialisasi 4 Pilar MPR RI (2009 – 2014)
5. Member of Tim Kerja Kajian Sistem Ketatanegaraan Indonesia MPR RI (2009 – 2014)
6. Chairman Fraction of PDI Perjuangan in MPR RI (2014 – 2019)
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[1] Arief Hidayat, “*Konsepsi Negara Hukum Indonesia Berdasarkan Pancasila*”, Makalah dalam Seminar Nasional dengan tema Sistem Ketatanegaraan Indonesia yang diselenggarakan pada 24 April 2013 di MPR, Jakarta, hlm. 6.

[2] Sekretariat Jenderal dan Kepaniteraan MKRI, “*Pancasila dan Mahkamah Konstitusi*”, Majalah Konstitusi, No.29 –Mei 2009, hlm. 5

[3] *Ibid*

[4] Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: Pustaka LP3ES, 1998), hlm 29

[5] Sekretariat Jenderal MPR, *Empat Pilar Kehidupan Berbangsa dan Bernegara*, (Jakarta: Setjen MPR RI, 2012), hlm. 32.

[6] *Ibid*, hlm. 34

[7] Yudi Latif, *Negara Paripurna, Historisitas, Rasionalitas, dan Aktualitas Pancasila*, (Jakarta: PT. Gramedia Pustaka Utama, 2011), hlm. 23

[8] *Ibid*, hlm. 83

[9] Minutes of meeting of BPUPKI, PPKI, 28 May 1945 – 22 August 1945, (Jakarta: Sekretariat Negara Republik Indonesia, 1998), hlm. 84. Lihat Juga Departemen Penerangan Republik Indonesia, *Lahirnya Pantja-Sila* (Jakarta: Departemen Penerangan, 1947).

[10] *Ibid*.

[11] A.B. Kusuma, *Lahirnya Undang-Undang Dasar 1945 (Edisi Revisi)*, (Jakarta: Badan Penerbit fakultas hukum Universitas Indonesia, 2009), hlm. 16

[12] Kementerian Hukum dan HAM, *Kajian Akademik Terhadap Penetapan Hari Lahirnya Pancasila 1 Juni 1945*, (Jakarta: Kementerian Hukum dan HAM, 2016) hlm. 46 .

[13] Ronald Dworkin, *Freedom’s Law: The Moral Reading of the Constitution*, (New York: Oxford University Press Inc., 2005), him. 2.

[14] Roeslan Saleh, *Penjabaran Pancasila dan UUD 45 Dalam Perundang-undangan*, (Jakarta: Aksara Baru, 1979), hlm. 51

[15] Bernard L Tanya, dkk, *Pancasila Bingkai Hukum Indonesia*, (Yogyakarta: Genta Publishing, 2015), hlm. 13

[16]The Federal Constitutional Court, “History, Location, Duties”, [http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Faltblatt.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Faltblatt.pdf?__blob=publicationFile&v=2), diakses 3 September 2016. p.3

[17] Caroline Elisabeth Wittig, *Ideological Values And Their Impact On The Voting Behavior Of Justices Of The Federal Constitutional Court Of Germany*, Thesis, 2009, p. 12.

[18] Dennis J. Goldford, *The American Constitution and the Debate over Originalism*, (New York: Cambridge University Press, 2005), hlm. 58-59.